

Product liability in India

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INTRODUCTION

In India, Product liability law, also called "products liability", governs the liability of manufacturers, wholesalers, distributors, and vendors for injury to a person or property caused by dangerous or defective products. The goal of product liability laws is to help protect consumers from dangerous or defective products, while holding manufacturers, distributors, and retailers responsible for putting into the market place products that they knew or should have known were dangerous or defective.

Product liability in India is, essentially, governed by

- a) The Consumer Protection Act, 1986
- b) The Sales of Goods Act, 1930
- c) The Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the "MRTP Act")
- d) The law of Torts.
- e) special statutes pertaining to specific goods

In addition, *criminal liability* for injury or damage caused by defective products in India is imposed by virtue of Indian Penal Code and Prevention of Food Adulteration Act 1954 and other special Acts discussed in this Chapter.

CONSUMER PROTECTION ACT 1986 ("CPA")

The Consumer Protection Act, 1986 was enacted for better protection of the interests of consumers. The provisions of the Act came into force with effect from 15-4-87. Consumer Protection Act imposes strict liability on a manufacturer, in case of supply of defective goods by him, and a service provider, in case of deficiency in rendering of its services. The term "defect" and "deficiency", as held in a catena of cases, are to be couched in the widest horizon of there being any kind of fault, imperfection or shortcoming. Furthermore, the standard, which is required to be maintained, in services or goods is not to be restricted to the statutory mandate but shall extend to that claimed by the trader, expressly or impliedly, in any manner whatsoever.

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The salient features of the Act are:

- (I) it covers all the sectors whether private, public, and cooperative or any person. The provisions of the Act are compensatory as well as preventive and punitive in nature and the Act applies to all goods covered by sale of goods Act and services unless specifically exempted by the Central Government;
- (II) It enshrines the following rights of consumers:
 - (a) right to be protected against the marketing of goods and services which are hazardous to life and property; (b) right to be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to protect the consumers against unfair trade practices; (c) right to be assured, wherever possible, access to a variety of goods and services at competitive prices; (d) right to be heard and to be assured that consumers' interests will receive due consideration at the appropriate fora; (e) right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and (f) right to consumer education;
- (III) The Act also envisages establishment of Consumer Protection Councils at the central, state and district levels, whose main objectives are to promote and protect the rights of consumers; (v) To provide a simple, speedy and inexpensive redressal of consumer grievances, the Act envisages a three-tier quasi-judicial machinery at the national, state and district levels. These are: National Consumer Disputes Redressal Commission known as National Commission, State Consumer Disputes Redressal Commissions known as State Commissions and District Consumer Disputes Redressal Forum known as District Forum; and
- (IV) the provisions of this Act are in addition to and not in derogation of the provisions of any other law for the time being in force.

Definition of 'Defect' and 'consumer'

Under the CPA, Consumer Forums at the District, State and National level have been specifically constituted to adjudicate claims of consumers for any “defect” in goods. A “defect” has been defined in Section 2(1) (f) of the Act as “*any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader (which includes the manufacturer) in any manner whatsoever in relation to any goods.*”

It is important to mention herein that by virtue of Section 2 (1)(d) persons/entities who had purchased goods for 'commercial purpose' (other than those persons who have purchased goods for using them to earn their livelihood by means of self employment) are excluded from the scope of CPA; they cannot institute proceedings under the CPA even if there is any 'defect' in the goods purchased by them for using the goods for commercial purposes.

Purview of a 'complaint'

According to the CPA, 'Complaint' means any of the following allegations made in writing by a complainant-

- i. any unfair trade practice or a restrictive trade practice has been adopted by a trader,
- ii. the goods hired or bought suffer from one or more defects
- iii. The goods hired or availed of are deficient in any respect
- iv. A trader has charged price in excess of price fixed by law or displayed on the goods or any package containing goods
- v. 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 requiring traders to display information in regard to the contents, manner and effect or use of such goods.

Grant of Reliefs under CPA

On arriving at a finding of defect in the goods according to Section 14 CPA, the jurisdictional Consumer Forum may direct one or more of the following: (i) to remove the defect; (ii) to replace the goods with new goods of similar description which shall be free from any defect; (iii) to return to the complainant the price; (iv) to pay such amount as may be awarded as compensation to the consumer for the loss or injury suffered by the consumer due to the negligence of the opposite party; (v) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them; (vi) to cease and desist manufacture of hazardous goods; (vii) to pay such sums as orders if injury/loss is suffered by a large number of consumers not identifiable conveniently; (viii) to issue corrective advertisement for neutralizing effect of misleading advertisement; (ix) not to offer the hazardous goods for sale; (x) to withdraw the hazardous goods from being offered for sale; (xi) to provide for adequate costs to parties (the Complainant).

There exists no clear pronouncement of the Supreme Court (the apex court in India) till date on whether the liability under the CPA is strict or fault based. However, failure to conform to the standards required under any law, contract or representations of the trader are sufficient to constitute a defect. Furthermore, under Section 14 of the CPA as explained hereinabove, it is only the remedy of compensation that requires the claimant to necessarily prove negligence. In the case of *Abhaya Kumar Panda v. Bajaj Auto* [(1991) 2 CPJ 644], the Orissa State Commission directed repair of the goods, even though there was no intentional defect. Thus, the defence of no negligence may not be accepted by Consumer forums.

