

## “Liability of Legal Professionals under The Consumer Protection Act”

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### Introduction

The Consumer Protection Act was enacted in India in 1986 and an amendment was passed recently in 2019. The act as mentioned in the preamble, aimed at providing better protection of the interests of the consumers and for that purpose to make provision for the establishment on consumer councils and other authorities for the settlement of consumers’ disputes and for matters connected therewith. So, the main aim of the Act was to protect the consumers from exploitation, educate them and make them aware of the right they have to seek redressal in case they are exploited.

The legal profession is considered one of the noble professions and as Justice Iyer calls it “*the most brilliant and attractive of peaceful professions, with responsibilities both inside and outside it, which no person carrying on any other profession has to shoulder*”.<sup>1</sup> We cannot ignore the fact that the profession of law is an honourable profession and it occupies a place of pride in the liberal professions of the country. Any conduct which makes a person unworthy to belong to the noble fraternity of lawyers or makes an Advocate unfit to be entrusted with the responsible task of looking after the interests of the litigant, must be regarded as conduct involving moral turpitude.<sup>2</sup> The regulation of legal profession is failing in its consumer protection role because the legal manner in which the quality of legal services is currently regulated causes insurmountable problems with access to legal services.<sup>3</sup> Is bringing legal professionals under the Consumer Protection Act, an answer for this? This article aims to give a perspective on the topic by examining whether lawyers or legal professionals come within the scope of definitions mentioned in the Consumer Protection Act, 2019, the duties of an advocate and when should his services be considered deficient, is the inclusion of legal practitioners in the Act imperative considering the existence of Advocates Act with the possible implications of inclusion.

### Scope of the definitions:

#### Client- a consumer?

According to Section 2 (7) (ii) of the Consumer Protection Act, 2019 a consumer is defined as any person who “*hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and*

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<sup>1</sup> Krishnaswamy Iyer K.V., Professional Conduct and Advocacy, 2ndedn., London: Humphrey Milford Oxford University Press.

<sup>2</sup> In re P an Advocate AIR 1963 SC 1313

<sup>3</sup> Laurel A. Rigertas, *The Legal Profession’s Monopoly: Failing To Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014).

*includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose”* The definition holds any person who hires or avails any service for consideration and does not include persons who avails services for commercial purpose. The provision also contains an explanation that says “*the expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment*”. Therefore, clients can be included under this as there is no reason to exclude them. They avail services from an advocate in return of a fee they pay as consideration. In *Srimathi v Union of India*,<sup>4</sup> the following was observed “the language in Clause 2 of Section 2(d) of the Act is very wide. It uses the expression "avails of any service for a consideration." Therefore, it does not exclude clients from the definition.

### **Does service include legal service?**

According to Section 2 (42) of the Consumer Protection Act, 2019, “service” has been defined as, “*service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;*”

It can be observed the definition can be subject to a very wide interpretation. The definition starts with terms ‘service of any description’ and also contains ‘potential users’, both these terms having very wide scope. Also, the amendment in 2019 included the terms ‘but not limited to’ which furthermore widens the scope of the provision. The same has been held in the case, *Lucknow Development Authority v M K Gupta*<sup>5</sup> which gives a detailed interpretation of the Section. The judge observed that the definition is in three parts. The main part which is followed by the inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to service made available to potential users. The words ‘any’ and ‘potential’ are significant. Both are of wide aptitude.

The third part of the definition which is the exclusionary clause excludes two types of services from the ambit of the Act – when the service is rendered free of charge and when it is done under a contract of personal service. The second part of this clause can be further analysed to understand it better. It says a ‘contract of personal service’. Is the relationship between an advocate and client, that of personal service? And is it a ‘contract of service’. It is

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<sup>4</sup> (1997) 5 CTJ 99

