

West Bengal National University of Juridical Sciences

From the Selected Works of Axay Satagopan

June, 2016

Educational Activities as Service under the Consumer Protection Act, 1986

Axay Satagopan



This work is licensed under a [Creative Commons CC_BY International License](#).



Available at: <https://works.bepress.com/axaysatagopan/2/>

EDUCATIONAL ACTIVITIES AS SERVICE UNDER THE CONSUMER PROTECTION ACT, 1986

*Axay Satagopan**

The amenability of educational activities to the provisions of the Consumer Protection Act, 1986 is one of the quintessentially tumultuous areas of Indian consumer law, falling in the penumbral area thereof. The Indian Supreme Court has through a series of three decisions gradually decreased the amenability of educational institutes and the educational activities performed thereby from the purview of the 1986 Act, with its most recent order – P.T. Koshy v. Ellen Charitable Trust – ostensibly excluded them altogether from the purview of the Act. In light of these developments, this article shall evaluate the tenability of the Supreme Court's position, by undertaking a critical analysis of the legal correctness of the exclusion of educational activities from the purview of the 1986 Act, and determine the practical implications that are bound to ensue therefrom. Further, it shall rebut the multifarious lines of reasoning that have been advanced, in support of such exclusion, and establish conclusively, why educational institutions (of every class) and the activities rendered by them should, to the extent that they are otherwise classifiable as 'services' as defined in §2(1)(o) of the 1986 Act, not be excluded from the purview thereof, and thus demonstrate the fallaciousness of the Supreme Court's position in this respect.

I. INTRODUCTION

The education sector is one of the largest and most important sectors of the Indian economy.¹ With the constitutionalisation of the fundamental right to receive education,² the actualisation thereof through the passage of the Right to Education Act in 2009,³ and the progressive shift of the Indian

* 4th year student of the W.B. National University of Juridical Sciences, Kolkata.

¹ See Nishith Desai Associates Report, *Investment in Education Sector*, 1-14 (January 2015), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Investment_in_the_Education_Sector.pdf (Last visited on February 14, 2016) (The education sector caters to the needs of over 230 million people, and is worth over a hundred billion dollars.); See PricewaterhouseCoopers Report, *India Higher Education Sector: Opportunity for Private Participation*, 3, available at: https://www.pwc.in/en_IN/in/assets/pdfs/industries/education-services.pdf (Last visited on February 14, 2016).

² Mohini Jain v. State of Karnataka, (1992) 3 SCC 666 : (1992) 3 SCR 658 (Fundamental Right to Education was held as being a necessary concomitant of the Right to Life guaranteed under Article 12 of the Constitution).

³ The Right of Children to Free and Compulsory Education Act, 2009 ('Right to Education Act, 2009') (provides teeth to the constitutionalised Fundamental Right to Education, by

economy from its agrarian roots to a more industrialised manufacturing and service base (in turn shifting the employment requirement from that of unskilled labour, to high quality, skilled labour),⁴ the role of the education sector is more important now than ever before. The Indian education sector thus is poised at a crucial stage in its growth. Nevertheless, it continues to be in a deplorable state, plagued with multiple shortcomings in various respects,⁵ and despite being one of the largest education sectors in the world,⁶ it is also indubitably one of the most problem riddled ones.

While many of these issues can be remedied through the implementation of better designed laws and policies, resort to which, admittedly should be the primary mode of effectuating changes therein, it must simultaneously be remembered that regulatory laws and policies primarily address issues at a macro level, i.e. on a large scale and not at the micro level, i.e. on an individuated or particularised basis. While changes at the macro level can be of immense use and are necessary to ensure the maintenance of quality standards and accountability in the sector, they are not adequate in themselves, for redressing every issue, which can arise in respect of a sector; such changes can only remedy faults, which are ‘systemic’ or ‘institutional’. For example, the Regulations passed by the Bar Council of India in respect of law schools, which deal with inter alia, the courses which are required to be taught in law schools, threshold infrastructural requirements of law school campuses, broad examination requirements etc. would help ensure a modicum of uniformity in the law programs offered across Indian law schools. Another example – the Right to Education Act, 2009 would facilitate the amelioration of the systemic denial of education to the economically weaker sections of society, in as much as it would eliminate their penury as a decisive factor in securing education. Another attribute of such changes is that the actualisation thereof in their entirety requires the lapse of a far greater amount of time; in other words, the effects of such changes do not manifest themselves quickly. However, not every issue arising in respect of the education sector is systemic; they are occasioned not by

guaranteeing to every child between the age of six and fourteen, free and compulsory education in a school situated in the child’s neighbourhood).

⁴ EY-FICCI Report, *Higher education in India: Moving towards global relevance and competitiveness: FICCI Higher Education Summit 2014*, available at [http://www.ey.com/Publication/vwLUAssets/EY_-_Higher_education_in_India/\\$FILE/EY-higher-education-in-india.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Higher_education_in_India/$FILE/EY-higher-education-in-india.pdf) (‘EY-FICCI Report 3’) (Last visited on February 14, 2016) (The report predicts that 90% of India’s GDP and 75% of India’s employment is expected to be contributed by the services and manufacturing sectors, and the consequent structural shift in employment will increase demand for more sophisticated workers, as opposed to the current requirement for cheap, predominantly unskilled labour).

⁵ Ernst & Young, *Higher Education in India: Twelfth Five Year Plan (2012–2017) and beyond*, available at <http://www.ey.com/IN/en/Industries/India-sectors/Education/Higher-Education-in-India--Twelfth-Five-Year-Plan--2012-2017--and-beyond> (Last visited on February 14, 2016) (It suffers from rampant absenteeism and shortage of teachers, disparity between states, urban-rural disparity, slow growth rate, lack of basic facilities, badly designed curriculums, generally bad accreditation ratings, citation impact etc.).

