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# Critical Appraisal of Judicial Creativity in the Development of Consumer Jurisprudence

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## ABSTRACT

*In regards to protecting the consumer's interests, the principle of laissez faire was followed by the after effects of the industrial revolution and then the provisions of the Indian Penal Code, 1860, Sale of Goods act, 1930, the Dangerous Drugs Act, 1930, Drugs Cosmetics Act, 1940, Prevention of Food Adulteration act, 1954, Standards Institution (Certification of Marks) Act, 1956, Monopolies & trade Restrictive Practices Act, 1969, Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, National Security Act, 1980, reference to Rule 8 of Order 1 of the First Schedule and also Section 482 of the Civil Procedure Code, 1908, writ remedies under Article 32, 226, 227 of the Indian Constitution etc. Consumer protection law enables welfare of the society by promoting the consumer's participation in the market economy and checking the exploitative tactics of the other party who usually have an upper hand than the former.*

**Keywords-** complainant, negligence, deficiency in service, commercial purpose

## I. LITERATURE REVIEW

- Consumer Protection Jurisprudence by V Balakrishna Eradi- This book illustrates the practical and hypothetical aspects in a broad sense. The case laws and connected provisions are intermingled to give the reader a holistic perspective.
- Consumer Protection Law in India by Dr. Vinay N. Paranjape- A crisp and brief analysis of the consumer protection scenario along with case laws and provisions that is a collection of god information rarely found on the internet.
- Judicial Process by Dr. Sheetal Kanwal- This book contains snippets of case laws along with the relevant theories and explanations as to why such a decree or judgement falls in line with the chain of thoughts pertaining to the factual matrix.
- Consumer Protection Jurisprudence: A Constitutional Perspective by Dr. Manoj Kumar Padhy- It talks about the rights of the consumer with respect to Article 14, 19,

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21, 32, 37, 38, 39, 47, 48, 226 and 245 to 255 of the Indian Constitution.

## II. ANALYSIS

The constitutional validity of the Consumer Protection Act was made prominent with regards to the hierarchy of consumer courts independent of the Parliament's influence and these courts striking at the independence of the judiciary but devoid of power to transfer cases and pass interim orders.<sup>2</sup> As per the word 'complainant' defined by Section 2 (1) (b) of the Act, a registered consumer organisation has the locus standi to file a complaint on behalf of the aggrieved party.<sup>3</sup> Some of the areas covered by the Act are given below-

**Agriculture**- In the ambit of the phrase 'consumer' used in agricultural purposes and in commercial purposes, there is a difference as given in Section 2 (1) (d) (i) of the Consumer Protection Act 1986.<sup>4</sup> If the seeds are brought by the complainant there must be a supporting evidence like the proof of sale in the petition. Floriculture is considered to be an agricultural activity contrary to the statutory schedule of tariff of supply of energy. A commission agent is not a consumer within the provisions of the Act. Along with being the de jure buyer and seller of article, he is also a de-facto article agent, acting on behalf of the buyers and sellers but not a true buyer himself. If no evidence was given by the complainant but crops standing in the fields are mismatched or if the seeds are defective in spite of being certified by the Seeds Corporation, the other party is liable to pay the compensation. If the agriculturist establishes his case with evidence for defective seeds, the trader can be held liable under the Act. In a complaint where seeds are not germinating properly, the onus of proof lies on the opposite party who sold the seeds. Article 31 B and Schedule 9 of the Indian Constitution puts the farmers to a disadvantage as their rights to challenge laws pertaining to agriculture and landholdings are curbed.

## III. MODE OF TRANSPORT

1. Airlines-If there is an absence of evidence from the complainant's side regarding who is at fault, the airlines or the travel agent in the final list of the bookings, then the airlines cannot be held liable as per Section 2 (1) (g) of Consumer Protection Act, 1986.<sup>5</sup> The medical report is prominent to show that the complainant has suffered anxiety or injury due to a jolt during aircraft landing. With regards to deficiency in service and negligence in delivering

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<sup>2</sup> State of Karnataka v. Vishwasarthi House Building Co-operative Society (2003) 1 CPJ 1 (SC): AIR 2003 SC 1043

<sup>3</sup> T.T. Private Ltd. v. Akhil Bharatiya Grahak Panchayat & Another II (1996) CPJ 239 (NC)

