

UNFAIR TRADE PRACTICES – A LOST IMPERATIVE OF THE INDIAN ECONOMY

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ABSTRACT

In the present neoliberal era, consumers can not be assured of quality and proper pricing without a legal enactment. The invisible hand of market ought to be guided by rules of fair trade. The “unfair trade practices” find itself in the legal system of every nation in some form or the other. The provisions in Indian definition of unfair trade practice are very specific in nature. However, it is a matter of deliberation whether such specifications make the definition wholesome or elusive. The present essay is an attempt to deliberate upon the prevailing unfair trade practices in India, secondly, it debates the historic evolution of legal system constituted to protect the consumers from unethical practices of companies and thirdly, it discusses much talked about serious issues of food adulteration which provides insight into wary Maggi controversy where some states found Maggi harmful and other did not. The essay also provides the legal framework in food industry. However, despite all the legal development, the institutional check on food quality remains a low key affair and lastly the paper concludes with a few recommendations by reflecting some interactions between economy and the unfair trade practices.

Keywords: *Consumer Protection Laws, Food Adulteration, Food Safety and Standards Act, Judiciary, Unfair Trade Practices.*

I. INTRODUCTION

The essential paradox associated with legal systems across world is that institutions which are responsible for legal enforcement of laws often negate the spirit of law and often it is reduced into a procedural conundrum which only finds itself at work, solving a few macro level cases of popular nature and ignoring a large chunk of micro cases. This dualism in law being differential in spirit and action, violates the basic premise of rule of law. This is true in all fields with consumer protection laws being no exception in this conspicuous legal aberration.

In the recent Maggi incident in the country, the missed reasoning in all those media debates is the interaction of the socio-economic condition of country with its legal jurisprudence. India, having faced many famines in the 19th and the early decades of 20th century, grappled the issue of food availability. Later, with enough food we faced a situation called accessibility issue and in this matured state of affairs in the nation, we have finally arrived at concern for food quality. This economic evolution of country in food production explains the general policy evolution of state for quality concerns. In general, no country can think about quality when there are availability concerns. Over and above this moral argument of lexical priority, institutional slack remains a glaring failure in enforcement. It is worth noticing that different states found Maggi safe and unsafe

simultaneously, if not pure politics, technology to enforce consumer seems completely compromised. Maggi, as a product, found itself into Indian markets in 1980s, got popular in metro cities and soon became household item. Continuation of a product with such unsafe level of heavy metal known as 'Lead' shows how efficient the consumer protection law is?

Another perplexing observation in this regard is occasional and intermittent activity of tackling mess of such products occurs less due to actual threats posed but more due to political expediency, often through soulless application of law. Hence, unfair trade practices in the economy needs a careful and vigilant legal system to protect the consumers.

The present essay is an effort to discuss about prevalent unfair trade practices in India. Further, it debates on the historic evolution of legal system constituted to protect the consumers from unethical practices of companies. The essay also deliberates about recent much talked about serious issues of food adulteration which provides insight into wary Maggi controversy. Correspondingly, it provides the legal framework in food industry and lastly, the essay concludes with few recommendations by establishing interface between economy and the unfair trade practices.

It should be noted at the outset that generically unfair trade practices involves interaction among different firms as well as between firms and consumers. So any discussion on the issue will involve slight digression into competition law, as different legal systems have a different approach to unfair trade practice. Some legal systems see both prongs with the same lenses and some have separated the two. In India, after recommendations of Raghvan committee, this logical separation between Consumer-Company and Company-Company disputes regarding unfair trade practice occurred. But nonetheless, still a discussion on the same becomes necessary to see the overall dynamic of consumer protection laws in reference to unfair trade practices around the world.

II. DEFINITIONAL ISSUES WITH UNFAIR TRADE PRACTICES

In some form, the phrase "unfair trade practices" find itself in legal system of every nation. Interestingly, all important definitions have come from cosmopolitan, universal institutions and international conventions. Except US and some developed nations which were privatized and had highly developed markets system; majority of other developing countries faced these issues in the ending decades of the 20th century. At that time, international institutions were developed to guide these transition economies. As per Monopolistic and Restrictive Trade Practice (MRTP) Act, 1969; the 'unfair trade practices' was defined as:

"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 including oral, written or visible misrepresentations regarding standard, quality, status, condition usefulness and price of goods or services; false warranty, guarantee or promise regarding goods or services; disparaging of goods and services of another person; and false advertising and misrepresenting with regard to the gifts, prizes and offers in sale etc." However the term "Unfair trade practices" remain generic in nature with no universal definition. This is because what is unfair depends on level of economic development and adoption of standard practices. This is often called market ethics, but as ethics depend on level of consciousness in an individual and society, unfair trade practices depend upon economic development and growth of market enterprise.