⁶ FICCI-EY Report 1, *infra* note 125.

flaws of the institution as a whole, but due to flaws in a specific instance of the functioning thereof. Changes at the macro level are ill-equipped to redress such issues, and would be, in respect of their redressal, wastefully inefficient at best and devoid of occasioning any tangible improvement at worst. Issues of that kind, of which many exist, require an individuated and expeditious mode of remediation, as is typical of changes made at the micro level. To provide an easily digestible example, the promulgation of a proscriptive or prescriptive law or a policy would not redress, or in any case, not address as efficiently, issues such as the issuance of incorrect transcripts, or the refusal to refund fees remitted, as corresponding changes made at the micro level. Consumer protection laws are effective for addressing grievances, which arise at the micro level, having been specifically designed, contemplating the interests and problems specific to consumers as an economic class of society. There is, thus, an irrefutable and compelling need to involve consumer protection laws in redressing issues that arise in respect of the education sector.

Given all this, the seemingly obvious and self-evident trajectory of the judicial policy in respect of the education sector would be to make it amenable to the protectionary framework of consumer legislation, such as the Consumer Protection Act, 1986 ('1986 Act'); however, experience reveals that such a trajectory is perhaps not nearly as obvious or self-evident as one might, not unreasonably, be led to believe. As it happens however, the law in respect of the amenability of the education sector – the educational institutes, which comprise it as well as the educational activities that such institutes perform – to the provisions of the 1996 Act, is one of the most obfuscated, controversial areas of Indian consumer law; with a catena of conflicting decisions, which have left it fraught with impenetrable turbidity. Things took a turn for the worse, when the Supreme Court of India stepped into the fray and over the course of three of its decisions⁷ gradually ousted educational institutes and educational activities performed by them, from the ambit of the 1986 Act, with its last order to date – *P.T. Koshy v. Ellen Charitable Trust*⁸ ('P.T. Koshy'), ostensibly excluding education altogether from the purview of the 1986 Act. Given the enormity of the potential ramifications that could ensue as a result, it is imperative to evaluate the tenability of the Supreme Court's position in this regard.

Such an evaluation requires three inquiries to be made, namely, first, whether activities in relation to education, performed by educational institutes, are classifiable as marketable services in the sense ascribed to the term, in a consumerist economy; second, whether therefore educational institutes

⁷ *Bihar School Examination Board v. Suresh Prasad Sinha*, (2009) 8 SCC 483; *Maharshi Dayanand University v. Surjeet Kaur*, (2010) 11 SCC 159 and *P.T. Koshy v. Ellen Charitable Trust*, (2012) 3 CPC 615 (SC). (P.T. Koshy 'ostensibly' excludes educational institutes and the educational activities performed by them from the purview of the 1986 Act, because the true import and scope of P.T. Koshy remains unclear yet, and the question of whether it does conclusively exclude education altogether from the ambit of the Act is still undecided. This has been dealt with in greater detail in Part VI of this article).

⁸ *P.T. Koshy v. Ellen Charitable Trust*, (2012) 3 CPC 615 (SC).

performing educational activities can be christened as service providers; and third, whether the student, in respect of whom the educational activities are performed, or his parents or sponsors as the case may be, can be regarded as consumers of such services. I shall argue, and thus demonstrate over the course of this article, rebutting the multifarious arguments which have been put forward as well as accorded judicial sanction to support and justify the exclusion of educational institutes and the educational activities they perform, from the pale of the 1986 Act, that all three of the aforementioned questions are answerable in the affirmative; and therefore, that such exclusion is sound, neither legally, nor logically. Furthermore, I shall expound upon the practical ramifications, which shall ensue consequent to such exclusion, to augment the force of my criticism of the Supreme Court's approach in this regard.

To this end, this essay shall be divided into ten parts. Part II shall formulate a functional definition of the term 'educational activities', for the purposes of this essay. Part III shall expound the concept of 'service' under the 1986 Act, the components of the definition thereof, and the judicial interpretation in respect of the import and ambit of the same. Part IV shall expound the concept of 'consumer' under the 1986 Act, and the judicial interpretation in respect of the import and ambit thereof. Part V shall entail a perusal of judicial pronouncements in respect of the classifiability of, the multifarious educational activities performed by educational institutes, as services as defined in the 1986 Act, educational institutes as service providers, and of the student and/or their sponsors, as consumers, as defined in the 1986 Act. The decisions shall be grouped in accordance with the definition of 'educational activities' propounded in Part III of the article. Part VI shall detail out the three Supreme Court decisions, earlier averred to, which held to be excluded from the purview of the 1986 Act, educational institutes, and the educational activities performed by them. Part VII shall entail a perusal of the decisions rendered post the three aforementioned Supreme Court decisions, to determine the current position of law. Part VIII shall undertake a critical analysis of such an exclusion and determine, the tenability thereof, by evaluating the legal correctness and logical soundness thereof. It is the most important part of the essay, and shall conclusively demonstrate the erroneousness of the position adopted by the Supreme Court, regarding educational institutes, and educational activities, in respect of their amenability to the 1986 Act. Part IX shall propound recommendations to both the legislature as well as the judiciary, to ameliorate the law in this regard, and Part X shall offer concluding remarks.

II. DEFINITION AND CLASSIFICATION OF EDUCATIONAL ACTIVITIES

The nidus of the obfuscation around the classifiability of educational activities as ‘services’ under the 1986 Act is the lack of a clear and precisely demarcated definition of ‘educational activities’.⁹ The scope of educational activities has not been delineated with exactitude thus far either by courts or consumer forums. All that can be said of educational activities is that they include services which involve or are in connection with education; such a statement however does not really say anything which is not self-evident from the very nomenclature of such services. The resolution of this lacuna shall constitute the prolegomenon of this essay.