<sup>5</sup> AIR 1994 SC 787

an indisputable fact that an advocate and client share a fiduciary relationship bound by trust. The advocate is morally obligated not to disclose any confidential information of the client. According to Merriam-Webster law dictionary, personal service is defined as “a service based on the intellectual or manual efforts of an individual (as for salary or wages) rather than a saleable product of his or her skills”. So, it can be contended that legal profession is a service based on intellectual and manual effects and so can be excluded from the purview of the Act. In *Rangaswamy v Jaya Vittal* <sup>6</sup> it was held that according to Section 2(1)(o) of the Consumer Protection Act, 1986 the service under a contract of personal service is excluded from the definition of the word service and since the advocate-client relationship falls under this category, it is automatically excluded from the definition of service. However, the National Consumer Redressal Commission in *D. K. Gandhi v Mathias* <sup>7</sup> held that “The ambit and scope of Section 2(1)(o) of the Consumer Protection Act which defines service is very wide and by this time well established. It covers all services except rendering of services free of charge or a contract of personal service. Undisputedly, lawyers are rendering service. They are charging fees. It is not a contract of personal service. Therefore, there is no reason to hold that they are not covered by the provisions of the Consumer Protection Act, 1986. “

Now, coming to the next question, if this comes under the term ‘contract of service’. For this purpose, it is necessary to distinguish between the terms ‘contract for service’ and ‘contract of service.’ In the case *Dharangadhara Chemical Works Ltd vs State of Saurashtra*,<sup>8</sup> the Justice cited Hilbery, J. in *Collins v. Hertfordshire County Council* which is as follows, a distinction is also drawn between a contract for services and a contract of service and that distinction is put in this way: " In the one case the master can order or require what is to be done while in the other case he can not only order or require what is to be done but how itself it ,shall be done." However, in the same case he also cited *Cassidy v. Ministry of Health* where Lord Justice Somervell, pointed out that test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a captain of a ship. The Justice however observed that in his opinion “it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case.” Therefore, there is no specific conditions to draw a distinction between ‘contract of service’ and ‘contract for service’. However, in *Indian Medical Association v Shantha*,<sup>9</sup> the Supreme Court further enunciated and held that “according to the Supreme Court, there is no doubt that Parliamentary draftsman was aware of this well accepted distinction between "contract of service" and "contract for services" and has 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). The reason being that an employer cannot be

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<sup>6</sup> I (1991) CPJ 685 (NC)

<sup>7</sup> From the order dated 10.3.2006 in Appeal No.1815/2000 of the State Commission, Delhi

<sup>8</sup> 1957 AIR 264

<sup>9</sup> 1996 AIR 550

regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment.” So according to this judgement advocates cannot be excluded.

On the other hand, it should also be kept in mind that services provided by an advocate cannot be compared with other services like banking, telecom or entertainment as both are of completely different nature. The BCI said it was a judicially acknowledged fact that advocates are not part of any trade, commerce or industry nor does their work fall within the ambit of Service Tax Act but it was merely an activity in aid and assistance of the justice administration.

### **Duties of an Advocate**

The duties of an advocate can be classified into three. His duties towards the client, his duties towards the court and his duties towards the opposite party. So which type of duties should be given the upper hand? How is the balance between these going to be determined? Should the Advocate be called liable for compromising one of these duties for the other? And should the Advocate be held liable for disappointing the client by not using unfair methods to win? In *Rondell v Worsley*,<sup>10</sup> “immunity for barristers was held on the ground that advocates do not owe a duty only to his client, he also owes a duty to the court and must observe it, even if it to do so might appear contrary to the client’s interest.” Also, in *State of U.P v U.P State law Officers*,<sup>11</sup> it was stated that “a lawyer has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies.” However, in *K Vishnu v National Consumer Dispute Redressal Forum*<sup>12</sup> it was observed that “even if the advocate is regarded as officer of the court and is a part of the justice system, he cannot be set free from his basic role of services to his client for the consolidation received.” Rules on Professional Standard that should be maintained by an advocate are mentioned in Chapter II, Part IV of BCI Rules and these rules have been placed under Section 49(1) (c) of Advocates Act, 1961.