At the international level, the World Bank and the Organisation for Economic Cooperation and Development Model Law (OECD) list the following trade practices to be unfair:

1. Distribution of false or misleading information that is capable of harming the business interests of another firm.
2. Distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, and suitability for use, or quality of goods.
3. False or misleading comparison of goods in the process of advertising
4. Fraudulent use of another's trade mark, firm name, or product labelling or packaging; and unauthorised receipt, use or dissemination of confidential scientific, technical, production, business or trade information.

Therefore, it is quite clear that trade between various firms and issues with consumers and firms, both are entangled in the same terminology of unfair trade. As stated in the next section, Indian divergence between these entanglements was sorted out with successive acts. It is worth noting the provisions in Indian definition of unfair trade practice are very specific in nature, it is a matter of debate if such specifications make the definition wholesome or elusive.

According to Consumer Protection Act, 1986, unfair trade vis-a-vis consumers includes:

1. Making any statement, whether orally or in writing or by visible representation which:
 - a) Falsely represents about goods or services relating to its standard, quality, price, value, nature, guarantee/warranty, affiliation, sponsorship received, etc.
 - b) Gives false or misleading facts disparaging the goods, services or trade of another person.
2. Permitting the publication of any advertisement for the sale or supply at a bargain price of goods or services that are not intended to be offered for sale or supply at the bargain price.
3. Permitting the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole or conducting any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest.
4. Withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.
5. Permitting the hoarding or destruction of goods, or refusing to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.
6. Manufacturing spurious goods or offering such goods for sale or adoption of deceptive practices in the provision of services.

It would be interesting to see that American experience in this regard has been more consumers oriented and is of progressive economic nature. In the USA, it is the Federal Trade Commission Act, which prohibits unfair trade practices by defining the term as:

- a) An act or practice that causes or is likely to cause substantial injury to consumers, that cannot be reasonably avoided by the consumers and is not outweighed by countervailing benefits to consumers or to competition

- b) An act or practice where a material representation, omission or practice misleads or is likely to mislead the consumer, who has reasonably interpreted such representation, omission or practice.

III. EVOLUTION OF CONSUMER PROTECTION LAWS TO CURB UNFAIR TRADE PRACTICES

The MRTP Act, a socialist-era enacted law to prevent monopolies and restrictive trade practices in India, was the only legislation to deal with unfair trade practices as for a very long time after independence, the private sector was not considered important. Also, consumerism as such was considered bad, so there was no specific provision for consumer protection in the law. MRTP mainly dealt with unfair trade practice in sense of competition between different companies. This continued till 1984, the MRTP Act gave protection to consumers to deal with false or misleading advertisements or other similar unfair trade practices.

There was a need to protect the gullible consumers from unfair trade practices. The Government of India then appointed an expert committee on the MTRP Act, under the chairmanship of Justice Rajindar Sachar. The Sachar committee was to review and suggest changes required to be made in MRTP Act in view of recent developments in economy and market structure. This was a signal of moving towards a more matured economy where consumers have rights vis-a-vis industries. The Sachar Committee went on to a deep survey and reached at a conclusion that a new chapter should be added to the MRTP Act for the purpose of dealing with unfair trade practices with a change that stakeholders will be consumers, manufacturers, suppliers, traders and other persons in the market. This was to address the whole supply chain network making everyone in the chain to identify their corresponding practices as unfair or fair. Otherwise it would have been hard to pinpoint the exact origin of unfair trade practices given the complex supply chain of market. This multi stakeholder approach made each aware of nature of activities which they are not supposed to do. The recommendation were adopted in 1984 and the amendment for the purpose of institutional enforcement of newly added provisions created a new authority which was supposed to be an independent body, called as the Director General of Investigation and Registration (DGIR). It was to work under MRTP Commission, the ombudsman for MRTP Act. It could take up cases on the basis of a complaint, or suo-moto. Director General of Investigation and Registration could investigate into issues of restrictive or an unfair trade practice from a host of activities mentioned in Section 36A of the MRTP Act. But after the investigation it ought to bring the problem in the MRTP Commission for taking ahead the case and for a full-fledged inquiry. If, in the inquiry of MRTP Commission, it was opined that the activities under scan are 'prejudicial to the public interest or to the interest of any consumer or consumers generally', then the MRTP Commission was empowered to act and stop the activity of such a trade practice under the statute. For the purpose of complaint, either MRTP Commission can take matter suo-moto or receive complaint from particular consumer or any association of consumers. Trade associations also could approach the MRTP Commission for complaint.

