

The Dual Priced Reciprocity in the Contemporary Indian Marketplace Is Consumer really the Potentate

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ABSTRACT

The contemporary times witness an increase in the malpractices and fraudulent activities against the consumer. Dual Pricing being one of them, refers to the practice of charging different prices from different consumers for the same product. It has been manifesting itself through en-number of instances in the economic marketplace of India, where the consumer at the behest of the seller, is left exploited. This study, takes into account the illustrations of dual pricing ,in various sectors, while noting down the relevance of the interest of both buyers and sellers. Also referred as price discrimination,dual-pricing is prohibited by the Section 18(2A) of The Legal Metrology Act, 2017, in India. However, the legislation is saddled with numerous limitations in regard to the scope and interpretation. The authors have thrown light on such limitations and at the same time explored the various dimensions in which judiciary plays its role to interpret it. It is further revealed that the interpretation of judiciary serves more purpose to tackle the ambivalence in the existing law. The judiciary has played a vital role, to explain the rationales in various cases and an attempt has been made to harmoniously construe the interests of both the buyers and sellers. Towards the end, it is suggested that the legislature should make uniform laws, on the lines of judiciary's interpretation on the legitimacy of dual pricing, so as to reduce the burden over the judiciary and serve the purpose of protecting consumers.

Keywords: *Consumer, Dual Pricing, Price Discrimination, Legal Metrology Act, Judiciary, Legislation.*

I. INTRODUCTION

Consumer, an individual buying goods or services for personal use, is an integral part of the society. He is the one who makes a purchase not for a resale or intermediate use, but instead for a consumption, which will cater to his needs, that is to say, provide him with the satisfaction he urges for, his equilibrium or probably the state he never wants to deviate from. He is the one who ultimately falls a bait to all the marketing and advertising, which anyhow influence his decision to buy the product. Obviously, he isn't enjoying the good or services

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without consideration. He pays or promises to pay, an equitable consideration in form of money or thing, for the good purchased or services availed.

The English Law, too justifies calling a person, consumer if, "An individual acts for purposes that are wholly or mainly outside that individual's trade, business, craft or profession"³. Indian law, provides a very extensive definition of consumer. According to Section 2(1)(d), of Consumer Protection Act, 1986 a consumer, means any person who buys the goods or services for the purpose of consumption and not for any commercial cause.⁴

The newfangled era, is known to be the era of consumers. No country can ignore the interest of the consumers intentionally or unintentionally. A consumer is the one, who spends his money to buy the goods and services, producer provides. Hence, they play a vital role in the economic system of the country. Without them demanding the goods or services, the producer would not make provisions of supply, and hence, the state of economic equilibrium will never be achieved.

II. EVOLUTION OF CONSUMER PROTECTION LAWS: FROM ANCIENT TO MEDIEVAL TIMES

The realization to protect the consumer from the exploitation and injustice isn't a new phenomenon. It can possibly be dated back to the code of Chanakya, Manu-Smriti, NaradaSmriti⁵ and so on of the ancient times of India. The earliest incarnation of consumer protection had been recorded as the implementation of 'Lex Julia De Anooma', passed by roman government around 50 B.C⁶. A plea, for stressing upon the ethical trade practices was made, with a punitive action against the offenders. The goods had a price set by the king, and entire trade was subject to the process of inspection in every six months.

The **medieval** period, the arrival of Mughals, led to the spread of Islam. The Holy stressed on the need of consumer protection⁷. The period of sultanate, gave importance to local conditions as to determine the price of the commodity, and took a stern action against the malpractices indulged in by the sellers. AlauddinKhalji, introduced various injunctions for market control in India.⁸

The rise of British Common Law, and its subsequent acceptance in other countries, especially in their colonies, amended the approach for the consumer protection. The first ever Consumer Protection law in England was

³ The Consumer Right Act, 2015, § 2(3) (UK)

⁴ The Consumer Protection Act, 1986, No. 68 of Parliament, 1986, §2(1)(d) (India)

⁵ SonikaShekhar, *The History of Consumer Protection*, 25 L.T.J. 185, 189-191(2018).

⁶ Pallattino M, *A History of Earliest Italy*, 1 ROUTEGE REV. 157, 181-182 (2014).

⁷ *ibid*

⁸ *ibid*

‘Sale of Goods Act,1893.’⁹ It was the time for the emergence of popular legal maxim of ‘Caveat Emptor’.

Modern period, witnessed the emergence of modern laws, which were way more organized and compensatory in nature, to undo the injustice met out to the consumer. It was the industrial revolution, that took a toll on the illegal practices against the consumer and at the same time, the laws enforcing protection to consumer became all the way more stringent.

In **America, Sherman Act, 1890**¹⁰, passed to prevent the artificial raising of prices by restriction of trade or supply, had setup a new machinery to prohibit unfair methods of competition.