### **Deficiency in service by lawyers**

When should a service be considered deficient? According to Section 1(11) of Consumer Protection Act "*deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes— (i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer ii) deliberate withholding of relevant information by such person to the consumer;*

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<sup>10</sup> [1969] 1 AC 191

<sup>11</sup> 1994 AIR 1654

<sup>12</sup> 2000 (5) ALD 367

consumer.” However, the word ‘negligence’ is not precisely defined in law. In *Jacob Mathews v State of Punjab*,<sup>13</sup> the court held that “The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession.” The judge also cited the case *Michael Hyde and Associates v J. D. Williams* where Sedley L.J. said “that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.” It was also observed in the case that “Judged by the standard, a 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. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.”. Lawyers should not be held responsible for the unfavourable outcome of a case as the result/outcome does not depend only on the lawyers’ services. But, if there is deficiency in rendering services promised, for which consideration in the form of fee is received by him, then the lawyers can be proceeded against under the Consumer Protection Act.<sup>14</sup> Thus, it can be inferred that services must be considered to be negligently or deficiently performed only when they are not done in a manner in which a reasonable, competent person practicing the profession would do and not by if the cases were won or not. Because if this is considered a standard, every client who lost a case could sue his lawyer and there would be no point of the provisions itself. A lawyer does not tell his client that the client shall win the case in all circumstance. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of the surgery would invariably be beneficial much less to the extent of 100% for the persons operated on. The only assurance that such a professional can give or can be understood to have given by implication is that he possessed the requisite skill in that branch of profession he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence.<sup>15</sup>

### **Consumer Protection Act and Advocates Act.**

The Advocates Act was passed in the year 1961 to amend and consolidate the laws relating to legal practitioners and to provide for the constitution of the Bar Councils and an All-India Bar. According Section 2 (1) (a) of the Act advocate means “*an advocate entered in any roll under the provisions of this act.*” The Act contains all the provisions regarding Admission and Enrolment of Advocates, the Right to Practice of Advocates, the Code of Conduct they are governed by and other provisions. Section 35 of the Act mentions about punishments for misconduct by Advocates. However, the problem is the fact that the term ‘misconduct’ has

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<sup>13</sup> 2005 (6) SCC 1

<sup>14</sup> Supra note, 7 P.3

<sup>15</sup> Supra note 13, P. 5

not been defined under the Act. In the case ***R. D. Saxena v Balram Prasad Sharma***,<sup>16</sup> it was observed that “The section uses the expression misconduct, professional or otherwise. The word misconduct is a relative term. It has to be considered with reference to the subject matter and the context wherein such term occurs. It literally means wrong conduct or improper conduct.” The judgement also refers to a passage at page 740, Volume 6 of Corpus Juris Secundum, which defines professional misconduct as the following “Professional misconduct may consist in betraying the confidence of a client, in attempting by any means to practise a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it.” In ***Noratanman Courasia v M. R. Murali***,<sup>17</sup> it was held that, “It reiterated that the term “misconduct” is incapable of a precise definition. Broadly speaking, it envisages any instance of breach of discipline. It means improper behaviour, intentional wrongdoing or deliberate violation of a rule of standard of behaviour. The term may also include wrongful intention, which is not a mere error of judgment. Therefore, “misconduct”, though incapable of a precise definition, acquires its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty.<sup>18</sup> Distinction was also drawn between ‘misconduct’ and ‘negligence’. It was held in ***P. D. Khandekar v Bar Council of Maharashtra***<sup>19</sup> that “there is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct.” However, the Advocates Act punishes only for misconduct, where an intention is required along with negligence and mere negligence without a wrongful intention on the part of the advocate does not amount to misconduct.

