

## Experts in the context of consumer protection Act, 1986

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### Abstract

The consumer protection Act, 1986 was enacted to provide better protection; simpler and quicker access to redressal of consumer grievance. The Act for the first time introduced the concept of “Consumer” and conferred express additional rights on him. It is very interesting to note that the Act does not seek to protect every consumer within the literal meaning of the term. The protection is strait jacket formula for the person who fits in the definition of “Consumer “given by the Act. But it does not include a person who obtains the goods for re-sale<sup>1</sup>.now we understand that the consumer protection Act.1986 provides means to protect consumers from getting cheated or harassed by the suppliers. The question arises how consumer will seek protection? The answer is the Act has provided Machinery whereby consumers can file their complaints which will be entertained by the Consumer Forums with special powers so that action can be taken against erring suppliers and the possible compensation may be awarded to consumer for

The hardships he has undergone. No court fee is required to be paid to these forums and there is no need to engage a lawyer to present the case. Besides that Hon’ble Supreme court of India has declared that there is no provision parallel to the provision contained in Order 9 Rule 9(1) of the Civil Procedure Code, 1908 which contains a prohibition that if a suit is dismissed in default of the plaintiff under Order 9 Rule 8, a second suit on the same cause of action would not lie<sup>2</sup>. Following article details a discussion on who is a consumer under the consumer

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<sup>1</sup> Sec 2 (1) d of the Act 1986

<sup>2</sup> Case briefs supreme court published on Jane26 ,2016

protection Act, what are the things which can be completed against, when and by whom a complaint can be made and what are the reliefs available to consumers.

### **Introduction:**

According to the sec 1(4) of the consumer protection Act, 1986 has been made applicable against all defective goods and deficiency in services. Nevertheless, attempts by the consumer forums, visualized and established under this Act, to bring various types of services within its ambit have met with considerable resistance. Act provides that “Service” means service of any description which is made available to potential Users and includes the provision of facilities in connection with banking, Financing, insurance, transport, processing, supply of electrical or other energy, Board or loading or both, housing construction, entertainment, amusement or the Purveying of news or other information<sup>3</sup>. Despite strong and repeated protestations from some of the concerned sectors, (problems concerning inclusion of services rendered by airlines, banks, housing boards, insurance companies, railways, roadways and telecommunications within the jurisdiction of CPA have been by and large settled now. It may also be appropriate to mention here that the attempts by the consumer forums to bring some kinds of services {i.e., housing, medical and educational services) within the fold of CPA had met with resistance to such an extent that in two cases {i.e., housing and medical profession) the matters went up to the Supreme Court for a final talk and the third issue {i.e., educational services) is also likely to be discussed there.

Thus with the proclamations of the apex court in Lucknow Development Authority v. M.K. Gupta<sup>4</sup> and in the case of Indian Medical Association v. V.P. Shantha<sup>5</sup> the issues relating to the services rendered by the housing boards/societies/corporations and the ones rendered by the medical professionals respectively appear to have been settled.

Though, as far as applicability of CPA to the educational services is concerned, there have been a large number of decisions — both in favour<sup>6</sup> as well as against<sup>7</sup> their inclusion within the ambit of CPA — which has given rise to a lot of controversy and speculation. Nevertheless, the inevitable conclusion is that till the final word on this issue too comes from the Supreme Court, the matter will certainly remain in contention.

Medical professionals are not the only ones being held liable for professional’s negligence under the Consumer Protection Act. The long arm of the law should extends to almost everyone who renders service for a fee- lawyers, architects, engineers, chartered accountants because its ultimately given in the definition of the Act that any service which is required or maintained by or under any law for the time being in force<sup>8</sup>.

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<sup>3</sup> Sec 2 (1) of the Act,1986

<sup>4</sup> 1993 CTJ 929 SC

<sup>5</sup> 1995 CTJ 969 SC

<sup>6</sup> Tilak Raj of Chandigarh v. Haryana School Education Board, Bhiwani, 1 (1992) CPJ 76

<sup>7</sup> Nirmal Taneja v. Calcutta District Forum, II (1992) CPJ 591

<sup>8</sup> Ibid

## Concept of Contract of personal service and contract for personal service under the Act

When we talk about ‘service’ under the Consumer Protection Act, we take it as a Regular commercial transaction. Thus the services rendered under the contract of Personal service are specifically excluded from the definition. The expression ‘contract of personal service’ is not defined under the Act. In common parlance, it means - a contract to render service in a private capacity to an individual. For example, where a servant enters into an agreement with a master for employment, or where a landlord agrees to supply water to his tenant, these are the contracts of personal service. The idea is that under a personal service relationship, a person can discontinue the service at any time according to his will; he need not approach Consumer Forum to complaint about deficiency in service. There is a difference between ‘contract of personal service’ and ‘contract for Personal service’. In case of ‘contract of personal service’, the service seeker can order or require what is to be done and how it should be done. Like a master can tell his servant to bring goods from a particular place. But in a ‘contract for Consumer protection act Para personal service’, the service seeker can tell only what is to be done. How the work will be done is at the wish of the performer. Like when a person gives a suit to the tailor for stitching, he does not tell him which method he should use to stitch it. CPA has been made applicable to “all goods and services” two types of services have categorically been kept out of the purview of this Act.