A similar kind of observance could be seen in Canada, and implementation of **Anti-Monopolistic** statutes in 1950s in Germany and Australia,¹¹ was followed by the implementation of **Restrictive practices Enquires and Contracts Act 1973**¹² in England. India, too didn't lag behind, and hence, enacted Consumer Protection Act, 1986, which was based on laws of the other countries and sought to address the socio-economic position.¹³

A. THE CONSUMER PROTECTION ACT, 1986 AND AMENDMENT,2018

A market, needs to take into consideration, consumer protection laws, which will act as a savior to the consumer, from the malpractices he is subjected to. The modern times, saw these rationales, being realized by the legislatures in India, and formulated for his protection, en-number of legislations, some to cite like, Sale of Goods Act, 1930¹⁴, the Agriculture Produce (Grading and Marketing) Act, 1937¹⁵, the Indian Standards Institution (Certification Marks) Act, 1952, Essential Commodities Act, 1955.¹⁶

These enactments were no doubt successful, in enforcing some regulatory provisions, non-observance of which attracted civil liability, however, they practically had no other remedy to offer to the aggrieved consumer, than from indulging him in costly and lengthy suits. They no matter contributed to the exploitation of the consumer, for that the compensation ordered stood always disproportionate. There was a need of a consumer specific law, which in particular could deal with the interest of the consumer, and grant him the adequate remedy. Hence,the Consumer Protection Act, 1986.

This Act provided the consumer, with a three-tier quasi-judicial redressal institution at the District, State and

⁹Antonella Corradi, *International Law and Consumer Protection: The history of consumer protection*, 2 HAUSER GLOBAL L.J. 555, 576-577 (2015)

¹⁰ The Sherman Act, U.S.C. § 13(a) (1890)

¹¹ *OECD reviews of regulatory reforms: Competition policy in Australia*, OECD ILibrary (May 5,2019, 10.04AM), https://www.oecd-ilibrary.org/governance/oecd-reviews-of-regulatory-reform_19900481.

¹² The Fair Trading Act 1973

¹³ The Consumer Protection Act,1986, No. 68, Acts of Parliament, 1986, § 2(1)(d)(India)

¹⁴ The Sales of Goods Act,1930, No.3 of Acts of Parliament, 1930 (India)

¹⁵ The Agricultural Produce (Grading and Marketing) Act,1937, No. 1. Acts of Parliament, 1937 (India)

¹⁶ The Essential Commodities Act,1955, No. 10, Acts of Parliament, 1955 (India)

National Level. it successfully made a provision, for providing the consumer with six rights¹⁷ of being informed about the quality, quantity, potency, being heard, being educated and aware, being able to seek redressal against the unfair trade practices, being able to choose.

For the apt redressal to the aggrieved consumer, the 1986 act provides for a three-tier quasi-judicial redressal of disputes, with the:-

(i) District Consumer Disputes Redressal Commission dealing with the matters less than Rs. 20,00,000 (Amended to Rs.1 crore),¹⁸

(ii) State Consumer Disputes Redressal Commission having the jurisdiction of the matters between Rs. 20,00,000-Rs.1,00,00,000(Amended to Rs.1 crore to Rs.10 crore)¹⁹, and the

(iii) National Consumer Dispute Redressal Commission entertaining all the cases above Rs.1,00,00,000 (Amended to above Rs.10 crore)²⁰.

This Act, has recently been amended, which has extended its scope to new parameters. The consumer can now file an online complaint, which can be admitted within a period of 21 days from the date on which the complaint has been filed.²¹ The manufacturer can now be penalized for a false or misleading advertisement, hence increasing the penalty from Rs.10 lakh to Rs.50 lakh.²² Its scope has been widened to include e-commercial activities too.

III. THE NEED OF CONSUMER PROTECTION LAW

Mahatma Gandhi once said, *"A consumer is the most important visitor on our premises. He is not dependent on us, we are on him. He is not an interruption to our work; he is the purpose of it. We are not doing a favour to a consumer by giving him an opportunity. He is doing us a favour by giving us opportunity to serve him."*

This clearly signifies the importance consumer has in our society, and how important is to protect the consumer, the center of the economics.

The contemporary times, witness the rise of marketing concept, where the interests of consumers are paid to importance. With rise of internet and allied information technology, the consumers are now acting as "prosumers", where they influence the product market, by airing out their reviews on its quality and other aspects, which act as reliable suggestions for the other buyers.

¹⁷The Consumer Protection Act,1986, No.68, Acts of Parliament ,1986, §2(1)(d) (India)

¹⁸The Consumer Protection (Amendment) Act, 2018, No. 68, Acts of Parliament, 1986, §34 (1) (India)

¹⁹ The Consumer Protection (Amendment) Act, 2018, No. 68, Acts of Parliament, 1986, § 47(1)

²⁰The Consumer Protection (Amendment) Act, 2018, No. 68, Acts of Parliament, 1986, § 58(1)

²¹ibid

²²The Consumer Protection Act, 2018, No. 68, Acts of Parliament, 1986, §. 89

Consumer, in the present times, finds himself as a part of the market, where his interests act in collusion with that of the producer, whose main motive behind the production is to reap as much amount of profit as he can, no matter even if it costs the well-being of the consumer.

The 2015 **Maggie ban**²³, due to presence of lead and monosodium glutamate, beyond the permissible limits, shows the extent to which producers can reduce themselves for increasing their surplus. 2019, finds directions being re-issued to Nestle²⁴, to make the Maggie maker, change the way of advertising and packaging. The famous case of **Johnson and Johnson**²⁵, manufacturing talc, containing carcinogenic substances, drew a huge outrage. And so was the reporting of **Coca-Cola**²⁶, to get pesticides mixed in their drinks, so as to reduce the amount of concentrate, so as to shoot its profitability, are few of the many incidents amongst adulteration, over-charging, dual pricing, false-claims and sub-standard products, which got enlightenment dawning upon the consumers, and the government as to protect their rights.