<sup>4</sup> Laxmi Agriculture Seed Store v. Dhup Singh and Ors (1995) I CPJ (NCDRC)

<sup>5</sup> Air India v. Yogendra Hiralal Parekh and Ors (1996) II CPJ 116 (NCDRC)

goods in consignments, the airlines will not be liable for any compensation as the complainant's bankers recover the value of the goods. The airlines would not be responsible for any cancellation or delay in flights for any unavoidable reasons such as bad weather, poor visibility or other unforeseen circumstances except for loss suffered on account of such negligence of the airlines and sufficient material evidence provided by the complainant. If the airlines violates Article 12 (2) of the Warsaw Convention and Hague Protocol and unauthorizedly delivers the consignment without production of the required documents resulting in the complainant losing the value of the goods.<sup>6</sup> The complaint has to be filed with the limitation period and in lieu of the criminal intent or negligence which may even be wilful. The airlines would have to compensate the complainant if denial of tickets in the economy class leads him/her to forcibly purchase an executive class ticket for a higher price. Increase in sudden fare changes may cause the complainant to become unstable or even agonized with decrease in status and money. Here, the complainant is entitled to the compensation for the loss suffered. Purchaser of an air ticket for self or family is a consumer, any such beneficiary has the right to file a complaint in case of any breach of duty by the airlines. Disembarking a passenger from the aircraft after denying his/her confirmed seat is a deficiency in service. If there is an application on behalf of the opposite party for the prosecution of the complainant forgery of airway bill, the complainant can seek remedy in a civil court.<sup>7</sup>The carrier's fault may also amount to breach of contract under the general law once it is proven that service was hired for consideration and that loss was incurred to the complainant for which relief could be sought, not affecting the jurisdiction of the consumer forums.<sup>8</sup> With regards to the locus standi, an agent has no stand in the case as compared to the real consumer. Security check is done for the safety of the passengers as well as to fulfil the legal obligation of the airlines. On account of a legal strike, it is the duty of the manager and the trade union to inform the consumer public in a timely manner so that they are able to make alternate arrangements.

2. Railways- The railway is held liable for deficiency in service like delayed arrival and negligence for theft, mob-violence in reserved bogie caused by unauthorised ticket-less persons, threatening the safe travel to its bonafide passengers.<sup>9</sup> The consumer forum may provide additional remedy but it has no jurisdiction to entertain matters pertaining to the

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<sup>6</sup> Presidency Kid Leather Ltd v. Singapore Airlines Ltd (1995) I CPJ 459

<sup>7</sup> Prem G's International v. Iraqi Airways (1996) I CPJ 347

<sup>8</sup> Synco Textiles Pvt Ltd v. Economic Transport Organization and Ors (1991) I CPJ 40

<sup>9</sup> Union of India & others v. Manoj H, Pathak, II (1996) 2 CPJ 31 (NC)

Section 13 (1) of the Railway Claims Tribunal Act, 1987 or any other judicial or quasi-judicial body.

3. Roadways- The public paying the taxes to the government have no voluntariness and therefore usage of roads cannot be viewed as complimentary to hiring of service by consideration paid in the form of tax. The complaint for deficiency in service for maintenance of roads and highways against the government will not be entertained.

**Banking** – If there is insufficient material evidence to support the deficiency in service or mala fide act against the complainant, the National Commission may dismiss the complaint. Since MICR cheques fell in the realm of pricing that aids banking services, the jurisdiction of the consumer courts does not relate to it. Its introduction was not only to facilitate the bank but also to avoid delays in the clearance of cheques. The instructions of the Reserve Bank of India was meant only for the banks and not for the customers, where in the banks cannot charge the consumers for rendering better service.<sup>10</sup> The Bank is liable to pay to pay interest to the complainant in a confirmed Bank Guarantee and irrevocable letters of credit and it is bound to honour the demand for encashment once it is made. In a complaint under Section 23 of the Consumer Protection Act, filed for deficiency in service of the bank for failing to collect money in foreign exchange and thus resorting to local currency, the delay may also be caused by governmental action- this decision of the Supreme Court overruled that of the National Commission.<sup>11</sup> If a prior FIR has been lodged by the complainant and it is still pending, the forum has no jurisdiction to try the case.<sup>12</sup>