Validity of Limitation of liability clauses

Contractual liability has a role to play in product liability claims under the CPA. Courts in India have upheld limitation of liability clauses, which parties have specifically agreed to in the contract as recognized by the Supreme Court in *Bharathi Knitting Company v DHL Worldwide Express Courier* (1996) 4 SCC 704. However, such clauses may be struck down if found to be unconscionable in nature. In *Maruti Udyog v. Susheel Kumar Gabgotra*, [(2006) 4 SCC 644], the manufacturer of the vehicle had stipulated a warranty clause limiting its liability to merely repair the defects found if any. In view of this clause, the Supreme Court reversed the findings of the National Commission to replace the defective goods and held that the liability of the manufacture was confined to repairing the defect. Compensation was, however, awarded for travel charges to the complainant, which was incurred due to the fault of the car manufacturer.

Applicability of other laws

Section 3 of the CPA provides that the Act is in addition to and not in derogation of any other law. The Supreme Court in *Secretary, Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha*, [(2004) 1 SCC 305] has interpreted the above provision to mean that the remedies provided under the CP Act are in addition to the remedies provided under other statutes. Hence, the fact that a remedy is specifically provided for under another statute would not necessarily oust the jurisdiction of the appropriate authority under the CP Act. It has been further held that if forums under one statute and the CP Act are approached, then it is for the appropriate authority to permit the parties to opt between the consumer forum and the other forum, depending on the facts and circumstances of the case.

Establishment of Consumer forums

At present, there are 34 State Commissions, one in each State/UT and 571 district fora besides the National Commission. The state governments are responsible to set up the district fora and the State Commissions. States have been empowered to establish additional District Forum and also additional members in the State Commission to facilitate constituting benches and also for holding circuit benches. The Central Government is empowered to establish the National Commission. It has been empowered to appoint additional members to facilitate creation of more benches and holding of circuit benches. The second bench of the National Commission started functioning from 24 September 2003. The government is monitoring the disposal of cases by the consumer courts through National Commission. As per the current statistics, since its inception and up to 5.9.2008, 2559451 cases were filed out of which 2327035 cases were disposed of by the District forums in various states of India.

Jurisdiction under Consumer Protection Act 1986

The District Forum has the jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed, is less than INR 50,000. A State Commission has the jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds 500,000 rupees but does not exceed 2 million rupees. It is also appellate forum for orders of the District forum. The National Commission has the jurisdiction to entertain complaints where the value of goods and

services and the compensation exceeds two million rupees and also hears the appeals against the orders of the State Commission.

Period of limitation

A complaint is only admitted by any of the competent forums under CPA if it is filed within two years from the date on which the cause of action has arisen but it may be entertained after the said period after recording its reasons for condoning such delay, if the complainant satisfies that he had a sufficient cause for not filing the complaint within period of two years.

Procedure to file a complaint

A complaint can be filed in a District Forum or as per pecuniary jurisdiction in another forum within local limits of whose jurisdiction the opposite party or any of the opposite parties resides or carries on business, or has a branch office or personally works for gain.

Class actions

Under CPA Section 2 (1) (b) permits filing of a complaint by a consumer, any voluntary consumer association registered under companies Act 1956 or under any other law, the State government or Central Government, one or more consumers where number of consumers have same interest, in case of death of a consumer, his legal representative may make a complaint.

Penalty under Section 27 CPA

According to CPA, where a trader or the complainant fails to comply with an order made by the relevant consumer forum, such person is liable to a punishment with imprisonment for a term which is not less than one month but which may extend to three years or with fine of not less than two thousand rupees but which may extend to ten thousand rupees or with both.

b) THE SALE OF GOODS ACT

Sale of Goods Act, 1930 is one of very early statutes explaining mercantile law in India. Sale of Goods Act repeals and replaces ss76 to 123 of the Contract Act 1872, which were adequate for their time, but by 1930 it clearly needed a separate legislation due to growing modern commerce. The Act is based upon and largely reproduces, the English sale of goods Act 1893 of the English common law. In principle, the Indian law of sale of goods is same and English authorities on the different interpretations of different sections although not technically binding in India, may usefully be cited.

The provisions of this Act are set against the background of the general law of contract and the personal property and lay down special rules of law which are peculiar to sale of goods. The provisions of the Indian Contract Act unrepealed by the Act, continue to apply to contracts for sale of goods (s3) and any rule of law not inconsistent with this Act is saved. (s.66 (e).) Basic concepts and provisions of Contract Act apply to contract of Sale of Goods also such as offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc.

Goods covered

Section 2 (7) of the Act defines 'Goods' as 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. [

Contract of sale

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another. [section 4(1)]. A contract of sale may be absolute or conditional. [section 4(2)].

Thus, following are essentials of contract of sale – (i). It is contract, i.e. all requirements of 'contract' must be fulfilled (ii). It is of 'goods' (iii) Transfer of property is required (iv) Contract is between buyer and seller (v) Sale should be for 'price' (vi) A part owner can sale his part to another part-owner (vii) Contract may be absolute or conditional (viii) Payment and delivery are concurrent conditions.

Conditions and warranties

According to Section 12 of the Sale of Goods Act, a buyer is conferred with the right to repudiate the contract and sue for damages in case of breach of a condition, whether relating to quantity, quality or description. Breach of warranty, on the other hand, entitles the buyer, to sue for damages but not repudiate the contract. Offer of a thing different from what was contracted for is not a breach of one term, but a total failure to perform the contract. A discussion on this aspect is found in *Anson on Contract* and *Chalmers*, p187-

*'if a man offers to buy peas of another, and he sends him beans, he does not perform his contract but that is not a warranty, there is no warranty that he should sell him peas, the contract is to sell peas and if he sends him anything else instead it is a non performance of it'*¹.