From the point of view of consumer, the evolution of the laws, oriented towards its protection aim at bestowing him with the right to complain, complain of all the malpractices and injustices they are subjected to that to at a nominal cost. Furthermore, the law entrusts them with the power to sue the service-providers if in case the service is not rendered with due care and in accordance with law, be it medical negligence.²⁷

In **Sehgal School of Competition V Dalbir Singh**²⁸, the court furthered the ambit of consumer protection, by allowing the consumer to refund the extra educational fees so paid. So is the case with over bookings, wherein the consumer has a right to seek refund. Having a right to examine the goods on delivery and return when not in accordance with specifications, he may now become far more aware and addressed, as he may file an RTI, so as to get information, and on its denial, may approach the court.

There is a twin benefit related to consumer protection laws, which not only protects the consumer but also the production house. Be it the long term interest of business or the increase in customer base, adherence to laws so as to protect the consumers from being trapped, has always been appreciated. In pursuance of its corporate social responsibility, the producers, also should consider it as their duty to work in a sustainable way, catering the interests of both.

²³Dr.P.K.Korde,*A Study of India's Favorite Instant Noodles- A Case Study of Maggie A Product of Nestle India Pvt Ltd*, 5 I.J.E.S.M.R77, 79-80(2017)

²⁴ibid

²⁵Lisa Garrison,*Special Report: Johnson and Johnson knew for decades that asbestos lurked in its Baby Powder*, THOMSON REUTERS (Dec. 17, 2018, 2:00 PM),<https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/>

²⁶Monalisa,&SuneeraTandon, *Supreme court declines to ban Coca-Cola beverages*, THE WASHINGTON POST (Oct. 03,2013 5:23PM),https://www.washingtonpost.com/politics/supreme-court-says-coca-cola-can-be-sued-over-juice-drink-label/2014/06/12/20e42536-f240-11e3-914c-1fbd0614e2d4_story.html?utm_term=.1b3819b835dc

²⁷Arvind Shah (Dr) v.KamlabenRamsinghKushwaha ,(2008) CPJ 121 (India)

²⁸Sehgal School of Competition v. Dalbir Singh, (2005) CPJ 33 (India)

IV. THE CONCEPT OF DUAL PRICING

Don't we find students in outstation universities these days hurrying as to book their flight ticket two months prior to their next trip to home? Maybe, because the same Indigo flight 660E, which now costs Rs.2500, find swell to cost Rs.5500, if booked in the nick of time. When he arrives at the airport, the same Frooty bottle which costed Rs.25, in this college canteen, was priced at Rs. 85, for the same quantity.

And let us further his journey to Agra, where he visits TajMahal, and pays Rs.50 for his ticket, but at the same point of time is shocked, finding the same ticket to be priced at Rs.1100 for foreigners.²⁹ Consumers, in the contemporary times, have been subjected to numerous instances of exploitation and malpractices. Adulteration, wrong use of weights, false advertising, for misrepresentation, to quote a few. This research study, throws light on the burning issue of the hour, to which every consumer falls a prey to, that is to say, the problem of **dual pricing**.

Referred as **price discrimination** in layman's language, it refers, to the practice of charging different prices for the same products, to different set of consumers. More aptly referred as a technique, for charging different prices, in different markets, it is a well devised scheme, via which a company is able to offset a lower price in a new market, helping to drive out competition out of the same. Being a tool, in the hand of industrialists, they craftily manipulate the prices, so as to meet the higher demands and reap higher profits³⁰. Dual pricing, at times, even protects the domestic business by the virtue of subsidies and taxes, to save them from competition.

A. DUAL PRICING: ITS MANIFESTATIONS IN VARIOUS SECTORS

Dual pricing, as a malpractice is vividly included as a part of daily economic transactions. A consumer can easily fall a prey to price discrimination and get exploited. The various below-mentioned instances illustrate as to how dual pricing as a stigma, has encroached the various sectors of the economy.

One may quote numerous instances of dual pricing, which tend to happen in marketplace.

(a) Railways

To begin with Indian Railways, the national carrier of the country, all the men above 60 years and women above 58 years, pay approximately 40% and 50% concessional fare respectively, in comparison to the men and women aged below 60 and 58 years.³¹ A kid below the age of 5, need not pay any fare at all. So the same

²⁹Timing and Ticket Price to Visit the TajMahal in Agra, India, THE TAJMAHAL (Mar. 30,2019, 7:56 PM)

<https://www.tajmahal.gov.in/ticketing.html>

³⁰Mario Kienzler & Christian Kowalkowski, *Pricing strategy: A review of 22 years of marketing research* 5 JOUR. OF BUS. RES.,21,23-26 (2015)

³¹RakeshDubudu, *Railways now change the rules for availing the Senior Citizen Concession & Quota*, The Factly (Apr.30, 2019, 8:23PM) <https://factly.in/senior-citizen-concession-in-indian-railways-rules/>

Shatabdi ticket would cost Rs.1200 for a young passenger, whereas, his granny might book a return ticket in that cost, with each side costing, just Rs.600³².

Indian Railways, tend to further the scope of dual pricing, by the virtue of flexi-fare system. In this, the base fare increases by 10% with every 10% of the berths being sold³³. That is to say in every 500 seated train, with base price being Rs.500, reservation of 50 berth, would amount to fare hike by 10%, which in this case would be Rs.550, and so on.