**Goods and services** – The definition of consumer contained in clause (d) of section 2 (1) and ‘service’ under section 2 (o) leads to an understanding that services rendered free of charge or under contract of service are not included under the Act. Any commodity held for commercial purpose and not for consumption is not liable to be stated in a complaint.<sup>13</sup> A defect within warranty period entitles the complainant to obtain compensation even if it was purchased for a commercial purpose.<sup>14</sup> The distinction between an activity falling under commercial use or commercial purpose should be made as the former is included in the category of a ‘consumer’ for the purpose of protection under the Act.<sup>15</sup> Where vicarious liability is concerned, the employer cannot escape it’s liability due to deficiency in service of

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<sup>10</sup> Archana Kamath v. Canara Bank (2003) II CPJ 7, (2003) CT3 GJX 112

<sup>11</sup> Corporation Bank v. Navin J Shah, (2000) I CPJ

<sup>12</sup> State Bank of India v. Kamalendra Pratap Singh, III (2008) CPJ 220 (UP)

<sup>13</sup> Sri Laxmi Narayan Rice Mills v. Food Corporation, (1996) CPJ

<sup>14</sup> Larsen & Toubro v. Sunder Steels Ltd., I (2009) CPJ 256 (NC)

<sup>15</sup> Manju Singh Chauhan v. MPEB, I (1992) CPJ 73 (75) (NC)

the employer.<sup>16</sup> A ceiling fan installed in an office cannot be contended as not being used for commercial purpose and the complainant cannot be considered as a consumer for the purpose of the Act.<sup>17</sup> The seller will be held liable to pay compensation to the complainant for any machine/equipment sold with a manufacturing defect and the defect continues during the warranty period.<sup>18</sup> Once the opposite party charges commission or fee for rendering services and looking after the complainant's interests, the complainant is a consumer and is entitled to maintain his plea for deficiency in service.<sup>19</sup> There is a difference between contact for service and contract of service where in the latter scenario a lawyer rendering his service against payment of his professional fees cannot be sued by his client deeming to be a consumer.<sup>20</sup> Presenting a document for registration does not amount to a person becoming a consumer nor does the services rendered by the registering authority which is a part of sovereign function of the state culminate as 'service' under the Consumer Protection Act.<sup>21</sup> When the possession as related to housing is delayed beyond a reasonable time from the date of allotment, the authority cannot demand interest on delayed payment from the consumer.<sup>22</sup> A government servant under Central Government Health Scheme is not a consumer within the meaning of the Act and therefore the term 'service' is also not covered by the same.<sup>23</sup> Acceptance of a tender by the complainant does not make him/her a consumer on the basis of mutual obligation of both the parties to render services to one another, regarded as 'hiring of service'.<sup>24</sup>

**Electricity**- The deficiency in service of the Electricity Supply Board entitled the complainant to compensation, cost, medical expenses as the former had failed to maintain the norms of the Electricity Act.<sup>25</sup> Disconnection of electricity in case of electric theft or pilferage does not amount to deficiency in service and the board has the right to demand payment of unmetered consumption of electricity, additional security deposit and re-connection charges from the user.<sup>26</sup> With regards to beneficiary of services for consideration paid by a person even if the connection was taken in the name of a deceased person, he/she is a competent consumer under the Act and can file a complaint against the electricity board.

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<sup>16</sup> K.C. Sathyanarayan v. Bharat Petroleum Corpn. Ltd., III (2006) CPJ 8 (NC)

<sup>17</sup> Interfreight Services (P) Ltd. v. Usha International & Another, I CPJ 128 (SC)

<sup>18</sup> East India Constitution Co. v. M/s Modern Consultancy Services & another, II (2006) CPJ 289 (NC)

<sup>19</sup> K.P. Leela, Advocate v. Aneja Financial Consultancy Services, II (1994) CPJ 269

<sup>20</sup> K Ramaswamy v. Jayavitthal & other, I (1991) CPJ 685 (KER)

<sup>21</sup> S.P. Goel v. Collector of Stamps Delhi, AIR 1996 SC 839

<sup>22</sup> Haryana Urban Development Authority v. Jeewan Asha Garg, AIR 2005 SC 1397

<sup>23</sup> Addl. Director CGHS Pune v. Dr. R. Butani, 1997 NCJ 56

<sup>24</sup> Vinodini Bajpai v. Rajya Krishi Utpadan Mandi Parishad, I (1991) CPJ 169 (NC)

<sup>25</sup> Kunchi Babu v. A.P. Transco, I (2005) CPJ 778 (A.P.)