1 Lord Abinger CB in *Chanter v Hopkins* (1838) 4 M&W, 404, 51 RR 654-655 approved in *Ex Ch, Azemar v Casella* (1867) LR 2 CP 679, *Drummond v Van Ingen* (1887) 12 App Cas 284

By virtue of the wordings of section 12(4) of the Act it would appear that where a stipulation was not a condition, it must necessarily be a warranty.

Although the parties have used no express words that would create a stipulation of a condition or a warranty, the law annexes to sale of goods contracts many conditions, breach of which may be treated by the buyer as avoiding the contract or giving a right to damages. These are called implied conditions and are enforced on the grounds that the law infers from all circumstances of the case that the parties intended to add such a stipulation to their contract but did not put it in express words²

Implied condition as to quality or fitness

Section 16 of the Sale of Goods is most important from the point of view of the present discussion. Section 16 prescribes Implied conditions as to quality or fitness. Section 16(1) requires that the goods shall be reasonably fit for the purpose made known to the seller by the buyer expressly or by implication. Section 16(2) requires only that the goods should be of merchantable quality. Secondly, Section 16(1) is excluded where the buyer does not rely on seller's skill or judgement, whereas section 16(2) is not so limited, though it does not apply when the buyer examines the goods, as regards defects which that examination ought to reveal. Where a defect is revealed to the buyer, not only is section 16(2) excluded, but that fact will normally indicate that it is unreasonable for the buyer then to rely on the seller for the purposes of s. 16(1).

This section reflects the principle of *caveat emptor*. That is, it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires or if he is buying them for a specific purpose, that they are fit for that purpose. In Section 16, the first exception to the rule of *Caveat emptor* is that of question of fact whether the buyer did rely on the skill or judgement of the seller, and no presumption is raised against him by reason of the fact that the goods were in esse and he had the opportunity of examining them. Nor is it necessary that he should rely on the seller's skill and judgement only and nothing else.

In *Ranbirsingh Shankarsingh Thakur v Hindustan General Electric corp ltd* AIR 1971 Bom 97, where a radio set purchased by a layman from a local distributor on hire purchase basis started giving trouble after two months of purchase, it was held that the article supplied ought to have been reasonably fit for a specific purpose, and seller's liability in such cases where he knows the purpose to supply goods that are reasonably fit, is an absolute one. It was held that the case fell within the purview of section 16(1) and 16(2). In the case of sale of an article under its tradename or patent, there is no implied condition as to its fitness for any purpose. Where there is an apparent (as opposed to latent) defect in goods which would have been discovered by reasonable care, the buyer cannot sue the manufacturer in tort or the retailer in contract.

Remedies for breach of warranty

² *The Moorcock* (1889) 14PD64,68, per Bowen LJ

A breach of warranty does not entitle the buyer to reject the goods and his only remedies would be those provided in Section 59 of the Sale of Goods Act., namely to set up against the seller the breach of warranty in diminution or extinction of the price or to sue the seller for damages for breach of warranty. In *Barium Chemicals Ltd v AP Mining Corp Ltd* (1980)1 Andh WR 350, the court held that the defence of diminution or extinction of price, by reason of breach of warranty is a statutory defence expressly provided by section 59 and it is not in the nature of a counterclaim or set off. According to Section 13 of the Act, a buyer may treat a breach of condition as a breach of warranty and claim damages instead of rejecting the goods. 3

Measure of damages is governed by Section 73 of the Contract Act, 1872. In the case of warranty of quality, the presumption is that the measure of damages is the difference between what the goods are intrinsically worth at the time of delivery, and what they would have been worth, if they had been according to contract⁴, and this must be ascertained by reference to the market price at that time, whether it has fallen or risen since the date of the contract. However, the buyer has a duty to act reasonably in mitigating the loss or damage.

Buyer's right to recover interest

Buyer is only entitled to recover interest when he is entitled to recover the purchase price, when he can sue for the price prepaid as money had and received, by reason of total failure for consideration. He cannot recover interest when his only remedy is to sue for damages, for breach of warranty even though damages may be sufficient to extinguish the price⁵

The Act contains no penal provisions nor does it lay down any special rules of evidence or procedure. Tortious liability, if any, of the parties towards each other or towards third parties is not affected, except as regards questions of property in and the right to possession of the goods which are subject of a contract of sale dealt with by the Act.

Limitation period

According to the Indian limitation Act, 1963 in suits for compensation for breach of any contract,, period of limitation is three years from the time when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases. As per Code of Civil procedure, in case of suits for compensation for wrongs to person or movables, suit is to be instituted either where wrong was committed or where defendant resides, or carries on business. Other suits are instituted where defendant resides or where any cause of action wholly or partly arises.

3 *Commissioner of Income tax v prafulla kumar mallik* AIR 1969 Orissa 187, *Bengal corp pvt ltd v the commissioner of port of Calcutta* AIR 1971 Cal 357.

4 *CW Simson v koka Jagannadha Row Naidu* AIR 1914Mad 633.

5 *Union of India v Rallia Ram* AIR 1963 SC 1685

**c) MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969
("MRTP Act")**

In order to promote fair competition in the market and to curb monopolistic and restrictive and unfair trade practices , India enacted the Monopolies and Restrictive trade Practices Act in 1969 .The Monopolies & Restrictive Trade Practices Act, 1969 was the first enactment to deal with competition issues and came into effect on 1st June 1970.