The closest attempt at defining and categorising educational activities was made by the National Consumer Dispute Redressal Commission ('NCDRC') in *Maharshi Dayanand University v. Ruchika Jain*,¹⁰ where it divided educational activities into two kinds: first, those performed in the discharge of statutory duties, such as laying down rules and regulations for conducting examinations, eligibility criteria for permitting students to take the examination, the evaluation of the answer scripts and declaration of results etc. and second, activities other than those performed in discharge of statutory duties, such as the provision of admission, recovery of fees etc.¹¹

This classification is flawed on two grounds. First, it categorises the activities of an educational institute, not on the basis of the nature of the activities, but on the basis of the source of the power or duty to perform such activity.¹² For instance, the activity of laying down rules in respect of various aspects of the institute's functioning, such as administration of examinations, evaluation of students' answer scripts and declaration of the results of the examination, are lumped into the same category of educational activities, i.e. activities performed in discharge of statutory duties, despite them being fundamentally different in nature, the former being a rule-making function, the latter an evaluative/declaratory function. Second, the classification ignores that under the 1986 Act, there is no differential treatment between activities

⁹ The lack of a clear definition is more problematic than is apparent at first blush. Consequent to the lack of a precise definition of educational activities, is the limited scope of application of decisions in respect of the classifiability of certain kinds of educational activity as service, to other kinds of educational activities, which are neither analogous nor otherwise similar to the kind of educational activity in respect of the classifiability of which as a service, the first decision was rendered, which in turn paves way for multiple conflicting decisions, at all three levels of the hierarchy of Consumer Disputes Redressal Commissions.

¹⁰ *Maharshi Dayanand University v. Ruchika Jain*, 2006 SCC OnLine NCDRC 43 : (2006) 3 CPR 18 (NC).

¹¹ *Id.*, ¶ 28.

¹² *LDA v. M.K. Gupta*, (1994) 1 SCC 243 (for a more detailed elaboration of this concept, refer to Part III of the essay).

performed in discharge of statutory functions and activities performed otherwise, in respect of the classification thereof as services; activities are not exempted from subjection to the provisions of the 1986 Act, merely because their performance is statutorily directed.¹³ Admittedly, some of the activities enumerated by the NCDRC are not classifiable as services, for the purposes of the 1986 Act; not because they are performed in the exercise of statutory functions of the institute, but because they are not done in reciprocation of consideration, in pursuance of an agreement with the student– for e.g., the formulation of rules pertaining to examinations etc.

In the absence therefore, of a properly delineated definition, it is imperative to evolve a functional definition, upon which basis this essay shall proceed. Such a definition must be formulated in such a manner so as to encompass the wide variety of activities that can be rendered in respect of education. For the purpose of this essay, therefore, educational activities would include the following: first, activities which entail the direct impartation or facilitation of education, which includes classroom teaching, as well as the provision of a library, laboratories etc.; second, administrative activities which are concomitant to the impartation of education, which though themselves do not entail either the impartation or facilitation of education, are closely connected therewith, like the administration evaluation of examinations, receipt of relevant fees (tuition fees, examination fees, laboratory fees etc.); third, activities, which are ancillary to the actual impartation or facilitation of education, and are as such unrelated to such impartation or facilitation, but which constitute an integral part of the services rendered by the institute, such as, the provision of accommodation (in the form of hostels), food (in the form of a mess etc.), recreational and health facilities (such as sports grounds, gymnasiums etc.) and other such facilities. These activities/functions are respectively classified as primary, secondary and tertiary educational functions. Any institute, notwithstanding that it is not in the sense ascribed to it by common parlance, which is capable of rendering at least one class of the educational activities delineated herein above shall be termed as an educational institute. For the avoidance of doubt, it is hereby stated that it is not required for an institute, to be able to discharge every or even more than one class of educational activities, for it to be classifiable as an educational institute.¹⁴ It is imperative to note at this juncture that neither are all the aforementioned activities performed, nor are they required to be performed by every educational institute, and the mere non-performance of one or more of these activities cannot in itself sustain a claim of deficiency against the institute. While such a breadth of this definition is arguably excessive, it is

¹³ *Id.*, ¶ 5.

¹⁴ For instance, Boards of Examination (such as CBSE, or CISCE) do not render any primary educational activity, as they are not concerned with the impartation or facilitation of education, but are solely concerned with the construction of syllabuses and the administration/ evaluation of exams, and the publication of the results thereof subsequently.

consistent with the objective of the 1986 Act, viz. to bring within its purview, as many services as can be brought into its fold.¹⁵

A perusal of the proposed definition reveals that the formation of rules – in respect of the various matters an educational institute is concerned with, such as rules regarding admissions, be it rules in respect of eligibility, prerequisites etc., rules regarding the administration and evaluation of the examinations held therein, of the procedural requirements entailed in such activities etc. – have not been included within the definition; their omission from the definition is not unintentional; this is because such activities are neither performed at the behest of the persons subject to them (i.e. the students), nor are they done in reciprocation of consideration and therefore are not classifiable as services thereunder.¹⁶

III. THE CONCEPT OF ‘SERVICE’ UNDER THE 1986 ACT

The term ‘service’ is defined in §2(1)(o) of the 1986 Act:

“service of any description, which is made available to potential users, including the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board 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.”¹⁷

A perusal of the definition reveals that the definition is divisible into three parts, namely, the descriptive part, the inclusionary part and the exclusionary part.¹⁸ The descriptive part contains the main definition of the term, the inclusionary part, a list of enumerated activities which constitute service for the purposes of the 1986 Act, and the exclusionary part, a list of services, which are excluded from the scope of the definition.

¹⁵ Refer to Part III of the essay.

¹⁶ See Homoeopathic Medical College & Hospital v. Gunita Virk, (1995) 3 CPR 467 (where the NCDRC held that the Consumer Disputes Redressal Commissions constituted under the 1986 Act have no jurisdiction to declare any rule in a prospectus of any institution providing for non-refund of tuition fee as unconscionable or illegal. In other words, activities the rendition of which is not at the behest of the consumer, and for consideration are not “services.”).