<sup>26</sup> CESC v. Babloo Shah, 5 (2005) CPJ 486 (WB)

Even under the Civil Procedure Code, 1908 a person who meddles with the property of the deceased is taken to be a legal representative of the deceased.<sup>27</sup> The Consumer Protection (Amendment) Act 2002 provides that legal heirs of the representative of the deceased consumer may file a complaint in the complainant's capacity opposing the claim of not having a locus standi in the case as stated in *Malti Devi v. Orissa State Electricity Board*, (1992) 3 CPJ 123 (Orissa).

**Unfair trade practice**- Before the Consumer Protection (Amendment) Act 1993, Section 36-A of the Monopolies and Restrictive Trade Practices Act, 1969 covered the expression of "unfair trade practice". Deceptive advertisement is an unfair trade practice and TV channels were liable for punitive damages jointly and severally.<sup>28</sup> For perpetuating a misleading Star Cruise advertisement the defaulting party was asked to withdraw the advertisement under Section 14 (1) (f) and issue corrective advertisement under the act along with a fine payable to the complainant.<sup>29</sup> A complainant who purchased a ticket in one airlines at a higher price was shifted to another airlines going to the same destination at a lower fare. The former airlines was asked to refund the excess amount to the consumer for indulging in unfair trade practice. A complainant was entitled to gold coin or equivalent amount for special offer of 15 grams of gold promised as a gift on purchasing Maruti 800 car as the other party had gone through an unfair trade practice and defaulted, although no compensation was awarded as the complainant had not suffered any loss due to deficiency in service.<sup>30</sup> Chips found to be less in weight as per the printed quantity on the packets invited compensation to be paid to the complainant<sup>31</sup> and also the degree of compensation to be paid was raised to that of exemplary for unfair trade practice in scratch and win scheme.<sup>32</sup> The following cases have not been treated as conforming to unfair trade practice-

- Increase in rent of Bank Lockers as 'pricing' is not a consumer subject<sup>33</sup>
- Prescribed tests to check renal failure and lack of evidence as to whether such tests were unnecessary and ways to extort money from the patients<sup>34</sup>
- Publishers having the right to revise the price of their books from time to time<sup>35</sup>

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<sup>27</sup> *Harish Kumar v. Chief Engineer, MPEB*, I (1993) CPJ 229 (MP)

<sup>28</sup> *Society of Catalysts v. Star Plus Television*, IV (2008) CPJ 1 (NC)

<sup>29</sup> *Cox & Kings I (Pvt.) Ltd. v. Joseph A. Fernandes*, I (2006) CPJ 129 (NC)

<sup>30</sup> *Maruti Udyog Ltd. v. Dinesh Chand Thapak*, II (2000) CPJ 478 (MP)

<sup>31</sup> *Ganesh Salian v. Pepsi Foods (P) Ltd.*, I (2007) CPJ 306 (Kant)

<sup>32</sup> *Bonn Nutrients (P) Ltd. v. Jagpal Singh Dara*, IV (2005) CPJ 108 (NC)

<sup>33</sup> *Sohanlal Kamboj v. Manager, State Bank of Patiala*, II (1999) CPJ 346 (Punj.)

<sup>34</sup> *Consumer Research Information & Education Society v. Durgabhai Deshmukh Hospital*, II (1999) CPJ 234 (A.P.)

<sup>35</sup> *Shyam Brothers v. Saroj Sharma*, II (2007) CPJ 310 (WB)