The application and operation of the MRTP Act

The MRTP Act gave new dimensions to the economic legislation of the post Independence era. This enactment imbibed the social and economic philosophy enshrined in the Constitution.

The principle objectives as stated in the Preamble to the Act are:

- (i) Prevention of concentration of economic power to the common detriment
- (ii) Control of monopolies
- (iii) Prohibition of monopolistic trade practices, and
- (iv) Prohibition of restrictive trade practices

According to Section 2 (e) of the MRTP Act 'goods' are defined as every kind of moveable property other than actionable claims and money and includes stocks and shares , growing crops , grass and things attached to or forming a part of land which can be severed under an agreement before sale or under contract of sale. This definition also includes products manufactured or processed or mined in India as well as shares and stocks. Goods imported in India also stand included.

In the context of the present discussion Section 36 A of the Act dealing with Unfair Trade practices is of significance. 'Unfair Trade Practice' refers to a trade practice which for the purpose of promoting the sale, use, or supply of any goods or for the provision of any services, adopts any unfair method or unfair or deceptive practice. Any statement whether orally or in writing or by visible representation is considered an unfair trade practice if it falls under nay of the following heads (without need to establish loss or injury to consumers⁶), interalia,-

⁶ After amendment of this section by MRTP (Amendment) Act,1991,it is no more necessary to prove loss or injury to consumer

- falsely represents that goods are of a particular standard , quality , quantity , grade, composition, style or model,
- falsely represents that the services are of a particular standard , quality or grade,
- falsely represents any second hand goods as new,
- represents that goods or services have sponsorship approval, performance characteristics, accessories, uses or benefits which it does not have
- represents seller has a sponsorship or approval which it does not have,
- makes false or misleading representation concerning need for or usefulness of any goods or services ,
- gives to the public any warranty or guarantee of performance, efficacy or length of life of a product, or any goods not based on any tests
- gives a warranty of a product or a promise to replace, maintain or repair an article which is misleading or given with intention of not fulfilling it
- materially misleads the public concerning price at which a product is ordinarily sold,
- permits the publication of any advertisement for sale or supply at a bargain price for goods or services not intended to be sold at that price
- permits offering of gifts , prizes with intention of not providing them,
- the conduct of any contest , lottery, game of chance for promotion of its goods
- permits sale of any goods to be used by consumers knowing or having reason to believe that goods do not comply with standards prescribed by competent authority relating to performance ,composition, contents, design, construction, finishing, packaging necessary to prevent or reduce risk of injury to the person using the goods,
- 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, destruction or refusal raises cost of those or other similar goods.

In *Girnar Scooters limited* UTP Enquiry No. 10/1986, order dated 11-6-87, there was false representation about the performance of scooters guaranteeing mileage of 40kms per litre, when factually the performance was not beyond 30kms per litre .The respondents also advertised that a substantial number of customers reported performance in excess of guaranteed mileage. Further, there was suppression of material facts by respondent in not having disclosed the latent defects within their knowledge , in regard to the starting trouble of scooters and stooing during drive , which could not be discovered by the buyer at the time of purchase. The commission accordingly issued a cease and desist order in this case.

In *Proctor and Gamble Home Products Ltd, Hindustan Lever Ltd*] (1997) II CPJ 21 MRTP), the Commission restrained the company from making false, exaggerated and misleading claims about its “New Ceramides Sun silk extra Treatment Shampoo”. In a similar decision, in *Hindustan Oil Co*1997 II CPJ 30 MRTPC case, the claim of the company that its cooking gas units, by use of kerosene, saved 30 percent against the LPG system was held to be false and misleading and, therefore, advertisement to that effect was restrained by the Commission.

Limitation period

There is no prescribed period of limitation for filing an application under MRTP Act. This is interpreted to mean that the applications for enquiry need to be filed within a reasonable time, which depends on facts and circumstances of each case.

MRTP Act AND CPA

There is an overlapping of jurisdiction of MRTP commission and consumer forums set up under Consumer Protection Act. An aggrieved consumer can thus approach the MRTP commission or the consumer redressal agencies under CPA for redressal of his grievance. However, a complaint cannot lie in CPA if goods are obtained for commercial purpose and scope of redressal relating to defects in goods is confined to manner and to the extent laid down in section 14 (1) of CPA. Also, MRTP commission has been vested with power to initiate inquiry suomotu in unfair trade practices under section 36 B(d) which consumer forum does not.

The MRTP Act has been comprehensively drafted so as to empower the MRTP Commission to grant temporary injunctions and compensation, for loss and damage, as a result of monopolistic, restrictive practices or unfair trade practises. In a case where the commission concluded there is an unfair trade practice by virtue of Section 36D, it could pass a cease and desist order. However, after MRTP Amendment Act, 1991, introduction of a new clause © in Section 36 D, the Commission is empowered to order issue of corrective advertisement.⁷ Also, as per Section 36 E the Commission has been empowered to exercise or perform same powers in relation to unfair trade practices as has been conferred for restrictive trade practice in Section 12 A, 12 B, that is power of commission to grant temporary injunction and power to grant compensation respectively. This power also vests with the consumer courts under Section 13 (3) (B) and 14 of the Consumer protection Act. The cease and desist orders issued by MRTP commission can also be issued by Consumer Courts under Section 14 CPA. .