According to Section 35 (3) of the Advocates Act, a person who is proven guilty of misconduct can be awarded the following punishments:

*The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely: —*

- (a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;*
- (b) reprimand the advocate;*
- (c) suspend the advocate from practice for such period as it may deem fit;*
- (d) remove the name of the advocate from the State roll of advocates.*

However, it can be inferred from the section that an advocate who is held guilty for misconduct can only be given punishments in the form of disciplinary action, no civil punishments or compensatory damages can be given to the client considering the fact that he

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<sup>16</sup> AIR 2000 SC 2912

<sup>17</sup> 2004 AIR 2440

<sup>18</sup> State of Punjab and ors. V Ram Singh Ex. Constable 1992 AIR 2188

<sup>19</sup> 1984 AIR 110

was affected due to the misconduct of the Advocate. This is further more important that due to the deficiency in service by some advocates, the common public may refrain from approaching the court for any injustice they may have faced. That is, it may cause the people to lose confidence in the judiciary, one of the important branches of the Government. Therefore, it is important to restrain people from losing the trust they have on advocates and the judicial system. The litigant suffering costs has a right to be compensated by his defaulting counsel for the costs paid. In appropriate cases the court itself can pass effective orders, for dispensation of justice with the object of inspiring confidence of the common man in the effectiveness of judicial system.<sup>20</sup> And for this to happen, it may be necessary for the legal profession to be brought under the purview of the Consumer Protection Act as the Advocates Act does not have the power to do so. Also, in *Kishore Lal v Chairman Employee's State Insurance Corporation*,<sup>21</sup> it was held that "Jurisdiction of Consumer Forum has to be construed liberally so as to bring many cases under it for their speedy disposal. The Act being beneficial legislation, it should receive a liberal construction." In *Virendra Kumar Gupta v Anil Kumar Jain*,<sup>22</sup> the advocate did not appear for an execution proceeding and so the case was dismissed for default. The petitioner was awarded Rs. One Lakh as compensation for mental agony and harassment caused due to the deficiency service on the part of the respondent advocate.

However, looking at the other side of the coin, bringing the advocates under the purview of the Consumer Protection Act may destroy one of the important purposes of the Act which was speedy disposal of cases. Clients who lost, may want to hold their lawyer responsible and sue him which will increase the number of cases filed before the forum. This may have two implications- one, that it may burden the Consumer Redressal Forum and two, the clients who may have genuinely been affected may not be provided with proper justice.

A finer way of doing this is by including a clause in Section 35 (3) of the Advocates Act ordering the advocate to pay reasonable compensation as damages to the affected client in cases in which the judge thinks is necessary. This will not burden the consumer forum and will also help to accommodate a solution without any inclusion into another Act. The Law Commission in its 226<sup>th</sup> Report recommended various amendments keeping in mind the current requirements and requirements that might arise in the future. One of this was to include the following clause in Section 35 (3) of the Advocates Act- "*award a fair and reasonable compensation of such amount, subject to the maximum of Rs.5 lacs as it may deem fit, payable to the person aggrieved, if any, by the misconduct of the concerned advocate.*" This would help in solving the issue without actually bringing advocates under the Consumer Protection Act.

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<sup>20</sup> Ramon Services Pvt. Ltd v Subhash Kapoor and Others AIR 2001 SC 207

<sup>21</sup> (2007) 4 SCC 579

<sup>22</sup> 2011 SCC OnLine NCDRC 242: [2011] NCDRC 241

**Conclusion**

The legal profession has always been considered a noble one. Currently, they are not liable under the Consumer Protection Act. The Legal Professionals play a major role in maintaining social order. Generally, people approach a lawyer for seeking justice against any unfairness they have faced rather than take law in their own hands and fight on their own. This is due to the faith and confidence they have on the lawyers and the judicial system. Thus, there should be no impediment preventing them from getting the justice they deserve. Holding advocates liable for negligence or misconduct is not completely new. They could be called guilty of negligence by suing them in court or of misconduct through the Advocates Act. But the problem is suing them in court is a lengthy proceeding involving high costs and time while the Advocates Act does not have provisions to provide them with compensation. Therefore, there has to be a solution for this. One option is to bring them under the Consumer Protection Act. However, considering the nature of the profession and the fact that there is already a special Act governing the advocates, it will be a better option to include a clause in the Advocates Act that provides compensation to the affected parties.