(b) Hotel and Hospitality Industry

Also, not to forget, the hotel industry, is well known for charging an exorbitant prices from the tourists especially foreign nationals in comparison to localities.³⁴ And so do the site viewing charges, which are hyped for the foreigners and nominal for the nationals. The example of TajMahal discussed above, suffice to justify. This is because the government, already charges various taxes from its citizens, which also include the charges for the protection of heritage and diversity³⁵. Since, foreign nationals are outside the ambit of taxes, charging a hyped price does make sense.

(c) Educational Institutions

Not just them, the educational institutions, particularly the universities too have different prices to be paid by the Indians and foreign nationals. Tuition fees, for Indian students is INR 85000 p.a. whereas it is USD 10,000 p.a. for Non- SAARC nations, students. The government offers a similar explanation, as it does while explaining the hyped prices of Taj seeing tickets. Via its numerous taxes, the government gets the revenue from the citizens to promote education and accordingly invest in educational institutions, therefore, a less consideration from the nationals, is aptly justified.

(c) Insurance Industry

Dual pricing in its most casual forms can occur, in retail business, where individual business owners can offer one group of consumers a lower price than another group. The insurance companies are often found charging lower premiums to customers who are known to bypass agents to buy policies directly from life insurance companies³⁶. This too, makes sense, when viewed from the perspective that a direct sale of policy to the consumer, will obviously cost less, instead when done via policy agents to whom commission has to be paid.

³²ibid

³³Press Information Bureau, GOVERNMENT OF INDIAN MINISTRY OF RAILWAYS, (Oct. 05,2018, 6:21 PM), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=149606>

³⁴ibid

³⁵ Michal Apollo, *Dual Pricing- two points of view(citizen and non-citizen) Case of entrance fees in tourist facilities in Nepal*, 4 3RD INT. GEO. SYM.-GEOMED, 63,65-66(2013)

³⁶Cho Yeung Chan, *The Impact of Gender-neutral Pricing on the Life Insurance Industry*, CASS BUSINESS SCHOOL CITY UNIVERSITY JOUR. LON., 56, 56-57(2014).

Also, the insurance companies are known to optimise the price of their policies. Earlier, they used actuarial parameters as to fix the rate of their policies. This practice has undergone a change, since a greater reliance is being placed on non-actuarial parameters. Consumer's mental and physical well-being, tendency to be price inelastic or price-elastic, to name a few. Insurance companies ascertain as to the nature of the consumer they would be dealing with, and in the event of finding the reluctance of consumer to search for a better policy price, the companies manipulatively exalt their prices, since the consumer's demand appears to be inelastic.³⁷

(d) Retail Business

The retailers often by via their online channels offer the goods at a discounted rate, as compared to offline route³⁸. The retailers do that because, there might be a condition when, an online sale saves various costs of marketing and transportation, which have to be paid in an offline sale. Also, while dealing with different set of customers and durations of time, a commodity priced at X, may be sold to an affluent customer in summer, but the same price is reduced to X-20%, when no longer that affluent customer generates a demand in winter. Hence, a stock clearance sale is a perfect example to compliment this.

(e) Sugar Industry

On an interesting note, dual pricing has also extended its root in sugar industry, as the National Federation of Cooperative Sugar Factories Ltd., an apex body representing 262 sugar mills, mulls, to have separate prices for industrial and retail consumers, with a suggestion of keeping the sugar rate at 50-60 per kg for industrial consumer and 30 per kg for retailers.³⁹ A very essential purpose is sought to be achieved via this, as more expensive sugar and sweeteners will cost to the industries making biscuits and jams, the less sugar they will add, hence, this will be an impetus to reduce obesity. It acts as a good substitute to fat tax.

(f) Electricity

The same has been the case with electricity, the rate of which varies from industrial, commercial and industrial purposes. Electricity for the commercial purposes, is available at a cheaper rate, due to its bulk demand, as compared to that of households. However sometimes, businesses may typically be required to pay 20% VAT, which stands 5% for domestic sector.⁴⁰

(g) Coal Industry

³⁷ Desheng Dash Wu & Anthony Ross, *Price Optimization, channel and uncertainty*, 56 I. J.P. R., 121, 121-124 (2018)

³⁸ Jen-Ming Chen, *Channel Pricing and pricing in a dual-channel with competition*, 11(4) I. J.E.B.M., 36, 36-37 (2013)

³⁹ Government of India, Report on Indian Sugar Industry, 'Dual Pricing for sugar suggested' (Ministry of Consumer affairs, 2017)

⁴⁰ *How the EU VAT exemptions impact the Banking Sector: Study to assess whether banks enjoy a tax advantage as a result of the EU VAT exemption system*, THE PWC (Apr. 21, 2019, 5:36PM), https://www.pwc.com/gx/en/financial-services/pdf/2011-10-18_vat_study_final_report.pdf

The government intends to formulate a price discrimination policy in the sale of coal. As to the current scenario, the off-shore coal producers depend on imported coal whereas the producers near the coastal areas, don't even substitute a fraction of domestic coal with that of imported one. Hence, this adds to the transportation cost for the off-shore producers, since most of the imports come via sea. Introduction of dual pricing, will enable a mixed pattern of consumption of both the imported and domestic coal. Hence, a pre-determined quantity of domestic coal, shall be distributed between the two segments, at a fixed price and the balance shall be procured either at import parity price (for domestic coal) or the international prices, in the event of imports.⁴¹

(h) Oil Industry: With reference to diesel

The proposal of the government to ensure that all the bulk users of diesel, as in railways, defence, agricultural sector and public sector, can afford to bear the burden of market prices and hence all the subsidies in that context shall stand withdrawn⁴².