Under Section 13 B MRTP Act, it is empowered to impose punishments for contempt of its orders. Further, Section 48 C of the MRTP Act imposes a penalty for contravention of order made by commission relating to unfair trade practices with an imprisonment for a term not less than 6 months but which may extend to three years and fine which may extend to ten lakhs. In the event of failure of a party to comply with order passed by commission relating to unfair trade practice a formal complaint is required to be filed in court of sessions for trial by that court. In CPA, where a trader or the complainant fails to comply with an order made by the relevant consumer forum, such person is liable to a punishment with imprisonment for a term which is not less than one month but which may extend to three years or with fine of not less than two thousand rupees but which may extend to ten thousand rupees or with both

⁷ In the consumer protection Act also after passing of Act 62 of 2002, S.10(wef 15-3-2003) consumer courts have been empowered to order issuance of corrective advertisements.

Class actions under MRTP Act

Class action can be initiated by filing of a complaint for unfair trade practice under Section 36 B of the MRTP Act wherein a complaint could be filed by any trade association, consumer, or registered consumer association or by reference made by central government or state government, upon application made to it by Director General or upon its own knowledge or information.

Advent of Competition Act ,2002

In the context of the new economic policy paradigm, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into the new law, Competition Act, 2002. The new law is designed to repeal the extant MRTP Act. As of now, only a few provisions of the new law have been brought into force and the process of constituting the regulatory authority, namely, the Competition Commission of India under the new Act, is underway. The remaining provisions of the new law will be brought into force in a phased manner. For the present, the outgoing law, MRTP Act, 1969 and the new law, Competition Act, 2002 are concurrently in force, though as mentioned above, only some provisions of the new law have been brought into force. Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order and the State shall, in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Government had appointed a committee in October 1999 to examine the existing MRTP Act for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law. Pursuant to the recommendations of this committee, the Competition Act, 2002, was enacted on 13th January 2003. The objectives of the Competition Act are to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade. This Act provides for different notifications for making different provisions of the Act effective including repeal of MRTP Act and dissolution of the MRTP Commission. The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India (CCI) which has been established by the Central Government with effect from 14th October, 2003. The rubric of the Act has essentially four compartments:

1. Anti- Competition Agreements
2. Abuse of Dominance
3. Combination Regulations
4. Competition Advocacy

The Competition Act prohibits anti-competitive agreements and abuse of a dominant position. It also regulates combinations of enterprises and persons. The acquisition of enterprises by persons or the merger or amalgamation of enterprises is considered to be a combination and requires filings with the Competition Commission of India, but only if the thresholds of their assets or turnover exceeds the value stipulated in the Competition Act.

Once the MRTP Act is repealed, the pending Unfair Trade practice cases (except those under (x) of Section 36 A(1)(giving false or misleading facts disparaging the goods) of MRTP Act in the MRTP Commission would be transferred to the concerned consumer courts under the Consumer Protection Act, 1986 i.e National Commission. The pending Monopolistic trade practices and Restrictive trade practices Cases in MRTP Commission shall be taken up for adjudication by the CCI from the stages they are in. Competition Act shall not apply to Unfair trade practice cases. Also, under the consumer protection Act , a complaint would lie if goods, which will be hazardous to life and safety when used , are offered for sale to the public in contravention of any law requiring the traders to display information in regard to the contents , manner and effect of use of such goods (Section 2(1) ©(v). There is no such provision in the Competition Act.

d) LAW OF TORT

In India, a claim under the product liability law shall also lie where the element of negligence, as enunciated in the **Law of Torts**, can be traced. The law of torts, in India is not codified and British precedents are being followed by Courts by altering doctrines for application in the Indian context. ‘Tort’ may be defined as a civil wrong which is redressible by an action for unliquidated damages and which is other than a mere breach of contract or breach of trust.

For the Plaintiff to make a successful claim, it must be proved that:-

- Defendant owed a duty to take care
- A breach of such duty
- Plaintiff suffered loss or injury as a result of such breach
- the plaintiff is entitled to damages.

Duty of care depends on reasonable foreseeability of the injury to the plaintiff. For ascertaining the liability of a person for the tort of negligence we compare the conduct of defendant with that of a reasonable man and make him liable only if he fails to perform a duty of care.

While a contractual claim restricts the number of Defendants who are liable to be impleaded in an action, negligence claim allows for inclusion of all those who may have breached distinct duties of care to the ultimate consumer In *Dongoghue v Stevenson* (1842)¹⁰ M&W

109, it was held that the consumer could bring an action in tort against the manufacturer even though there was no contract or privity of contract between manufacturer and consumer.

When a person transfers goods to another person under a contract his liability arises not only in contract but also in tort for negligence. In *Clarke v Army and Navy Cooperative Society Ltd* (1903) 1 K.B 155, the plaintiff purchased a tin of chlorinated lime from the defendant's store. When the plaintiff tried to open it in the usual way by pressing the lid off with a spoon the content flew on to her face and injured her eyes. The defendant knew of this danger but negligently omitted to warn the plaintiff about that. The defendant was held liable in tort towards her.

Liability towards ultimate transferee

Liability towards ultimate transferee can be placed under two heads, Liability for fraud and liability for negligence. In *Langridge v Levy* (1837) 2 M&W 519, the defendant sold a gun to plaintiff's father for use of the plaintiff and stated that the same had been manufactured by a celebrated manufacturer and was safe. The gun burst when the plaintiff was using it and he was injured. It was held that even though the fraudulent statement was made by defendant to plaintiff's father yet plaintiff was entitled to sue in fraud because the statement made by defendant was intended to be and was communicated to the plaintiff on which he had acted.