¹⁷ The Consumer Protection Act, 1986, §2(1)(o).

¹⁸ Indian Medical Assn. v. V.P. Shantha, (1995) 6 SCC 651 : AIR 1994 SC 550.

A. THE DESCRIPTIVE PART

The descriptive part contains the main definition of service; it defines services as meaning services of ‘any’ description, made available to ‘potential’ users. The use of the words ‘any’ in respect of the services included within the definition signifies that the definition includes within its scope, every service capable of contemplation, including such services which are not specifically enumerated in the inclusionary part of the definition.¹⁹ The only services excluded from its purview are those, which are expressly excluded therefrom, in the exclusionary part of the definition. Furthermore, a service may be rendered not only in respect of persons who are actual users of that service, at that time, but also in respect of potential users, i.e. persons who, though are not present users of such a service, can subsequently become, at a future stage, users of that service. The phraseology of this part unequivocally evidences the intention of the legislature to include within the ambit of the 1986 Act, every service which is capable of contemplation, except those services or classes of services, which are expressly excluded from the purview thereof.²⁰ Thus, the test for the determination of whether an activity constitutes service under the 1986 Act is the nature of the activity; all extraneous considerations, such as the nature of the person or the entity performing the activity, are inconsequential in respect of such a determination.²¹ The very purpose of widening the definition of service was to include within its ambit, even such activities, which though not commercial in the same sense of day-to-day buying and selling activities, as undertaken by the ordinary laypersons, resulted in the conferment of some benefit on the consumer.²²

Courts have therefore stated that the ultimate test, in respect of determining whether or not an activity constituted service, as defined under §2(1)(o) of the 1986 Act, was whether such activity entailed the conferment of some ‘benefit’ on the person(s) in respect of whom it was rendered, subject to the sole qualification that such conferment must not be gratuitous but must be in exchange for consideration.²³ Courts have thus far neither defined the concept of benefit nor made any pronouncement as to the nature of the benefit that needs to be conferred by the activity for it to be classifiable as a service under the Act. Does the benefit, the conferment of which is contemplated as being the requisite element for an activity to constitute service, have to be tangible? Does it have to be pecuniary? What about spiritual benefits? Are benefits which are intangible or non-pecuniary excluded from the scope of the concept

¹⁹ CBSE v. Consumer Disputes Redressal Forum, 1993 SCC OnLine Ker 263 : AIR 1994 Ker 153.

²⁰ A.P.J. School v. K.L. Galhotra, (1992) 2 CPJ 807; Kishore Lal v. ESI Corpn., (2007) 4 SCC 579 : (2007) 6 SCR 139; A.S. Chandra v. Union of India, (1992) 1 ALT 713.

²¹ *Id.*, ¶ 8.

²² *Id.*, ¶ 6.

²³ *Id.*, ¶ 4.

of benefit? A perusal of the definition of the term benefit in dictionaries would aid the resolution of this issue. The Merriam-Webster's Dictionary defines benefit as "a good or helpful result or effect,"²⁴ whilst the Black's Law Dictionary defines benefit as an 'advantage; privilege.'²⁵ The Collin's American English Dictionary defines 'benefit' as "(a)gain or advantage (b) a favourable or beneficial circumstance, condition, or result".²⁶ These definitions adequately describe the nature of the concept of benefit for the purposes of the 1986 Act. Given the extraordinary amplitude of the definition of service under the 1986 Act and its object and purpose, as evinced therefrom, i.e.to bring within its fold, as many services as can be accommodated therein, without doing violence to its express statutory language, it is only right that a commensurate width be accorded to the definition of benefit; thus, it must necessarily be taken to mean benefits of all kinds – tangible and intangible, pecuniary and non-pecuniary, and even include conditional benefits – benefits the accrual of which is contingent upon the satisfaction of a stipulated precondition.²⁷

B. THE INCLUSIONARY PART

The inclusionary part of the definition enumerates a list of activities, which constitute service, as defined in the 1986 Act. The inclusionary part specifically enumerates fourteen classes of activities as constituting services, as defined in the 1986 Act, namely, activities which entail the provision of facilities in respect of banking, financing, insurance, transport, processing, the supply of electrical or other forms of energy, board or lodging, housing construction, entertainment, amusement or the purveying of news or other information. It is imperative to note, however, that these entries are not either exhaustive or all encompassing, it is only indicative and illustrative.²⁸ The mere lack therefore of explicit mention of any activity or class of activities in the list of activities enumerated by the inclusionary part does not in itself imply the exclusion of such activity or class of activities from the ambit of the definition, or a preclusion of the classifiability thereof, as services under the 1986 Act.²⁹ This line of reasoning finds further reinforcement in the very phraseology of the main part of the definition, which describes service as being a service of any description. This unequivocally implies that every service which is capable

²⁴ MERRIAM-WEBSTER'S DICTIONARY, available at: <http://www.merriam-webster.com/dictionary/benefit> (Last visited on February 14, 2016).

²⁵ BLACK'S LAW DICTIONARY 178 (9th ed., 2009).

²⁶ THE COLLIN'S AMERICAN ENGLISH DICTIONARY, available at <http://www.collinsdictionary.com/dictionary/american/benefit> (Last visited on February 14, 2016).

²⁷ For the proposed definition of the term "benefit" refer to Part IX of the essay.

²⁸ LDA v. M.K. Gupta, (1994) 1 SCC 243 ¶ 6 (the Court held, "The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part."); A.P.J. School v. K.L. Galhotra, (1992) 2 CPJ 807; Regl. Provident Fund Commr. v. Bhavani, (2008) 7 SCC 111; See also Bharat Cooperative Bank (Mumbai) Ltd. v. Cooperative Bank Employees Union, (2007) 4 SCC 685.