The market price proposed at the state run fuel retailers, is Rs.10 per litre higher than that charged at petrol pumps. Another rationale as to support dual pricing, has been the soaring demand of diesel, in relation to its supply by 17%-20% in the past few years.⁴³, by virtue of its subsidized price.

(i) Liquefied Petroleum Gas

January, 2019 saw the government contemplating to implement dual pricing system for Liquefied Petroleum Gas. For this, the Ministry of Industry, Commerce and Supplies, has begun to have dual-colors for LPG cylinders- red cylinders for the household at subsidized rates, whereas blue cylinders for commercial users like hotels and restaurants, without subsidy. This according to the Ministry will ensure subsidies only to the needy.⁴⁴

(j) Energy Subsidies and WTO

Not stemming within the territorial boundaries, dual pricing has gained significance in international organizations like WTO. International Energy Agency defines energy subsidies as, "any government action that concerns primarily the energy sector that lowers the cost of energy production, raises the prices received by the energy producers, or lowers the prices paid by energy consumers."⁴⁵

⁴¹Dual Pricing for supply of Coal: Can this be the Answer to Future Coal Shortages?, THE BING (Apr. 14, 2019, 6:21PM), <https://www.bing.com/search?q=Dual%20Pricing%20for%20supply%20of%20Coal%3A%E2%80%99%20Can%20this%20be%20the%20Answer%20to%20Future%20Coal%20Shortages%3F%E2%80%99&qsn&form=QBRE&sp=-1&pq=&sc=6-0&sk=&cvid=31AE4FCAD57D4C8FA217B8241A4737AE>

⁴²Union Of India v Government Of Tamil Nadu, (1983) 1. S.C.C 130 (India)

⁴³Devansh Sharma, *Why you end up paying almost double for petrol and diesel*, THE E.T, Sept.11, 2018, at 7

⁴⁴LPG Price in India, THE GOOD RETURNS, (Mar. 30, 2019, 8:23PM) , <https://www.goodreturns.in/lpg-price.html>

⁴⁵Rajesh H Acharya&AnverSadath, *Implications of energy subsidy reform in India*, ENERGY POLICY, 89,89-91 (2017)

Dual pricing programs take a toll in energy endowed areas, whereby the government bestowed with large oil and energy reserves, indulge in a two-tier pricing practice, wherein the domestic prices of energy are often subsidized to achieve social and economic development in the underdeveloped areas, and hence, energy inputs prices cost much lower than that of the export prices.

This, no doubt, has been held essential from the shoes of developing countries, but same has been criticized by the developed countries, on the charges of jeopardizing the international business, and trouble the environment for the worse. The same has been found in contravention of Article 3 and 5 of Subsidies and Countervailing Measures Agreement.⁴⁶

The developed countries, hold that the low domestic prices, affect their bargaining power, since the energy outputs of developing countries are priced less, owing to their subsidized inputs, in comparison to outputs from developed countries, priced more in absentia of subsidies in international market.

From the **environmental perspective**, the developed nations contend, that the availability of fossil at mitigated rate, discourages the producers to switch to greener and cleaner energy sources, and also results in wastage. Last, but not the least, there is also a scope for price differentiating when, a same commodity is purchased in hilly areas and plains, on the other side.⁴⁷

Taking into account the maximum cases of dual pricing, this research paper, now, takes into consideration, as to the legitimacy of this practice. One instance of dual pricing might sound, completely justified from the point of view of sellers, the other may violate the rights of the consumer for the worse. While on one hand, dual pricing tries to serve the long term interests of the business, since it allows the enterprise to charge different prices from the different set of customers, hence aiding in revenue generation.

Also, charging different prices to different set of customers may be at times justified. For instance, the vegetables delivered to hilly areas, will definitely be priced more than the ones sold in plain area markets, owing to the difference in transportation costs. While at the time, it may hinder the interest of the consumers for the worse. Where a same Aquafina bottle is priced higher in a mall, as compared to a street shop, perils accrue to the consumers.

Hence, when, where and how, which interests take relevance, and how does law actually harmoniously construe both, so as to justify its stand, will be brought to the brim, in the next section.

⁴⁶World Trade Organization, *Agreement on Subsidies and Countervailing Measures(Article 1-9)*, THE WTO(Mar.05, 2019, 5:21 PM), https://www.wto.org/english/docs_e/legal_e/24-scm.pdf

⁴⁷Desheng Dash Wu & Anthony Ross, *Price Optimization, channel and uncertainty*, 56 I. J. P.R., 56,56-58(2018)

V. THE DEVELOPMENT OF LEGISLATIONS AND PRECEDENTS RELATING DUAL PRICING

The government being the legislative organ has the duty to enforce laws to protect the interest of aggrieved consumers. The history of the laws relating to dual pricing, aiming to ensure the protection of the consumer from such malpractices and unfair treatment, could be dated back to the formation of International Organization of Legal Metrology (OILM) in 1955. Initially, this aimed to ensure a fair dealing in weights and measure.

Hence realizing its importance, the governments around the globe formed unison, to shield, a desired level of credibility of the various measuring instruments.