These are:

- **Services rendered free of charge**<sup>9</sup> and
- **Contract of personal services**<sup>10</sup>

Whereas, there has hardly been any controversy with regard to the first term, the second term ‘contract of personal service’<sup>11</sup> has been strongly debated before the consumer forums in a large number of cases. In the context of medical profession, for instance, the highest decision-making body under CPA — the National Consumer Disputes Redressal Commission — has observed that a “contract of personal service” is the one which involves a “master and servant relationship” and which is wholly different from a “doctor-patient relationship”<sup>12</sup>. Thus according to the National Commission, the service rendered by a medical doctor to his patients cannot be called as ‘personal service’ coming within the exempted category mentioned in section 2(1)(o) of CPA<sup>13</sup>. The aforesaid issue was ultimately debated at length before the Supreme Court in the case of Indian Medical Association v. V.P. Shantha<sup>14</sup>. It was in this case that the Supreme Court had finally held that CPA was applicable to the medical profession in India. The Supreme Court had defined, distinguished and elaborately discussed the two allegedly controversial terms, i.e., ‘contract for services’ and ‘contract of service’ in this case and had observed:

<sup>9</sup> Sec 2(1)(o) of the Act

<sup>10</sup> Ibid

<sup>11</sup> Motibai Dalvi Hospital v. M.I. Govilkar, 1991(1).

<sup>12</sup> Ibid

<sup>13</sup> see, Gurjeet Singh, "The Consumer Protection Act. 1986 and the Medical Profession in India

<sup>14</sup> Supra Note 2

A 'contract for services' implies a contract whereby one party undertakes to render services e.g. professional or technical services, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion.... A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

According to the Supreme Court, the parliamentary draftsman was aware of this well accepted distinction between 'contract of service' and 'contract for services' and that he had deliberately chosen the expression 'contract of service' instead of the expression 'contract for services' in the exclusionary part of the definition of 'service' in section 2(1)(o) of CPA<sup>15</sup>. The Supreme Court had accordingly decided:

With the aforesaid verdict of the Supreme Court, at least the controversy relating to the applicability of CPA to the medical profession in India appears to have been finally settled, notwithstanding the views expressed in favour and against the verdict<sup>16</sup>.

*All experts — Advocates, Architects, Chartered Accountants, Doctors, Engineers, Interior Decorators and others — are covered under the Consumer Protection Act, 1986.... All the experts are licensed and covered under respective laws of the land. So it does not mean that professionals are not liable for due compensation under the Consumer Protection Act for their 'negligence' and 'deficiency' in service.*

It is no doubt true that the relationship between a professional man and a consumer carries with it certain degree of mutual confidence and trust, and therefore, the services rendered by a professional man can be regarded as service of personal nature but since there is no relationship of 'Master' and 'Servant' between the professional man and the consumer, the contract between them cannot be treated as 'contract of personal service' but it is 'contract for service' and the service rendered by an expert man to his customer or client under such a contract, is not covered by the exclusionary part of the definition for 'service'.

Hence all experts are answerable and covered under the Consumer Protection Act, 1986 which is unique piece of legislation. Another factor that contributed to the apathy of the advocates towards the consumers/litigants was a decision of the National Consumer Disputes Redressal Commission in *K. Rangaswamy v. Jaya Vittal*<sup>17</sup>. which was pronounced as far back as in the year 1990. In this case, the Commission had categorically stated that the service offered by an advocate to a litigant was the one under the 'contract for personal service' and therefore could not be considered as the 'service' within the meaning of CPA. However, the Madras High Court has recently pronounced a landmark decision on the said issue which is completely opposed to the one pronounced by the National Commission.

- **Legal profession and the consumer protection Act,1986**

Roscoe Pound defines professions as "callings in which men pursue a learned art and are united in the pursuit of it as a public service."<sup>18</sup> According to another scholar, Marshall, "Professions are a select body of superior occupants where commercialization cannot be tolerated and which are pursued not for pecuniary gains but out of a sense of duty to serve

<sup>15</sup> Ibid

<sup>16</sup>Manickamand K.R.Mythili, "Medical Profession and the Consumer Protection Act in India". 1(2) CPJ 1-6 (Feb. 1997)

<sup>17</sup>I (1991) CPJ 685 (NC).