²⁹ *Id.*, ¶ 8.

of contemplation is encompassed by the definition, including those not specifically enumerated in the inclusionary part of the definition.³⁰ Unlike the exclusionary part, the inclusionary part does not qualify or restrict the scope of the main definition.³¹ To word it otherwise, the main part of the definition is not subject to or subservient to the inclusionary part, as it is to the exclusionary part. The purpose of the inclusionary clause is to expressly include within the ambit of the definition of services, such activities, which by virtue of the lay-person's perspicacity of their nature are likely to not be considered as services, despite their having satisfied the requirements to be classified as a service.³² As observed by the Court in *LDA v. M.K. Gupta*³³ ('Lucknow Development Authority'), services pertaining to the construction of houses were within the purview of the definition of services, even before the effectuation of the amendment, which caused it to find express mention in the inclusionary part; that the amendment merely made explicit, something that was already implicit in the definition³⁴; and that it did not introduce any substantive alteration, at a conceptual level, into the definition of service, under the 1986 Act.³⁵

C. THE EXCLUSIONARY PART

The exclusionary part is the third and final part of the definition, and excludes expressly from the purview thereof, services rendered gratuitously, i.e., devoid of consideration, and services rendered consequent to a contract of personal service, i.e., a service, contracted to be rendered by a specific person and none other. Unlike the inclusionary part, the exclusionary part

³⁰ A.S. Chandra v. Union of India, (1992) 1 ALT 713, ¶ 26 (The Andhra Pradesh High Court held: "The intention of Parliament, in our view, was not and could not be to confine the definition of "service" to what are specifically mentioned in [§2(1)(o)]."); The opening words of the clause, "service means service of any description" clearly bring out the intention of Parliament that service of every description is comprehended by [§2(1)(o)] inclusively certain services are mentioned. By no stretch of reasoning can it be said that services mean only what are specified in that clause especially when the opening part comprehends service of any description. Therefore, in the context the expression 'includes' enlarges the meaning of word 'service' without confining it to what are specifically mentioned in the clause...They are too numerous to be specified and that was the reason why inclusive definition was adopted.").

³¹ Bharat Cooperative Bank (Mumbai) Ltd. v. Cooperative Bank Employees Union, (2007) 4 SCC 685, ¶ 22 (The Supreme Court held "when the word "includes" is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise."); A.P.J. School v. K.L. Galhotra, (1992) 2 CPJ 807, ¶ 9 (where the Haryana State Commission observed-[The] inclusion cannot possibly cut into the larger arena of the definition which includes services of any description made available to potential users." and "This enumeration does not in any way constrict the essence and meaning of the word 'service' for the purposes of the Act. Indeed it enlarges the same.").

³² *Id.*, ¶ 10.

³³ LDA v. M.K. Gupta, (1994) 1 SCC 243.

³⁴ *Id.*, ¶ 7.

³⁵ *Id.*, ¶ 7.

qualifies the main part of the definition. Further, while no decision has thus far been delivered which expressly states the exclusionary part to be exhaustive in respect of services excluded from the purview of the definition, it can be safely concluded, on the basis of a combined reading of the definition, and its import, as has been delineated above, that the exclusionary clause is exhaustive in that regard.

IV. THE CONCEPT OF ‘CONSUMER’ UNDER THE 1986 ACT

The term consumer is defined in §2(1)(d) of the 1986 Act and includes within its ambit every end user of goods or services,³⁶ where such use is consequent to the payment of consideration (which may be paid in any form or medium), either directly, i.e. by the user himself, or indirectly, i.e. on behalf of the end user, by a third person, with whose approval the user uses the goods or services, so long as such use of the goods or services is not for resale or any commercial purpose. As in the case of the term service, the term consumer as defined in §2(1)(d) has a wide definition, whose scope far exceeds that of the definition ascribed to the term consumer in common parlance,³⁷ in that it includes not only the purchaser, i.e. the person who furnishes the consideration to procure a good or avail of a service but also to persons other than the purchaser, notwithstanding the lack of privity between such third party user and the provider of the goods or services as the case may be, subject to the sole qualification that the use of such goods or services by such third party user is with the approval of the purchaser of those goods or services.³⁸ The rationale behind such a wide and expansive import being ascribed to the term consumer is that more often than not, goods purchased and services hired, are wont to be used by persons other than the purchaser of such goods or services, such as his/her family, friends and acquaintances, who are as likely as the original purchaser,

³⁶ Morgan Stanley Mutual Fund v. Kartick Das, (1994) 4 SCC 225, ¶ 26.

³⁷ Jagdamba Rice Mills v. Union of India, (1991) 1 CPJ 273, ¶ 19 (The SCDRC observed there:

“...It is thus evident that [the definition of “consumer” in §2(1)(d)] gives [the term] an altogether new legal colour and scope...The legislature deliberately extends it to persons who have had no privity of contract with the original trader, manufacturer or the person who had hired out the service...It would thus, be seen that the [1986] Act introduces a new concept and class of consumers, and give them a very precise legal connotation. The word ‘consumer’ herein becomes a legal term of art having a meaning different and distinct from that used in loose common parlance...”); B.S. Sidhu v. Central Govt., Post and Telegraph Deptt., (1991) 2 CPJ 90 (The SCDRC observed there:

“The definition [of “consumer”] is thus, an inclusive and extensive one. Designedly, it brings within its scope not only the person who has the privity of contract with the person hiring out the services, but also subsequent beneficiaries thereof, even though the latter may not be a party to the original contract or have a direct nexus therewith. In the true spirit of consumerism the [1986] Act has not confined itself to the original hirer alone but equally extended [itself] to the subsequent beneficiaries of the services as well.”).