The Government of India was a signatory to the same. Directorate of Legal Metrology, being a separate wing of Department of Consumer Affairs, Food & Supplies in India, with a view to provide an extensive scheme for uniform standards of measurements enacted Standard Weights and Measurement Act, 1956⁴⁸, based on the metric system and internationally recognized units.

Amended in 1976, 1977 and 1987, this Act, never specifically addressed the question of legitimacy of dual pricing, except for the fact that the only requirement of law was to display prominently at a conspicuous place of the premises in which the retail business was being carried on, the rates at which the local taxes were leviable or at the most the price of the commodities sold⁴⁹.

This Act was finally repealed in 2009⁵⁰, by the Legal Metrology Act (Hereinafter referred to as the “LM Act”), which came into force on 1st April, 2011. However, it, like its predecessors, was ambiguous as to status of legitimacy of dual pricing. Section 18(1), of Legal Metrology Act, 2009⁵¹, prohibited a seller, to manufacture, pack, sell, or import any pre-packaged commodity for sale, in the absence of declarations of standard quantity or numbers upon it. Sub section 2, of LM act, 2009, mandated the mention of Maximum Retail Price, along with the net quantity or number of commodity.

The mentioning of the MRP, however, didn't provide any clarity, as to whether, a seller had the liberty to print the hyped MRP, and subsequently raise its sale, under the scanner of ambiguous law. In **Hindustan Coca-Cola Beverages V.SiddarthManchanda&Ors**,⁵² the guilty party took the advantage of the said law, and hence justified its acts of selling the same commodity, under different MRPs, on the pretext that, Section 18(1) of Legal Metrology Act, 2009, mandated just the mention of MRP. No where, was this mentioned that a there

⁴⁸ The Standards Of Weights and Measures Act, 1956, No. 89, Acts of Parliament, 1992 (India)

⁴⁹ibid

⁵⁰ibid

⁵¹The Legal Metrology Act , 2009, No. 1, Acts of Parliament, 2010 , § 18(1):No person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed.

⁵²(2017) 268 S.C.D.R.C. (Del)

cannot be a dual fixation of price on the commodity. The company here, justifies its very act of selling its Diet Coke Cane, and Rs. 60/- in Wave Cinema, which was available just for Rs.30/- at Easy Day.

Holding that under LM rules of 2009, the only requirement was to have the MRP printed on every pre-packaged commodity, it was not at all prohibited to declare more than M.R.P. for the same Coca Cola Can, to be sold at different places, for different class of consumers. Hence, there was no unfair practice indulged, the suit being dismissed.

A. LEGAL METROLOGY ACT, 2017 (AMENDMENT) AND LIMITATIONS

In order to fix such vagueness, in the law of utmost importance for the protection of the consumers, the Ministry of Corporate Affairs, in 2017, proposed an amendment to Legal Metrology Act, 2009, and added sub-sections 2A to Section 18⁵³, which strictly prohibited, the manufacturers or packer or importer to declare different prices on identical pre-packaged commodity, which is in consonance with clause (c) of sub section (1) of section 2, wherein, a complaint can be filed by the consumer, if the trader charges for the goods, a price, which is in excess of the one fixed by the law, or displayed on the goods. This law via the virtue of Section 36(1) of The LM Act, 2017 imposes a fine Rs.25000, and Rs.50000, for the second offence, and above Rs.50,000 in the event of subsequent offence, in the event of a sale of pre-packaged commodity being sold, without conforming to the declarations on the package provided in the Act.

The bird eye read, may appeal much to the consumer, since a law, to enforce his protection is now especially mandated. However, the said provision is in direct conflict with Section 4A, Explanation (2) of The Central Excise Duty Act, 1944,⁵⁴ which clearly holds it fair for the producer, to declare different retail prices on different packages for the sale of any excisable goods in packaged form in different areas.

In order to solve this ambiguity, this paper, places reliance on **Solidaire India Ltd v. Fairgrowth Financial Services**⁵⁵, wherein the court specifically held that, for all those acts which begin with a non-obstante clause i.e. to say, for all those acts which begin with “Notwithstanding anything inconsistent therewith” are special acts. And whenever there arise a situation, that both these acts are in conflict with each other, the later will be prevailing. Hence, both the Central Excise Act, 1944 and Legal Metrology Act, 2017, begin with a non-obstante clause, which gives them a overriding effect in the first place, and hence makes them special acts. In the event of conflict between them, with no doubt, the later act, i.e. the Legal Metrology Act, 2017, will prevail. Hence, dual pricing, as per this interpretation stands prohibited.

⁵³Amendments in Legal Metrology (Packaged Commodities) Rules 2011, THE PWC (MAR. 02, 2019, 6:51 PM),https://www.pwc.in/assets/pdfs/newstax/2017/pwc_news_alert_30_june_2017_amendments_in_legal_metrology_rules_2011.pdf

⁵⁴The Central Excise Act, 1944, No. 1, Acts of Parliament, 1944), § 4(a) (India)

⁵⁵ (1994) 4 S.C.C. 246

B. THE LEGAL METROLOGY ACT, 2017: LIMITATIONS

The LM Act, 2017, is the sole legislation so far to deal with the question of dual-pricing. However, it is discouraging to realize that the same has been saddled with limitations in regard to its scope and interpretation.