- Fixing the price of a flat<sup>36</sup> or milk packets<sup>37</sup>

**Medical Negligence-** A patient died out of choking of air passage after he was given intravenous injuction and a small nasal pack which was placed anteriorly. In this case the hospital was held liable and not the doctor as he was only a Unani Hakim and not a allopathic doctor.<sup>38</sup>In *Parmanand Katara v. Union of India*, AIR 1989 SC 2039 it was held that no medical authority would deny medical attention to patients during an emergency. When negligence and deficiency in service is proved beyond reasonable doubt, it calls for compensation to the complainant as seen in *M. Chinnaiyan v. Sri Gokulan Hospital, III* (2007) CPJ 228 (NC) where a patient suffering from a bleeding uterus was injected two units of HIV infected blood in contrary to the consent given for hysterectomy and not blood transfusion, violating Rule 66 (A) of the Drugs & Cosmetics Rules. The doctor or hospital who does not operate and wait for a rather implicit consent in case of emergency situations, would be held liable for deficiency in service under the Consumer Protection Act, provided that the patient refused to undergo the operation even after being informed about the possible dangerous consequences.<sup>39</sup> A doctor in his/her justified medical practice who administers an option out of two or more available ones would not be held liable for negligence or deficiency in service in accordance with the distinction between a reaction and a side effect where the former is more immediate.<sup>40</sup> An earlier order passed by the consumer forum dismissing a case on the grounds of criminal proceedings pending against a negligent doctor was rejected by the State Commission stating that criminal proceedings were no bar to complaint before a consumer forum under the Consumer Protection Act as criminal negligence is different from deficiency in service under Section 2 (1) (g) of the Act.<sup>41</sup>

**Insurance-** The insurance claim against accident insurance policy was not maintained by the court as the gas cylinder having any leakage was ruled out as it was not empty over a period of time and the entire burden of proof shifted to the complainant.<sup>42</sup> When a vehicle is overloaded which is a violation of the Motor Vehicles Act, 1988 and it overturns, the insurer cannot be held liable for the complainant's mistake.<sup>43</sup>

An insurance claim for damage done to the roof of an insured building for torrential rainfall

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<sup>36</sup> *D.D.A. v. Govind Rao & another*, I (1994) CPJ 103 (NC)

<sup>37</sup> *K.A. Kadar v. Director, Tamil Nadu Milk Production Association*, I (1994) CPJ 162 (SC)

<sup>38</sup> *P.N. Thakur v. Hans Charitable Hospital, III* (2007) CPJ 340 (NC)

<sup>39</sup> *Pravat Kumar Mukherjee v. Rubby General Hospital, II* (2005) CPJ 62 (NC)

<sup>40</sup> *Manju Garg v. Goel Hospital, IV* (2005) CPJ 62 (NC)

<sup>41</sup> *Rishi v. Pushpa III* (2005) CPJ 193 Del

<sup>42</sup> *New India Assurance Co. Ltd, v. Mala, II* (2007) CPJ 80 (NC)

<sup>43</sup> *National Insurance Co. Ltd. v. Suresh Babu*, I (2007) CPJ 23 NC

was made but the insurer denied to cover the loss on the grounds that it was not as per the terms of the policy which included only 'flood' or 'tornado'. The Commission gave Oxford dictionary meaning of both the words and in the literal sense they are related to heavy downpour of rain, thus making the insurance company liable to pay the damages.<sup>44</sup> The burden of proof is on the complainant to prove that a mishap was accidental and not engineered. An insurance company ceases to be liable if the claim is not pressed within a reasonable time of 12 months from the date of the loss or accident.<sup>45</sup> A fishing trawler claiming insurance was a complex case as to whether the sinking of the vessel was pre-planned to get a hefty amount of money or it was the insurer's deficiency in service. After a close look at the evidence and witnesses, the plea against the insurance company was dismissed leaving the parties the freedom to seek relief through a regular suit in a Civil Court.<sup>46</sup>

#### **IV. CONCLUSION**

The Consumer Protection Act, 1986 seeks to provide some form of relief to the consumers by taking into account the injustice caused to them by the other parties either by exploitation of power, negligence, deficiency in service or by any other way. It is replaced by Consumer Protection Act, 2019 which includes establishment of Central Consumer Protection Authority and Consumer Dispute Redressal Commissions, states six consumer rights and also prohibition and penalty for misleading advertisement, gateway for e-commerce along with modifications to the jurisdiction of consumer courts. With the changing times and need, the role of the judiciary in satisfying the rationale with respect to the factual matrix of the case is crucial in determining the direction in which justice will prevail. The independence and power of the jurisdiction of the consumer forums needs to be acknowledged with much vigour as these functional units can facilitate division of labour putting off the load from the higher courts to a considerable extent.

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<sup>44</sup> United Insurance Company Co. Ltd. v. Imperial Gift House, I (2007) CPJ 6 (NC)

<sup>45</sup> U.P. State Forest Co. Ltd v. United India Assurance Co., I (2009) CPJ 1 (SC)

<sup>46</sup> Vani Marine (P) Ltd. v. The New Assurance Co.,I (2001) CPJ 26 (NC)

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