³⁸ *Id.*, ¶ 19.

to be the recipients of any adversity that the use of such goods or services might entail to the original purchaser. To preclude their claims on the sole basis of lack of privity with the provider of the goods or services, notwithstanding the legitimacy of their claim, would be against the very spirit of a social welfare legislation of the kind of the 1986 Act.³⁹ However, persons who use goods and/or services, either for resale, or for or in furtherance of any commercial purpose do not fall within the scope of the term consumer. Presumably, the rationale of such exclusion is because the 1986 Act aims to protect the interest of only 'ordinary consumers' (for the want of a better term), i.e. consumers whose use of goods or services is for the satisfaction of their personal needs and requirements, who would stand to lose the most due to the cumbrances of conventional litigation, both in terms of time and expenses, for the redressal of their complaints, as against persons/entities whose use is commercial, who presumably would not have such constraints.

V. POSITION IN LAW IN RESPECT OF THE THREE KINDS OF EDUCATIONAL ACTIVITIES

As had been observed at the outset of this article, the law in respect of the classifiability of educational activities as services as defined in §2(1)(o) of the 1986 Act is one of the most turbid areas in Indian consumer law. The problem is exacerbated by two factors, namely, first, the lack of a precise definition of the term 'educational activity' and the consequent limited scope of application of the decisions rendered in respect of the classifiability of certain kinds of educational activity as service, to other kinds of educational activities, which were neither analogous nor otherwise similar to the kind of educational activity in respect of the classifiability of which the decision was rendered; and second, the multitude of conflicting judicial decisions, in respect of the same. This section shall entail a perusal of various judicial pronouncements in respect of the classifiability of various primary, secondary and tertiary educational activities as services as defined in §2(1)(o) of the 1986 Act, in Parts A, B and C respectively.

A. PRIMARY EDUCATIONAL ACTIVITIES

Primary educational activities are those educational activities performed by an educational institute, which entail the direct impartation or facilitation of education.⁴⁰ Classroom teaching springs forth to the mind as the most obvious and paradigmatic example of a primary educational activity. Other examples of primary educational activities include among others, the provision, by the institute, of libraries, laboratories, bookstores for the purchase of study material, classroom infrastructure etc. Judicial treatment of the

³⁹ *Infra* note 40.

⁴⁰ For the complete three class definition of educational activities, refer to Part II of the article.

classifiability of primary educational activities as services has been scant, in so far as directly evaluating the rendition of the activity in respect of which, a complaint alleging deficiency had been instituted. However, there are relatively more decisions, which pertain to the provision of infrastructural facilities, albeit in an indirect sense – such cases did not as such entail an objective evaluation of the quality of the services rendered. Instead, they entailed an evaluation of the rendition of such services compared to the representations of quality made in respect thereof, through misleading advertisements and prospectuses, which occasioned claims alleging deficiency of service. This stems partly from the difficulty, inherent to an evaluation objectively, and in vacuo, of the quality of the services rendered, in that it is difficult to establish in their respect, overarching objective standards, the exceedance of which, in respect of the performance of the activity, would be necessary to constitute service of adequate quality. It would, for instance, be both impracticable as well as irrational to prescribe, that for a library to be objectively regarded as well stocked, it must contain a certain number of titles, or even specific titles, or for that matter, for a teacher to be regarded as capable of imparting education adequately, that she has a certain number of degrees, or that her vocabulary or linguistic prowess be of a certain standard etc. Such a standard cannot be established even across all or even many institutes of the same discipline, much less those dealing with different disciplines. While it is fairly easy to determine instances of obvious deficient service such as the complete absence of books appertaining to the discipline, programs in respect of which are conducted by an institute, in the library thereof, the complete lack of knowledge or inability of a teacher in articulating the material sought to be taught etc., it is much harder to make determinations objectively in respect of performances, which are not so obviously deficient. This has necessitated, in the evaluation of the performance of primary educational activities, a frame of reference, which is a standard, typically purported as being followed by the educational institutes, in comparison to which the actual performance is evaluated. This section shall peruse judicial pronouncements that have been delivered in respect of primary educational activities.

1. Student-teacher relationship

The issues of whether the relationship between a teacher and a student in educational institutes was within the purview of the 1986 Act; whether therefore, the activities performed by the teacher, in respect of the student could constitute service thereunder and consequently, whether the student in respect of whom such activities are performed, would be a consumer, as defined thereunder arose for adjudication in three cases, viz. *N. Taneja v. Calcutta District Forum*⁴¹ ('N. Taneja') before the Calcutta High Court, *Central*

⁴¹ N. Taneja v. Calcutta District Forum, 1991 SCC OnLine Cal 241 : AIR 1992 Cal 95.

*Academy Educational Society v. Gorav Kumar*⁴² ('Gorav Kumar') before the Rajasthan State Commission, and *Oza Nirav Kanubhai v. Centre Head Apple Industries Ltd.*⁴³ ('Oza Nirav Kanubhai') before the National Commission.

In N. Taneja, the issue which arose for adjudication before the Calcutta High Court, was whether the relationship between teachers and students in an educational institute was one of service-provider and consumer, and whether therefore the teachers' refusal to promote a student and allow her to participate in the board examinations amounted to deficiency of service. In this case, the teachers refused to promote the complainant's daughter to the next grade, due to her having failed in multiple subjects, thus effectively disallowing her from participating in the board examinations, that would have been conducted that year, occasioning the institution of a complaint in the District Commission, against which the teachers instituted a writ petition in the Calcutta High Court. The Court held that the relationship between teachers and students in an educational institute is not one of service-provider and consumer, as the position of students in such a relationship is not akin to that of a buyer of commercial or marketable goods; further, that there was no transfer of property from a teacher to a student through the impartation of education, which precluded teachers from being regarded as sellers; that education, not being expressly enumerated in the inclusionary part of the definition of service, and further, being of a vocational or religious nature, as against a trade-oriented activity, it was not classifiable as service as defined in the 1986 Act. The Court therefore allowed the writ petition, and dismissed the contentions of the complainant.