The two limitations in the law are as follows:-

- A narrow scope, since it includes only ‘pre-packaged commodities’ and not **services**.
- Ambiguity as to what constitutes an interpretation to “**Unless otherwise specifically provided under any law.**”

The narrowed down scope

The Act, explicitly prohibits dual pricing in regard to all the pre-packaged commodities. However, fails to include services in its ambit. The numerous illustrations of dual-pricing discussed above, showcase the instances in both the goods and services oriented industry. In the prevalence of such an ambiguous law, the charging of Rs.85 and Rs.20 for an Aquafina bottle is held to be prohibited, but the insurance company selling its policies at different rates, can easily escape liability, in absentia of law considering services.

Ambiguity as to Interpretation

The next limitation inherited in the Act, deals with the interpretation of law. The section 18(2A) is read along with the proviso “Unless otherwise specifically provided under any law.” This clearly provides a very good ground, for the sellers, to get two different prices for a single commodity under the banner of “In accordance with law”.

Role played by judiciary

We, now take into consideration the precedents, whereby the Supreme Courts and High Courts have upheld dual pricing, since they found the same to in harmony with law. In the landmark case of **Pallavi Refractories v. Singhreni Collieries**⁵⁶, the classifications of core/linked sector industries and non-core/unlinked sector industries and the consequent supply of coal to the former at a price less than the notified one, and to the latter at an additional 20% over the notified price, didn’t act violative of Article 14 of the constitution, and that dual pricing was held to be valid.

The ground given by the court is that was that, since the core sector of the economy, constitute the bulk consumers of the respondents, charging lesser price was justified. Also, these bulk users, constitute the strategic industries producing consumer goods, and hence, in the event of any increase in their input price, would ultimately transfer the burden to the consumer, in the form of increased price, a lesser price was held to be in

⁵⁶ (2005) 2 S.C.C. 227

accordance with law, in comparison to the non-core sector, which purchase a relatively lesser quantity and also, any increase in their input price wouldn't pass the burden to the consumer. Hence, dual-pricing was held to be in accordance with law, on the grounds of serving larger **public interest**.

In another pioneering judgment in **Travel Agents Association of India v. Lufthansa German Airlines &Ors**⁵⁷, the association, contested the selling of air-tickets by the said airlines, via its online website, to the customer at a much low price. They complained that, the airlines, used to sell tickets to them, at a much higher price, which jeopardized their business for the worse, since customers preferred buying directly from the airline's website. It was also complained, that the said airlines, in order to avoid the payment of 5% commission to the agents for the sale of tickets by them, adopted the latter route.

The court completely upheld the dual pricing of the tickets, via the different channels, owing to the fact, that online sale doesn't impose any additional charges of advertising and marketing, whereas the sale of tickets via the agents, costed company some additional costs, like payment of commission, advertising and marketing, the burden of which, ultimately fell on the shoulders of the consumer. Also, the company was free to decide, as to what channel of sale, it wanted to opt for.

Similarly, the decision of the railways to charge different prices from big and small manufacturers, was held to be rational and in accordance with law, since the former, were the bulk users of the railways services, charging a rebated price, was held to be in national interest.⁵⁸

It is to be understood at this point of time that, judiciary never intervenes in the legislative functions unless necessitated. Fixation of price being a purely legislative function, the court doesn't regard the same as its forte, and holds it outside the ambit of functions of Court.⁵⁹ Also, the court normally stands firm on its approach of non-intervention in the decisions of the government in financial matters. Obviously, the court lacks the expertise to substitute the opinion of an expert related to a particular policy. The only ground on which court interferes is when such a policy decision is found to contrary to public interest or violative of the constitution.

VI. CONUNDRUM: THE LEGITIMACY OF DUAL PRICING IN INDIA

Despite the very prohibition on dual pricing by Legal Metrology Act, 2017, there is still a lot more to do about this. The limitations can result in numerous interpretations to be drawn. Not going so far, the Supreme Court of India, has upheld dual pricing in hotels and restaurants. The apex court, has given a green signal to all such enterprises to continue the practice of charging above MRP for bottled mineral water. Despite the various pleas

⁵⁷ ibid

⁵⁸ Union Of India and Ors v. Hindustan Development Corpn., (1993) S.C.R. (3) 128 (India)

⁵⁹ Union Of India &Anr v Cynamide India Ltd. &Anr., (1987) S.C.R. (2) 841(India)

made by legislature in regard to banning the price discrimination and a similar stand taken by the Kerala High Court, the Supreme Court stands unaltered in its decision.

The very selling of Diet Coca Cola, at Rs.60/- and Rs.30/-, in malls and Easy Day, respectively, was upheld by the court on a very distinct ground, of no unfair trade practice being reported.⁶⁰The selling of Frooti for Rs.85, while the same being purchases by Vijay Goel, outside the outlet for Rs.20/-, meant no illegality for the court.

The rationale which court have was that, in the first place, a consumer enters the premises of hotels and restaurants, obviously not to buy a water bottle. The main motive is to enjoy the ambience, the environment of the said enterprise. Also, even if the consumer ends up buying a water bottle, it is not merely a sale of good, instead it is a combined sale of good and sale of service, which basically remains outside the scope of Legal Metrology Act, 2017.

Legal Metrology Act and its predecessor Standards of Weights and measure Act, 1976, deals with the trade and commerce of goods sold by weight or number. It becomes very much evident that services are anyhow not included into this. Therefore, even if these hotels, overcharge in terms of MRP, they are held not to be liable, since, they are responsible to provide a number of services to the consumer, along with the sale of goods. These services can be the centrally fitted air-conditioners, deluxe couches, hospitable staff, lush green surroundings, fancy crockery and so on and so forth.