Liability for negligence can be placed in three heads –

- Things dangerous per se,
- things not dangerous per se but actually dangerous and known to be so by transferor
- and things neither dangerous per se nor known to be so by the transferor but dangerous in fact.

In *Dixon v Bell* (1816) 4 M&S 198, defendant gave a servant a loaded gun which she fired on plaintiff who was seriously injured. The defendant was held liable for the same.

In case of things not dangerous per se but known to be so, we have seen in *Clarke's* case above that transferor owed a duty to warn about the known dangers not only to immediate transferee but to all persons likely to be endangered by that thing.

For the third category, things neither dangerous per se nor known to be so by the transferor but dangerous in fact, application of *Donoghue v Stevenson* principle requires manufacturer to take reasonable care (when thing is to reach ultimate consumer without any possibility of intermediate examination) and is liable for not taking that care despite being no privity of contract. This liability principle has extended to repairers, assemblers, builders and suppliers of products.

Products liability--strict liability in tort

Strict liability in tort is the concept that in certain situations a defendant is liable for plaintiff's damages without any requirement that the plaintiff prove that the defendant was negligent.

In *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57 [13 A.L.R.3d 1049], confronted with injury to an ultimate consumer caused by a defective power tool, the California Supreme Court assigned strict liability to a manufacturer who placed on the market a defective product even though both privity of contract and notice of breach of warranty were lacking. The court rejected both contract and warranty theories, express or implied, as the basis for liability. Strict liability does not rest on a consensual foundation but, rather, on one created by law. The liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies.

Product liability distinguished from negligence

The distinction between products liability and negligence was explained in *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383 [52 A.L.R.3d 92]: "It is pointed out that in a products liability case the plaintiff in order to recover in strict liability in tort must prove that he was injured by a defect in the product and that the product was defective when it left the hands of the retailer or manufacturer; whereas to recover in negligence the plaintiff must prove the same two elements plus an additional element, namely, that the defect in the product was due to negligence (and fault) of the defendant."

Trends in product liability law in India country.

The laws relating to product liability, in India, have been constantly evolving, by way of judicial interpretations and amendments, to become one of the most important socio-economic legislations for the protection of consumers. The legislation, in respect of product liability in India, though was enacted to protect the interest of consumers but the same was, earlier, construed narrowly, thereby frustrating the object sought to be achieved. The trend, however, has changed in the recent times with the Courts adopting a pro-consumer approach. The Courts, in India, have now started awarding compensation and damages which are *more punitive than compensatory* in nature.

In *Wheels World vs. Pradeep Kumar Khurana* MANU/CF/0280/2002 the complainant, a doctor by profession, complained to the respondent about deficiency in service in not repairing, free of charge, a technical fault, which occurred during warranty period, in his new Montana car and then not delivering the same for a period of 4 years. A sum of Rs. 30, 000/- with interest @ 18% per annum from 2/7/1988 to 7/5/1992, was awarded as compensation, in favour of the complainant for his suffering, both professionally and otherwise, on account of non availability of car for a period of 4 years. Further interest, at the same rate for the same period, was also awarded on an amount of Rs. 82, 000/-, being the price of the car as well as an amount of Rs. 55, 00/- towards costs and, last but not the least, an amount of Rs. 50,

000/-, which was deposited by the Respondent on account of stay of imprisonment, was also awarded to the petitioner.

Remedies in tort –Product liability

Generally in tort cases under product liability two remedies are common – one is claim for damages and the other grant of the court has discretion in refusing the latter remedy if grant of damages is sufficient relief injunction. Suits for compensation for wrongs to person or movables is instituted in local limits of jurisdiction where wrong was committed or where defendant resides or carries on business.

Limitation time

In suits relating to tort, for compensation for doing or omitting to do an act alleged to be in pursuance of any enactment in force in India , limitation period is one year from the date when act or omission takes place, and for negligence in supply of defective products , generally the limitation periods is three years from the date the right to sue accrues.

PRODUCT LIABILITY INSURANCE

There is no enactment for compulsory insurance to cover supply of defective products in India .It is voluntary on the part of a seller or vendor to take this form of insurance in best interests of his business . The prevalent legislation Public liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith .Every owner i.e a person who has control over handling any hazardous substance, has to take insurance policy so that he is insured against liability to give relief incase of death or injury to a person , or damage to any property , arising from an accident occurring while handling any hazardous substance. Further, the Motor vehicles Act, 1988 makes the insurance of motor vehicles against third party risks , compulsory.

CRIMINAL LIABILITY FOR MANUFACTURING OR DISTRIBUTING A DEFECTIVE PRODUCT IN INDIA

The product liability law, in India, apart from the civil liability, also imposes criminal liability in case of non-compliance with the provisions of each of the below mentioned Acts. The said Acts are in addition to and not in derogation of any other laws in force, which implies that an action imposing penal liability can be simultaneously initiated along with a claim under civil law. Some of these are special Acts pertaining to sale of specific goods such as food, drugs, cosmetics etc.. The provisions of these enactments are preventive in form , though the relief envisaged is an action for breach in civil or criminal court.