In Gorav Kumar, the Rajasthan State Commission held, by a majority, that neither did the activities performed by a teacher in respect of students constitute service, as teaching could not be equated to the rendition of a marketable service, nor could the students in respect of whom such activities were performed, be regarded as consumers, as they were not the buyers of any economic goods; education not being a commercial activity. However, the dissenting judgment held contra, that the impartation of education by a teacher, upon accepting remuneration, amounted to service, as would have been the case, for any other professional rendering service in exchange of consideration, and that likewise, an institute imparting education after accepting a fee for the same would be rendering service to the student for consideration. On appeal, the NCDRC upheld the majority decision of the State Commission. Interestingly, the majority, while holding that the activities performed by teachers in respect of students did not constitute service under the 1986 Act, did not hold that educational activities as a class could not constitute service thereunder. Rather, they held that such a determination ought to be made on the basis of the marketability of the activity as a service; that only educational activities, which

⁴² *Central Academy Educational Society v. Gorav Kumar*, (1996) 3 CPJ 230.

⁴³ *Oza Nirav Kanubhai v. Centre Head Apple Industries Ltd.*, (1992) 1 CPR 736.

are capable of marketisation (such as the sale of textbooks, or the provision of accommodation, by the educational institute) are classifiable as services, while those which are not capable of marketisation (such as conducting examinations, conducting lectures or framing of syllabuses etc.) are not classifiable as services. Furthermore, those activities which are of the nature of public service, i.e. intended to promote the interests of society as a whole, are not classifiable as services; only services, which confer particularised benefit, i.e. services rendered for the benefit of specific individuals, are classifiable as services. They sought to support this approach by stating that the services contemplated by the 1986 Act are marketable services, as they stand in symmetry with goods, sharing their character of marketability.

In Oza Nirav Kanubhai, the National Commission held that the private educational institute, against which the complaint alleging the deficiency of service had been instituted rendered service, and was a provider of services, for the purpose of the 1986 Act, and that the aggrieved complainant was a consumer thereunder. The issue before the Commission was whether the complainant, who had been mistreated by one of the faculty of a private institute, in which he was enrolled, and subsequently rusticated from, due to having instituted a complaint in respect of such mistreatment, was entitled to a refund of the fees that had been remitted by him for the course. The faculty member had insulted the complainant, and had treated him in a prejudiced manner, even refusing to check the complainant's homework, upon coming to know that the complainant had brought his misbehaviour to the notice of the head of the institution. Worse, the head of the institution, instead of ameliorating the situation, threatened to have the complainant expelled, and ultimately had the complainant rusticated from the institute, which necessitated the institution of the complaint, seeking a refund of the remitted fees and compensation for the mental agony inflicted upon the complainant. The National Commission held that the institution, not being statutorily established, the relationship between itself and the student was purely contractual, that therefore, activities performed by it respecting the student were classifiable as service as defined in the 1986 Act. The Commission held the institute to be *prima facie* liable for the misconduct of its faculty member and remanded the matter to the District Commission. Ostensibly, there is a conflict between the stances adopted in the three cases. On the one hand, N. Taneja and Gorav Kumar expressly held that the relationship between the teacher and student or for that matter, a university and a student cannot be regarded as constituting a relationship of a service-provider and consumer, and is not amenable therefore to the provisions of the 1986 Act. On the other hand, Oza Nirav Kanubhai held private educational institutes (i.e. institutes that are not statutorily established) to be classifiable as service providers, and students enrolled therein, or their sponsors, as consumers. Ostensibly, the decision in Oza Nirav Kanubhai restricted the exemption granted to educational institutes, and educational activities performed by them, from subjection to the 1986 Act; however, the conflict can be safely concluded

to be illusory, and not real. A perusal of the decisions in respect of the classifiability of the activities of educational institutes in respect of examinations, wherein such activities were held to constitute service evidences this conclusion; one of the predominant arguments advanced in support of such exclusion was that such activities were done in discharge of the statutory functions of the institutes directing such performance. The distinction drawn by Oza Nirav Kanubhai thus is consistent with the judicial approach in exempting only statutorily established institutes, and not every institute, from the purview of the 1986 Act. Of course, the reasonableness of the distinction itself is a matter which is altogether different and shall subsequently be dealt with in the critical analysis part of this article below.

2. Provision of defective study material

In *Jai Kumar Mittal v. Brilliant Tutorials*,⁴⁴ the issue for adjudication was whether the supply, by Brilliant Tutorials, of study materials which contained material substantive mistakes, amounted to deficiency of service, in respect of which a complaint could be instituted under the 1986 Act. The opposite party, i.e. Brilliant Tutorials, claimed in their prospectus and their advertisements that the information contained in the study material were “double-checked for authenticity and precision”, and that students need not take any recourse whatsoever to any other reading material, to prepare for the exams. Furthermore, Brilliant Tutorials had falsely claimed to have updated and revised their study materials on a yearly basis despite their modules being out of date. Holding Brilliant to have rendered deficient service, the NCDRC held that the supply of defective study materials by an institute can sustain a valid claim against it for deficiency of service. There has not been another decision on the same matter since, and it is safe to assume this case to be an authoritative precedent on the point of law it establishes, viz. that educational institutes are susceptible to claims of deficient service, in respect of providing defective or erroneous study materials; especially given that it has not been overruled even post P.T. Koshy.

3. Provision of infrastructure (misrepresentation)

In *Bhupesh Khurana v. Vishwa Budha Parishad*,⁴⁵ the issue before the National Commission was whether students, who had been defrauded by a sham university into joining it, were entitled to a refund of fees remitted thereof. In this case, the opposite party ran a sham college, which solicited applications through advertisements, which averred the college to be affiliated to Magadha University, and accorded recognition by both the Dental Council of

⁴⁴ *Jai Kumar Mittal v. Brilliant Tutorials*, 2005 SCC OnLine NCDRC 23 : (2005) 4 CPJ 156 (NC); (2006) 1 UC 43.