These enterprises also assert their justifications of passing the burden of their high rentals to the ultimate consumer, in exchange of the services he is provided with along the sale of goods. Moreover, when it comes to the question of fraud and misrepresentation, the hotels are very firm on their stand that they by no means indulge in such practices, since there is nothing hidden. The MRP being printed, no vital information is concealed from the consumer. In the event of such dual pricing, it is open to consumer, whether to buy the Diet Cola from the street hawker, or the hotelier. Even if he ends up purchasing from the mall or the restaurant, he can't complain of being cheated since, he bought it on his own will.

AIRPORT

However, the court is known for taking a different stand when it comes to the practice of price discrimination in airports and cinema halls. In much contradiction to what it held in the previous cases, the court bluntly rejects any such dual pricing, in over-charging the water bottles or any other commodity beyond their MRP. In the case of **Big Cinemas V. Manoj Kumar**⁶¹, the National Consumer Disputes Redressal Commission, righteously affirmed the imposition of a sum of Rs.5,00,000/ on the petitioners because, for illegally benefiting themselves by charging two different MRPs from the consumer. All sorts of vehement arguments advanced by the

⁶⁰ibid

⁶¹ (2016) N.C.D.R.C. 123 (India)

petitioner to justify the two MRPs of Rs.16/- for ordinary shops and Rs.30/- for Cinema Halls, failed. A similar ruling was observed by the court in **Vijay Goel v. Inox Cinema**, again dwelling over the subject matter of two MRPs for Aquafina.

CINEMA

The court has very specifically rejected the price discrimination in charging the goods like packaged drinking water in airports as well. Substantiating the said statement, **D.K. Chopra v. Snack Bar**,⁶² provides with the authority, stating that a stall of snack bar in the airport premises, is not at all justified to sell the water bottle at a hyped price beyond its MRP, for which it is available with a roadside vendor.

The plea of high rentals in the airport made by the Snack Bar, don't find any logic, as like hotels and restaurants they don't serve the consumer with additional services, hence nowhere can it, logically construe to pass the burden to the ultimate consumer, who is left with no choice at the airport, than to buy the over-charged bottles.

Hence, all these precepts, Acts and Precedents when brought together, lead to a whole lot of conundrum as to what litmus test those the enacted law and case law provide to interpret the legality and illegality of dual pricing. What can be best extracted by such extensive study is that, wherever there is an imposition of unreasonable burden on the consumer, the court takes a firm stand to prohibit dual pricing in the best interest of the consumer.

Upholding dual pricing in hotels and malls, completely makes sense, when the sale of goods is viewed to happen along with some additional sale of services in the form of hospitality, comfort and ambience. The consumer probably has all the doors open, and shun the purchase of high priced goods in such places, and simply walk outside to purchase it from an ordinary retailer. However, when it comes to airport and cinema malls, no justifications, by any of the guilty party has been provided, as to why dual pricing should be upheld, taking into consideration that consumer's helplessness as to go out and purchase, is held to be exploited. And hence, he is left with practically no other option in such enterprises than to purchase the good, at an over-charged MRP.

VII. CONCLUSION

Analyzing the position, with respect the entire descriptive study the authors has made, it stands highlighted that a major chunk of interpretation as to the legitimacy of dual pricing has been made by the the judiciary. The Supreme Court via its innumerable judgment has been successful enough to bring forward as to when and how, are the interests of the sellers and buyers, be harmoniously construed, as that none suffers and feel exploited.

⁶² (2015) N.C.D.R.C. 108 (India)

Obviously, it would be unfair for seller, when asked to supply vegetables at same rate in both the hilly and plain areas. Similarly, the consumer also cannot be left at the behest of the seller, charging Rs.85/- for a bottle sold inside the cinema, and Rs.20/- for the same commodity sold outside. The LM Act, 2017, no doubt, provided the provision of prohibiting dual pricing, however, the same has been enforced in the light of various exit gates. Be it conformity with law or the larger national interest, delivery of services or a comfy environment, sufficient grounds for upholding dual pricing have been evolved by the court by a series of judgments.

It appears, as if the judiciary is extraneously burdened with interpretation of law regarding dual pricing. The rationale and dicta it provides, serves more purpose than the explanations of legislature acts. Sadly, despite dual pricing, extending its roots deep, in every market transaction, the legislature upto now, has been not able to frame a law, which efficiently tackles all the exceptions and explanations to dual pricing. It will all the way save a whole lot of time for the courts, to explain as to the why and why-nots of holding and discarding price discrimination.

The suggestions stand as follows:-

- Hence, what makes relevance, at this point of time is that, the legislature should realize its duties and hence, draft a new law or to make amend the existing, as to address the ambiguities of the prevailing legislation.
- The judiciary has already, by its numerous judgments provided rationales behind different evens of dual-pricing, hence, making it easy for the legislature.
- This when implemented would result in the reduced burden over the judiciary, and will suffice the purpose of protecting the interests of the consumer from the fraudulent and malicious activities of the producers.
- A rule book as to what constitutes dual pricing, should be made, thus providing a straitjacket solution to this issue.
- The consumer should be awarded appropriate compensations, in the event of his exploitation. While at the same time, efforts must be made to support the objectives of producer, if the same doesn't happen at the cost of buyers.

Hence, all this when implemented, will pave a way for enhanced consumer protection, who constitutes the most important part of our economic system.

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