- The Foods Adulteration Act, 1954
- The Food Safety and Standards Act, 2006
- The Drug & Cosmetics Act, 1940
- The Indian Penal Code, 1860
- The Standards of Weights and Measures Act, 1956

- The Agricultural Produce (Grading and Marking) Act, 1937 for marking and grading of commodities like vegetables, butter, etc.
- The Indian Standards Institution (Certification Marks) Act, 1952 to formulate a number of standards for different products by ISI
- The Bureau of Indian Standards Act, 1986

Each of the aforesaid Acts provides for imposition of fine and/or imprisonment in case of supply of defective products or adulterated consumables.

The Food Safety and Standards Act, 2006 is the most recent legislation which comprehensively deals with food and safety standards which are to be complied with by manufacturers and producers, non-compliance of which imposes a liability, upon defaulters, of fine, extending upto Rs. Ten Lakhs and/or imprisonment.

The provisions of Indian Penal Code (IPC), on the other hand, in respect of product liability, are attracted when the element of cheating and fraud can be attributed to such defects. For example, in the case of *Smt. Uma Deepak v. Maruti Udyog Ltd Ors (2003) CPJ 90(MRTP)* the Complainant alleged that the car sold by the opposite party was not only accidental but the price, for the same, was also overcharged. The Court, in response to the allegations made by the complainant, directed arrest of the Directors as well as the manager of the dealers/agents who sold the said defective car to the complainant and remanded them to judicial custody. Subsequent thereto, the said officers of the opposite party were released on bail and were directed to replace the disputed car with a new car.

Provisions of IPC are also attracted to provide punishment to offenders for false weights and measures, adulteration of goods (food, drugs etc -6 months imprisonment, fine of 1000 rupees or both), and false property marks (one year imprisonment, fine or both). The period of limitation as per Section 468 of the Criminal Procedure Code is 6 months if offence is punishable with fine only, and one year if offence is punishable with upto one year imprisonment and three years if offence is punishable with imprisonment of above one year and upto three years.

The provisions of the Standards of Weights and Measures Act, 1976 are attracted in case of any false packaging, weight or measure which does not conform to the standards established by or under the said Act and breaches the mandatory declaratory requirements on a package. If any mandatory declaration is found missing on the package a fine of upto 2000 rupees shall be levied as per Rule 39 of the Standards of weights and measures packaged commodity rules.

The Drugs and Cosmetic Act, 1940 also provides for criminal liability for manufacturers and producers of medicinal products or cosmetics etc, which do not adhere to the prescribed standards.

Standardisation law in India

The standardization law in India is governed by a) **The Bureau of Indian Standards Act, 1986** (hereinafter referred to as “BIS”), b) **Agmark Grading and Standardisation** under Agricultural Produce (Grading & Marking) Act, 1937 (in respect of agricultural commodities) and **The Food Safety and Standards Act, 2006**. The mandatory requirement of notifying safety standards is with respect to food items under The Food Safety and Standards Act, 2006 only. There is, however, no mandatory requirement of such notification under the BIS and Agmark, except a few products under mandatory list issued by concerned department, but, if a manufacturer/producer is desirous to grade their commodities under Agmark or BIS, they have to obtain Certificate of Authorisation or Certification Mark, respectively. Since the said certifications acknowledge the safety and health standards in a product, majority of manufacturers/producers, therefore, certify their products under the aforesaid Acts.

The Food Safety and Standards Act, 2006 makes it obligatory for the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food. The said Authority clearly sets out standards which are to be maintained with respect to food items and non-adherence of the same makes the defaulter liable to imprisonment and exorbitant fine. A similar legislation, namely the Fruit Products Order, 1955 enacted under the Essential Commodities Act, 1955, supplements the Food and Safety Act and, inter alia, sets out quality standards, in relation to fruit products, sweetened aerated water etc., as also sanitary requirements of factory manufacturing fruit products.

The Agmark system, on the other hand, sets out quality standards for agricultural commodities, based on their intrinsic quality. Standards are harmonised with international standards keeping in view the WTO requirements. Certification of agricultural commodities is carried out for the benefit of producer/manufacturer as well as the consumer. While Certification of adulteration prone commodities viz. Butter, Ghee, Vegetable Oils, Ground-Spices, Honey, Wheat Atta etc. is very popular, blended edible vegetable oils and fat spread, on the other hand, are compulsorily required to be certified under Agmark.

Under the BIS Act, such specification which hints at the nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age, material, mode of manufacture, or other characteristic which distinguishes it from any other article or process, shall be applied to any substance, artificial or natural, or partly artificial or partly natural, whether raw or partly or wholly processed or manufactured. The BIS offers numerous certification schemes, like the product Certification Scheme, whereby manufacturers of products interested in producing their products as per relevant Indian Standards are permitted to use the Standard Mark of the Bureau (the popular ISI mark) on their products after obtaining a licence from the Bureau. The pre-requisites for obtaining a licence require the manufacturer to possess the necessary manufacturing and testing facilities for the product as also follow the quality assurance scheme of the Bureau, in addition to payment of necessary fees as stipulated. The scheme, though, is voluntary in nature but, the government has made ISI marking compulsory for about 136 products which affect the health and safety of consumers or are products of mass consumption like

LPG Cylinders, Food Colours and Additives, Cement, Packaged Drinking Water, etc.. Yet another scheme is the Certification for Indian Importers, wherein, the Government has stipulated compulsory approval, from BIS, for certain category of products before they are imported into India.

The Agmark, on one hand, aims at promotion of Grading and Standardisation of agricultural and allied commodities, and whereas, the BIS provides for standardisation, marking and quality certification of goods, in general. Both the Acts, however, empower the authorities to search and seize goods which, inspite of obtaining certification, do not confirm to the prescribed standards, as well as those for which certification has not been obtained and such marks, as to quality and standard, have been falsely applied. The Acts also provide for imprisonment and/or fine for non-adherence of any of the provisions contained therein.