During 1990s when economy was opened up, gradually the economy moved towards efficient market practices. This new avenue where private sector was to become a key player demanded for legal amendments to unfair trade practices as old provisions were outstripped by changing composition of markets. Subsequently, same was brought into picture to hold up the changes in economic regime to Liberalization, Privatization and

Globalisation reforms and to institutionalize a proper process for regulating business management and settling disputes concerning unfair trade practices. Now, with the increasing issue of tackling “antitrust laws issues” in the Indian economy, the Government of India went to constitute a committee on Competition Policy and Law chaired by Mr. S.V.S. Raghavan in 1999. The Raghavan Committee was to deal with competition issues in market. It was a watershed event in growth of the Indian economy as pejorative MRTP Act which had fundamental negative view on the private sectors was to be replaced by a competition law which saw companies as positive stakeholder in the Indian economic development. The committee also went on to say that the MRTP Act, owing to its very nature, could not grapple the thrust of liberalisation, privatisation and globalisation reforms. The narrow provisions of the MRTP Act were to handle state driven economy with a tiny private sector activity. This was realization of the fact that to reap the benefits of developing Indian economy in wider context of international economy, it was quintessential that policy of ensuring competition was necessary. These recommendations were sweeping in nature and changed the whole outlook of the Indian system of dealing with competition. This later led to formation of the Competition Act. So, the unfair trade practices from then on were dealt under Consumer Protection act. The reasoning being the consumer not only needs protection from fraud in goods and services being used by him but this problem should be seen in larger sense of unfair trade which harms consumer interests. Consumer Protection Act, in sense, become de facto adjudicatory law for all unfair trade practices. It created a three layered legal structure that is at district level, state level and national level, quasi-judicial bodies for dealing with affairs in consumer protection act. But all these bodies are not efficacious and efficient. Poorly staffed bodies with hardly any skills of tackling complex issues have become an institutional paradox as mentioned earlier. One important change which usually goes unnoticed in this is definition of a consumer was changed and was considerable reduced to people who are direct consumers. This was to deal with unwarranted mess of complaints as litigations become a major legal issue in 1990s.

IV. UNFAIR TRADE PRACTICES AND THE FOOD INDUSTRY

Given the constraint of space, not all the sectors of economy can be analysed here. But given the important and recent nature of controversy in food industry, the same issue is being dwelled upon here. Food adulteration in India is a serious issue without a serious response. The reasons are complicated and many, some of the theoretical reasons have been mentioned in earlier paragraphs.

The department of food and drug administration regulates the food industry by enforcing various parameters. As the subject matter comes under the state list in the VII Schedule, enforcement remains differential across various regions. The recent Maggi controversy exposed the hollow institutional structure of food industry, where some states found Maggi harmful and other did not. The practice of heavy chemical ripped fruits is rampant in India. Despite the fact that, we have something called Prevention of Food Adulteration Act. It includes a list of “usual suspects”, the substances which are prohibited. Any food adulteration by any brand results in immediate retraction of product from market.

Recently another legal issue regarding advertised quality of food products has emerged. In the Maggi issue, many celebrities who once endorsed Maggi were given legal notice. There is no clarity as to what is extant of responsibility on their shoulders. But given they can influence market and bias the consumers for a particular product, ergo, the onus is onto them to be sure of quality before advertising the product in market.

V. LEGAL FRAMEWORK IN FOOD INDUSTRY

Food Safety and Standards Act, 2006 (FSSA) is a key legislation in the food industry. This Act was result of repealing of many existing cumulative regulations and consolidation of relevant laws. Earlier various laws were scattered under various ministries often leading to non-action on adulteration. Food Safety and Standards Act came up with higher fines for food regulation violations. It is an act of wholesome nature, it includes all businesses in food industry whatever be their economic level. Food Safety and Standards Act is now a key act to ensure availability of safe food in country. But despite all the legal development, the institutional check on food quality remains a low key affair, as stated earlier, because food availability issue has priority over food quality.