<sup>18</sup>Roscoe Pound quoted in M.K. Ramesh, "Consumer Interest in Legal Profession: Problems and Perspectives", Cochin U L Rev 405 at 408 (1989)

society.”<sup>19</sup> Service to individuals in a private relationship of trust between the practitioner and the client is inherent in the idea of professionalism. Thus a profession differs from business in that it is committed to public service and the earnings resulting from such a service is only an incidental one.<sup>20</sup> As a matter of fact, the profession of law has been characterized as ‘noble profession’ for good reasons. A case is won or lost as a result of the ability or inability of the lawyer to cope and tackle with the situation successfully by bringing his ingenuity, ability, mental resourcefulness, knowledge of law and advocacy to bear upon it.

Though it may seem paradoxical, it is a hard fact that a noble profession likes law which is expected to provide specialized services to its clients and champion their causes, is nowadays witnessing resentment amongst its consumers. For example, ever since the implementation of CPA, unlike a large number of cases which came up against the medical profession, though only a limited number of cases involving issues relating to the legal profession have been filed before the consumer forums, this does not indicate a healthy trend. Perhaps the first reported case on the issue was *K. Rangaswamy v. Java Vitta*<sup>21</sup>. The complainant in this case had engaged the services of an advocate at Bangalore for conducting a civil writ petition before the Karnataka High Court by paying a consolidated fee of Rs.2500. The complainant allegedly paid Rs.2000 to the advocate through two cheques. When the said writ petition came up for hearing, it was passed over to the next day on account of the absence of the respondent's counsel. The said case was not reached on the next date, too. In the meanwhile, the respondent demanded Rs.3000 more but the complainant expressed his inability to pay the said amount. The respondent failed to appear on behalf of the complainant on the day of the next hearing and the case of the complainant was accordingly dismissed. On being informed about the dismissal of the writ petition, the respondent advised the complainant to file an appeal before the Supreme Court and also promised to help the complainant by entrusting his appeal to some of his friends at New Delhi on the payment of a fee of Rs. 10,000. The complainant however spurned his offer and instead filed a complaint against the respondent for his professional misconduct. Thus the main issue involved in this case was whether the services rendered by an advocate to a litigant for a fee was a ‘contract of personal service’? The National Consumer Disputes Redressal Commission answered the question in the affirmative and held that the service offered by the respondent to the complainant was one under the ‘contract of personal service’ and therefore could not be considered as ‘service’ within the meaning of CPA. According to the Commission, the complainant was not a consumer within the meaning of section 2(d) of CPA and the dispute between him and the respondent could not be termed as a “consumer dispute”<sup>22</sup>. The above issue has, once again, been vehemently contested in *Srimathi v. Union of India*<sup>23</sup> — a recent case decided by the Madras High Court. In this case, the court held that the consumer forums have got the necessary jurisdiction to deal with the claims-against the advocates. The decision in this case has given rise to another controversy and that concerns the applicability of CPA to the legal profession in India.

The Madras High Court in this case was dealing with a bunch of writ petitions which had been filed by the practicing advocates against whom claims had been filed by certain persons in the respective cases before the consumer disputes redressal forums. The common question raised

<sup>19</sup> .H. Marshall quoted in M.K. Ramesh, *ibid*

<sup>20</sup> M. K. Ramesh, *ibid*

<sup>21</sup> 1994(3) CPR 491.

<sup>22</sup> Consumer protection Act, 1986

<sup>23</sup> (1997) 5 CTJ 99

in these writ petitions was regarding the validity of section 3 of CPA and a prayer was made in all the writ petitions for a declaration that section 3 of the Act was unconstitutional being opposed to the objects of the said Act. It may be mentioned here that section 3 of the Act lays down that this Act is “in addition to and not in derogation of the provisions of any other law for the time being in force.”

According to the petitioners, if section 3 was struck down as unconstitutional, it would not be possible for any person to drag the advocates before the consumer forums as the claim will be outside the scope of the said Act. It was further submitted that in a proceeding before the consumer forum, no court fee is payable and that it may be possible for any person to file a frivolous action against the advocate in that forum and even if that persons fails ultimately, he would lose nothing. However, on the other hand, if the advocate concerned wanted to file a claim for damages, it could not be filed without the payment of the court fee by him in the civil court. According to the petitioners, such provisions could cause “undue hardship and place the advocate in a hazardous situation thereby making his profession worthless”. The Madras High Court, after referring to the statement of the objects and reasons of CPA rejected the petitioners' contentions. The court held:

