

Consumer Protection Bill, 2018: An Insight

1. Introduction

The advent of globalization coupled with modern business methods has had a significant impact on consumer experience in India. Presently, consumer interest is safeguarded under a three decade old Consumer Protection Act, 1986 (“**Act**”). The Act, despite being amended thrice in 1991, 1993 and 2002, struggles to effectively protect consumers from business malpractices such as misleading advertisements, is unable to curtail protracted litigations and lacks presence of an effective regulator for addressing issues concerning consumers at large. Nowadays, apart from regular issues concerning faulty products and services, consumer exposure has also extended to unsolicited telemarketing and e-commerce. Tactful marketing by persons tend to mislead consumers and, therefore, there is need for a dedicated regulator to protect consumer interests and educate them on their rights. Enabling suo moto action by a regulator against errant persons would be one such positive step, as under the Act, a consumer has no choice but to initiate proceedings before the competent consumer forum for redressal of their grievances. In order to address these issues and others, the Consumer Protection Bill, 2018 (“**Bill**”) was tabled in the lower house of the Indian Parliament i.e. the Lok Sabha on January 5, 2018, to substitute the Act with a new one.

This newsletter examines and analyzes certain important provisions of the Bill, with a view to address its relative impact on consumers, manufacturers and service providers.

2. Creation of a Central Consumer Protection Authority

The Bill proposes to establish a Central Consumer Protection Authority¹ (“**CCPA**” or “**Regulator**”) for specifically addressing matters concerning unfair trade practices and misleading advertisements by persons, and protecting and facilitating enforcement of consumer rights. If this Bill becomes law, a complaint could be filed directly to the CCPA, in writing or through e-mail, regarding issues that are prejudicial to the interests of “consumers as a class”. Though the Bill does not define the phrase, we understand “consumers as a class” to mean persons having common grievances against the same party and seeking similar reliefs from such defaulting party. This implies that the Regulator shall not entertain any individual consumer complainants, who shall continue to have recourse to the appropriate consumer forum. The Regulator is also mandated to take a comprehensive approach and engage with individuals who are experts in the field of consumer welfare, medicine, food safety and public affairs.² This in turn could benefit both consumers and businesses alike, as these experts with their sector-wise in-depth knowledge and experience can effectively assist CCPA in resolving consumer issues affecting consumers as a class, whenever specific expertise is necessary for adjudication of a complaint. However, it is presently unclear whether such experts would be chosen from the industry, government, or both.

¹ Chapter III of the Bill deals with the CCPA

² Section 13(3) of the Bill

Powers to be vested in the CCPA include investigating into unfair trade practices³ prevailing in the market, referring complaints received by it to the district, state or national consumer commissions (“**Consumer Forums**”), intervening in matters before Consumer Forums, issuing safety guidelines for unsafe goods or services and advising governments on consumer welfare measures. For purposes of conducting such inquiries and investigations into complaints of unfair trade practices and/or misleading advertisements by persons, an investigation wing shall assist the CCPA. Pursuant to an investigation, the Regulator shall upon receiving incriminating findings against a person can order (i) recall of goods or withdrawal services, (ii) reimbursement of price of goods or services, and/or (iii) discontinuation of practices, which are harmful to consumers. We believe that powers in CCPA to investigate shall act as a deterrent to persons engaged in unfair trade practices and misleading advertisements, and would minimize consumer exposure to such practices. However, we view CCPA’s power to modify, or prohibit and/or levy penalties against defaulting persons to overlap with the jurisdiction of Consumer Forums on matters where consumers as a class are seeking similar reliefs against the same defaulting party, and specifically pertain to claims for reimbursement for defective products, discontinuation of unfair trade practices, recalling of products and modifying or discontinuing misleading advertisements. Here, we foresee potential for a conflict of subject matter jurisdiction between the Regulator and Consumer Forums.

Lastly, CCPA will also have the flexibility to refer a complaint received by it to another regulator, if it is of the opinion that such complaint is not within the realm of its jurisdiction⁴ and would be best addressed by the appropriate regulator. For instance, in a matter concerning spurious beverages, the Regulator can instead refer these complaints to the food safety regulator, i.e. Food Safety and Standards Authority of India.⁵

3. Product Liability

Until now, product liability had not been defined in any Indian statute, and is introduced through the Bill for the first time. “Product liability” entails situations when product manufacturers, sellers or service providers are held liable for compensating a consumer because of harm caused to the latter due to their defective products or deficient services.⁶ The Bill aims to make persons who are product manufacturers, sellers and service providers, liable for product liability claims. A product manufacturer can be held liable, if its product has: (i) a manufacturing defect, or (ii) a design defect, or (iii) deviated from manufacturing specifications, or (iv) not conformed to express warranties, or (v) otherwise failed to provide adequate instructions for the consumer’s benefit and use of the product or service. We anticipate the inclusion of a “design defect” to be used by complainants to file frivolous product liability claims against persons. For instance, a bus manufacturer could be held liable, if its bus seat design excludes handle bars near the seats, thereby causing a passenger to fall off the seat when the bus took a sharp turn. How Consumer Forums will differentiate between necessary safety norms and requisite product designs is something which one cannot predict at the moment.