When a large chunk of Indian population suffers from food poverty, it becomes morally difficult for Governments as well as other relevant authorities to enforce higher food standards which might hurt the food security for a lot of people in the country. Maggi controversy found itself in safe zone in eastern parts of India for the same reason. Although, a large disaster has been averted by banning this 'lead' ridden product but key issues of institutional failure and incapability still remains to be tackled.

There have been many instances in the past wherein the judiciary has stepped in to curb this disaster of sub-standard food quality and adulteration.

In *Municipal Corporation of Delhi v. Kacheroo Ma, B. R. Kochhar*, Food Inspector, purchased 600 grams of Kaju-Tukra as sample for analysis from the grocery shop of Kacheroo Mal. The sample was given to the Public Analyst for examination upon which there was a finding that 21.9% of the sample were insect-infested pieces of Kajus. Subsequently, a complaint was filed for an offence under Section 7 read with Section 16 of the Prevention of food Adulteration Act, 1954. The High Court opined egregiously saying that “*an article of food which is infested with living insects and is consequently unwholesome for human consumption, ceases to be so and becomes wholesome, when these insects die out and the 'infestation' turns into an infestation by dead insects.*”

I believe that the Act has been passed to curtail and make available the remedy to the extensively prevalent vice of food-adulteration, and to make certain the sale of wholesome food to the people. It is well settled proposition that *wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention.* The construction adopted by the learned Judge in this case is repugnant to the cardinal rule of interpretation. There is a rooted presumption that in the case of food articles for which no minimum standard of purity is prescribed, the moment it is proved that a proportion or percentage of the article - not being a proportion or percentage as would be covered by the rule, *de mini-mis non curat lex* - is putrid, filthy, disgusting, decomposed or insect-infested, it would be deemed to be unfit for human consumption and ,therefore, adulterated within the contemplation of Section 2 (i) (f). Consequently, the Supreme Court reversed the High Court's verdict.

In another case of the same ilk, the food inspector took a sample of hard boiled sugar confectionery from the shop of the appellant. After sending it to the public analyst, the reports showed that the sample was not according to the prescribed standard as mineral oil was found which was an unwholesome ingredient, and also that the sample had a very unpleasant smell and taste. The Chief Judicial Magistrate found the appellant guilty.

The court of the district and Sessions Judge upheld the conviction. On appeal, even the High Court found him guilty, opining that “Moreover we are firmly of the view that strict adherence to Prevention of Food Adulteration Act and the Rules framed thereunder is essential for safeguarding the interest of consumers of articles of food.”

VI. UNFAIR TRADE PRACTICES AND ECONOMY INTERACTION

Among other purposes of prohibiting unfair trade practices, it is a market ethic of second order, the first order being Intellectual Property Right and related issues which are tangibly embodied into laws. It is a truism that absence of competition not only harms the general businesses, but it also impedes the consumer choice. Presence of many competitors is single best guarantee of consumer satisfaction in long run which perhaps is unachievable by any law as such. So, the two aspects as we talked above - about entanglement when seen from lens of consumer are aspects of the same thing. In general, price and quality of goods and services depend crucially on how far unfair trade is regulated in an economy. In this neoliberal era, when governments have stopped providing even most basic goods and services, consumers can not be assured of quality and proper pricing without a legal enactment. The invisible hand of market ought to be guided by rules of fair trade. In the Indian context, where medium and small scale is a major commodity manufacturer, abating unfair trade practice becomes important because they don't possess market power as few other big players do. Therefore, for fast paced and inclusive economic development of India, it is important that interests of medium and small scale industries are taken into account while framing the legal prohibition of unfair trade practices. But nonetheless, in the fast transitioning economies it is very subjective to quantify some new emerging practices as unfair given the huge competition locally and globally. In market system with too many sellers, advertisements are often disguised.

The general principle is “buyer-beware”. But in a larger sense, the individual buying power of a consumer is limited and the absence of consumer groups necessitates legal framework for consumer protection. Therefore, lastly, I would recommend that the legal system of India should be so strong in future that even a small consumer should feel empowered to address his/her grievances against unfair trade in the market.

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