We are unable to find anything in the Statement of Objects and Reasons which runs counter to the provisions of section 3 of the Act. What all section 3 of the Act says is that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law. In other words, the Act does not have the effect of overriding other enactments with reference to matters dealt with in the Act. The section only provides that it will be open to any person to claim the benefits of this Act and also avail himself of the provisions of other enactments if there is no inconsistency of conflict and if he is not barred otherwise, by any other principles of law, like estoppel or election. With regard to the contention that once section 3 was declared unconstitutional, no person could institute any proceeding before the consumer forums, the High Court held that even if the section was declared to be unconstitutional, “the other sections of the Act will continue to be intact and if the services of the advocate fall within the definition of service under Section 2(o) of the Act, then it will certainly be open to a client to proceed against the advocate before the Consumer Redressal Forum<sup>24</sup>. Another argument put forward by the petitioners was that they were governed by the provisions of the Indian Advocates Act and that they shall not be made to answer the claims under CPA. It may be appropriate to mention here that an exactly similar plea was taken by the medical professionals before the Supreme Court in the case of Indian Medical Association v. V.P. Shantha<sup>25</sup>. However, while rejecting their plea, the apex court had categorically held: The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/ or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act. In raising the contention that the advocates were governed by the Indian Advocates Act, the petitioners placed reliance on the decision in the case of Nathamal Ashok Kumar v. Western Railway<sup>26</sup>. The main issue involved in that case was whether a complaint filed before the consumer forum under section 12 read with section 17(1)(a) of CPA was barred by the provisions of section 15 of the Railway Claims Tribunal Act 1987. Section 15 of the 1987 Act bars the jurisdiction of any court or other authority in

<sup>24</sup> Ibid

<sup>25</sup> Supra note 2

<sup>26</sup> 1 (1991) CPJ 618

relation to the matters referred to in sub-section 1 of section 13 of that Act. According to the Rajasthan State Commission, the claim made before the said forum fell within the scope of section 13 and consequently the bar under section 15 of the said Act would apply. Hence it was held that the proceedings before the forum were not maintainable, inasmuch as, they were banned by section 15 of the Railway Claims Tribunal Act.

- **Medical profession under the consumer protection Act,1986**

Professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes shall be exercised with reasonable degree of care and caution. On the same analogy, this assures the patients that a doctor possesses the requisite skill in the medical profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. Judged by this standard, a professional including medical professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. Over the last fifteen years there has been increased speculation on whether "Medical Services" are expressly or categorically included in the definition of term under the consumer protection Act<sup>27</sup>. In *Indian Medical Association v. V.P. Shantha and Ors*<sup>28</sup> the principal issue which arose for decision before the Supreme Court was whether a medical practitioner renders 'service' and can be proceeded against for 'deficiency in service' before a forum under the Consumer Protection Act, 1986. The Court dealt with how a 'profession' differs from an 'occupation' especially in the context of performance of duties and hence the occurrence of negligence. The Court noticed that medical professionals do not enjoy any immunity from being sued in contract or tort (i.e. in civil jurisdiction) on the ground of negligence.

- **Conclusion**

The recent ruling of the Madras High Court has spelled out what was "already an accepted proposition that services of advocates were covered under the Consumer Protection Act."<sup>29</sup> As a matter of fact, there is hardly any need for repeating the arguments put forward by the advocates for keeping them outside the jurisdiction of CPA for there appears to be no real substance in those arguments. Nevertheless one important point which deserves mention here is that there are now two inherently contradictory decisions involving exactly the same issue, that is, the applicability of CPA to the legal profession. As a matter of fact, there is hardly any need for repeating the arguments put forward by the advocates for keeping them outside the jurisdiction of CPA for there appears to be no real substance in those arguments. Nevertheless one important point which deserves mention here is that there are now two inherently

<sup>27</sup>Section 2(1)(o) of the Consumer Protection Act.

<sup>28</sup> Ibid

<sup>29</sup>Rosy Kumar, "Advocates and the Consumer Protection Act", 5(2) CTJ. 29-30 at 30 (Feb. 1997)

contradictory decisions involving exactly the same issue, that is, the applicability of CPA to the legal profession.

While concluding the discussion, once again it may be argued that with the implementation of CPA and as a result of some of the far reaching decisions pronounced by the consumer disputes redressal forums, there is a clear message for accountability on the part of every segment of society in general and that of the professionals in particular. Irrespective of the nature and style of their job and duties, they would now have to be accountable and answerable to the society in general and to the consumers who engage them in particular.

In summing up, a consumer activist has rightly observed:

Medical experts are not the only ones being held liable for professional negligence under the Consumer Protection Act. The long arm of the law extends to almost everyone who renders service for fee- lawyers, architects, engineers, chartered accountants<sup>30</sup>. Therefore, the inevitable conclusion of the above discussion is that if used properly, CPA which is a benevolent, beneficial and indeed a consumer friendly legislation can definitely ensure accountability in almost every profession. What is required is the necessary awareness amongst consumers about their rights and above all their willingness to assert for these rights as well as the determination and confidence to expose the negligent and insensitive professional

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