³ Section 2(47) of the Bill defines “unfair trade practice” as a trade practice for which unfair and deceptive methods are adopted to promote the sale, use or supply of goods or services

⁴ Section 19 (1) & (2) of the Bill

⁵ FSSAI is a statutory body constituted under the Food Safety and Standards Act, 2006 for regulating food safety and standards in India

⁶ Section 2(34) of the Bill

Typically, the onus to prove a defect is on the complainant. But, what happens when a product liability claim involves sophisticated technology products? Would the onus still be on the complainant or the product manufacturer, seller or service provider? This is relevant as a consumer may not be in a position to prove defects in such products. However, there is a safety value which states that the manufacturer will have strict liability for defects in products manufactured by it, even if it proves that it was not negligent and had exercised due diligence.⁷ Of course, this is bound to make manufacturers, sellers and service providers jittery and more vulnerable than before thereby compelling them to be extra vigilant in conducting internal quality control checks and manufacturing audits. Needless to say that this is a pro-consumer measure, which will enable consumers obtain timely relief.

4. Misleading Advertisements and Endorsements

Misleading advertisements were never defined in the Act, which did create ambiguity around what is a misleading advertisement. The Bill now provides a definition and states that a misleading advertisement includes an advertisement which (i) falsely describes a product or service, or (ii) gives false guarantees that mislead consumers about a product or service, or (iii) convey representations, which if made by the manufacturer, seller or a service provider would constitute unfair trade practice, or (iv) deliberately conceals important information. Further, any false or misleading advertisement released by manufacturers or service providers that is prejudicial to consumer interests shall be punishable with imprisonment upto two years and/or fine upto INR 10 lakhs or both.⁸ This is also a first as the Act never provided penal consequences for misleading advertisements. In our view, introduction of criminal prosecution for misleading advertisements will positively compel persons to release advertisements with caution and within contours of the prescribed legal framework.

The impact of product endorsers or brand ambassadors on consumers is well-known. This makes their inclusion in the Bill both important and relevant. However, once again the Bill does not define an “endorser”. It is unclear whether an endorser would be confined only to film and television personalities or could also include social media influencers. The Bill states that an endorser shall also be equally liable with a product manufacturer which is novel. Section 21(2) of the Bill empowers CCPA to impose a penalty upto INR 10 lakhs on an endorser, if it concludes that an advertisement by him or her, is misleading the consumers. However, an endorser would be exempt from such penalty if he can prove, that he or she exercised reasonable care and due-diligence to authenticate claims made in such advertisement.⁹ But, as every endorser would have different financial capacities (an actor or an influencer) and would charge differently for an advertisement, the Bill should have instead pegged the penalty to a certain percentage of the total endorsement fee received by an endorser, which would be an effective deterrent. We see imposition of penalties on endorsers to cause them to renegotiate their endorsement agreements, to include an indemnity from their employer or product manufacturer, in order to protect themselves should a consumer claim that an advertisement was misleading.

⁷ Section 84(2) of the Bill

⁸ Section 89 of the Bill

⁹ Section 21(5) of the Bill

5. Jurisdiction of Consumer Forums and Consequences Thereof

5.1 Territorial Jurisdiction

Under the Act, a complaint can be filed before a Consumer Forum, where (i) the opposite party resides or carries on business or has a branch office or works for gain, or (ii) any of the opposite parties, if more than one, actually reside, carry on business or have a branch office or works for gain, provided the permission of the consumer forum is procured or where the opposite party does not reside or works for gain acquiesce to the jurisdiction of a consumer forum, or (iii) the place where the cause of action wholly or partly arises. The Bill adds to the territorial jurisdiction of Consumer Forums by stating that a consumer can now file complaints before a consumer forum where he or she resides or works for gain. Indeed, this simplifies the consumer grievance redressal process from an aggrieved consumer's perspective. But, will give consumers an opportunity to indulge in forum shopping.

5.2 Pecuniary Jurisdiction

Typically, inflated claims are filed before the national commission, whose pecuniary jurisdiction is fixed at INR 1 crore and above, which ultimately burdens it with pendency of cases. To address this issue, the Bill has amended the pecuniary jurisdiction of district commission which now does not exceed INR 1 crore, the state commission exceeds INR 1 crore, but does not exceed INR 10 crore and national commission exceeds INR 10 crore. Such increase in pecuniary jurisdiction can pose challenges for members of district and state commissions, as they may not have the requisite experience and expertise to deal with large and complex matters, unlike the national commission. It is pertinent to note that though the Bill allows the state and national commissions to take assistance of experts in matters involving larger consumer interests¹⁰, with an increase in the pecuniary jurisdiction, it will also be necessary for the district commissions to have such access to expert advice.

5.3 Mediation

The Bill proposes that if a consumer forum upon admitting a complaint anticipates that a settlement between parties is possible, then it may instead refer parties to mediation as per the procedure stated under Chapter V rather than adjudicate the dispute itself. To give an impetus to mediation, the Bill authorizes both central and state governments to establish consumer mediation centres, which shall be attached to the Consumer Forums.¹¹ The Act did not provide parties recourse to mediation and directed them only towards Consumers Forums for dispute resolution. Consumer disputes may, at times, arise over trivial issues, which can be resolved by mediation thereby reducing the burden on consumer forums and increasing time and cost efficiencies.

6. Conclusion

In summation, by introducing specific provisions governing pressing issues like misleading advertisements, creation of a regulator, mediation and product liability for the first time, the Bill does fare well. It aspires to substantially reduce the time taken for adjudication of disputes by

¹⁰ Section 66 of the Bill

¹¹ Section 74(1)&(2) of the Bill

Consumer Forums. However, clarity on certain issues like a definition of endorsers, design defects under product liability and overlapping jurisdiction of CCPA and Consumer Forums for grievances affecting a class of consumers are some areas, which need to be revisited. While the Bill is definitely a step in the right direction and shall strengthen consumer rights and sentiment in the foreseeable future, it is yet to see the light of day.

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