INDIA AND ITS LEGAL SYSTEM

The main source of law in India is the Constitution which, in turn, gives due recognition to statutes, case law and customary law consistent with its dispensations. Statutes are enacted by Parliament, State Legislatures and Union Territory Legislatures. There is also a vast body of laws known as subordinate legislation in the form of rules, regulations as well as by-laws made by Central and State Governments and local authorities like Municipal Corporations, Municipalities, Gram Panchayats and other local bodies. This subordinate legislation is made under the authority conferred or delegated either by Parliament or State or Union Territory Legislature concerned. The decisions of the Supreme Court are binding on all Courts within the territory of India. As India is a land of diversities, local customs and conventions which are not against statute, morality, etc. are to a limited extent also recognised and taken into account by Courts while administering justice in certain spheres.

Enactment of laws

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

Applicability of laws

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

Judiciary

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

Class actions for product liability

Class action can be initiated by filing of a complaint for unfair trade practice under Section 36 B of the MRTP Act wherein a complaint could be filed by any trade association, consumer, or registered consumer association or by reference made by central government or state government, upon application made to it by Director General or upon its own knowledge or information.

Under CPA Section 2 (1) (b) permits filing of a complaint by a consumer, any voluntary consumer association registered under companies Act 1956 or under any other law, the State government or Central Government, one or more consumers where number of consumers have same interest, in case of death of a consumer, his legal representative may make a complaint.

TAKING OF EVIDENCE ON FOREIGN LAW

In India, according to section 34 and 84 of the Evidence Act, 1872 court may take judicial notice of a publication containing a foreign law if it is issued under authority of foreign government concerned, and may be accepted as set out in the publication, as law in force in particular country at relevant time. What is the whole law of that country may be determined by calling an expert as provided for in Section 45, Evidence Act

SERVICE OF SUMMONS

According to order 5 rule 9 of Code of civil procedure, where defendant resides within jurisdiction of the court in which the suit is instituted, or has an agent resident within that

jurisdiction who is empowered to accept service of summons, the summons shall, unless the court otherwise directs, be delivered or sent either to proper officer to be served by him or one of his subordinates or to such courier services as are approved by the court. The service of summons may be made by registered post acknowledgement due, fax or by e-mail, courier service provided by high court rules provided plaintiff bears this cost. A defendant who resides outside the jurisdiction of the court in which suit is instituted, summons service may be made by any of the methods mentioned hereinbefore except by registered post acknowledgement due as per rules of high court.

When an acknowledgement receipt is received back declaring defendant refuses to accept the service, the court will declare summons were duly served. Provided summons was properly addressed, prepaid and duly sent by registered post acknowledgement due, such declaration will be made even though summons were lost or mislaid.

If an application is made by plaintiff an order of service of summons personally by plaintiff is also possible served under the sealed cover of the court.

By virtue of Rule 20 of order 5, CPC, an order for substituted service may be made where defendant is deliberately avoiding service of summons, such summons are pasted at last known residence of defendant. In case where defendant resides out of India, Order 5, rule 25 provides that if such person has no agent in India, summons shall be addressed to defendant at the place where he is residing and sent to him by post, courier, fax or e-mail or other means approved by high court.

RECOGNITION & ENFORCEMENT OF JUDGEMENTS

In case a judgement is passed by Indian court, by virtue of Section 38 Code of civil procedure, a decree may be executed either by court which passed it or by court to which it is sent for execution. According to Section 51, Code of civil procedure, execution order may entail delivery of any property specifically decreed or attachment and sale of any property, by arrest and detention in prison, by appointing a receiver, or other manner as the court may deem fit.

RECOGNITION & ENFORCEMENT OF FOREIGN JUDGEMENTS

The Code of civil procedure, in Section 13 of the code lays down the conditions for when foreign judgements are considered not conclusive by Indian courts. It provides that a foreign judgement is conclusive as to any matter directly adjudicated upon between the same parties where it has not been pronounced by a court of competent jurisdiction, where it has not been given on merits of the case, where on the face of it, it appears to be founded on an incorrect view of international law, or refusal to recognize the law of India in cases where such law is applicable.

Further, Section 44 of the Code of civil procedure provides for execution of decrees passed by courts in reciprocating territory. By virtue of this provision, Where a certified copy of a

decree of any superior courts of any reciprocating territory has been filed in a district court, the decree may be executed in India as if it had been passed by the District Court. Reciprocating country has been explained to mean any country or territory outside India which central government may, by notification in official gazette declare to be reciprocating territory.

CONCLUSION

India is recognising and realising the imperativeness of strengthening and enforcing a strict Product liability regime to protect the interests of its consumer and general public interest at large. While specific legislations such as Consumer Protection Act,1986 are in place to protect rights of consumers against supply of defective materials by manufacturers and suppliers, the law of Tort and contract also aid in protecting the interest of consumers. The standardization regimes are shifting from voluntary to mandatory in nature for certain specified products such as packaged drinking water wherein BIS rules makes it a mandatory certification .The judicial framework is hierarchical and well demarcated and rules of evidence to record evidence, summoning of witnesses, and execution and enforcement of judgements are clearly pronounced and are equally effective. Recently, India is witnessing that its exporter community is particularly interested in product liability insurance and certain insurance by strengthening its product liability regime and its future is indeed promising!

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