⁴⁵ *Bhupesh Khurana v. Vishwa Budha Parishad*, (2001) 2 CPJ 74 (NC).

India and the Bodh Gaya Dental Council, despite such affiliation and recognition, respectively having been expressly denied to it. The institute further did not conduct examinations at the end of term, as it was required to. As a result, the unsuspecting students, who had been lured into joining the institute, ended up wasting two years of their life, and incurred large expenditures during the course of their enrolment in the institute. The National Commission held, in respect of the recovery of the fees paid to the institute, that the institute was liable to refund the fees, having lured the students to enrol in it through deceitful tactics, and further imposed punitive damages. On appeal (by the institute), the Supreme Court held in *Buddhist Mission Dental College and Hospital (2) v. Bhupesh Khurana*,⁴⁶ affirming the decision of the National Commission, that educational institutes can be said to provide services for consideration, where they charge fees, and therefore that they are liable to compensate the students for having scammed them.⁴⁷

B. SECONDARY EDUCATIONAL ACTIVITIES

Secondary educational activities are those administrative activities, which are concomitant to the impartation of education, which though themselves do not entail either the impartation or facilitation of education, are closely connected therewith, like the administration evaluation of examinations, receipt of relevant fees (tuition fees, examination fees, laboratory fees etc.). Unlike in the case of primary educational activities, deficiencies in the rendition of secondary educational activities are far easier to evaluate and determine, as there either is a case of negligence or capricious callousness, both of which, if present, are easily discernible. However, the judicial position in respect of these activities has been, almost consistently, that they are not classifiable as services, and that institutes providing them cannot be regarded as being service providers. This section shall entail a perusal of the judicial decisions, in respect of different kinds of secondary services.

1. Activities in respect of examination

Courts and forums have been tasked with the determination of whether educational institutes, in conducting and administering exams, evaluating the answer scripts thereof, and publishing results subsequent to such evaluation, rendered service, as defined in the 1986 Act, and thus, whether students, by participating in the examinations, and remitting the requisite fees to the institute, could be classified as consumers, as also defined in the 1986 Act. The impugned issue therefore, was the classifiability of activities of educational

⁴⁶ *Buddhist Mission Dental College and Hospital (2) v. Bhupesh Khurana*, (2009) 4 SCC 473, ¶¶ 12, 13.

⁴⁷ See also *Dhirendra Kumar v. M.R. Sarangapani*, 2015 SCC OnLine NCDRC 1410 : 2015 Indlaw NCDRC 278.

institutes, in respect of, and in connection with exams as services under the 1986 Act.

The judicial answer to the aforementioned question has predominantly been in the negative. The NCDRC has consistently held that boards of examinations, in the discharge of the aforementioned activities, did not render any service for hire; that the discharge of such activities being statutorily required, such activities were not amenable to the 1986 Act. There has been, however a difference in opinion, in respect of the classifiability of concomitant administrative actions and omissions as service, under the Act, with some decisions espousing the view that they are classifiable as services and others that they are not. In *University of Karnataka v. Poonam G. Bhandari*,⁴⁸ the National Commission observed:

“We are clearly of the view that in carrying out its statutory function of conducting the examination, evaluating answer papers, publishing the results of candidate, the University was not performing any service for consideration and a candidate who appeared for the examination cannot be regarded as a person who had hired or availed of the services of the university for consideration.”⁴⁹

In *Board of Examinations v. Mohideen Abdul Kader*,⁵⁰ the National Commission held by majority that negligent issuance of a hall ticket, by the educational institute, which bore a subject code, corresponding to a subject other than the one actually opted for, and the consequent unjust prevention of the examinee from writing the examination did not constitute deficient service in respect of which a complaint could be instituted under the 1986 Act. In this regard, the National Commission observed:

“[A] University or the Board in conducting public examination, evaluating answer papers, announcing the results thereof and thereafter conducting re-checking of the marks of any candidate on the application made by the concerned candidate is not performing any service for hire and there is no arrangement of hiring of any service involved in such a situation as contemplated by §2(l)(o) of the [1986] Act. A candidate, who appears for the examination cannot be regarded as a person who had hired or availed of the services of the University or Board for consideration.”⁵¹

⁴⁸ *University of Karnataka v. Poonam G.. Bhandari*, FA No. 245 of 1992, decided on 16-9-1993.

⁴⁹ *Id.*

⁵⁰ *Board of Examinations v. Mohideen Abdul Kader*, (1997) 2 CPJ 49 (NC).

⁵¹ *Id.*

In *Gujarat Secondary Education Board v. Bharat Narottam Thakkar*,⁵² the National Commission held that the delay on part of the Gujarat Secondary Education Board in conducting the examinations and re-evaluating answer scripts did not constitute deficient service, and further that the Board, in performing activities in respect of examinations did not provide services for hire. This position was further reiterated by the National Commission in *University of Bombay v. Mumbai Grahak Panchayat*,⁵³ where it held that educational institutes did not provide any services for hire, by performing activities in respect of examinations, and that the students that participated in such examinations could not be regarded as consumers.

In *Maharshi Dayanand University v. Ruchika Jain*,⁵⁴ the National Commission held that since in case of examinations, conducted either by the multifarious boards of examination or universities, students appear in them voluntarily, for the purpose of having their competency and knowledge in the fields, tests in which they are desirous of taking and consequently getting certification declaring their competency therein, such activities in respect of examinations cannot be treated as a service, and consequently, students who wrote the exams cannot be treated as consumers.

In *University of Jammu v. Brinder Nath*,⁵⁵ the High Court of Jammu & Kashmir held that the preclusion of the complainant from participating in the examinations, occasioned by the negligence of the university, and its failure to remedy the same even after the lapse of five years despite being required to address the issue within a period of six months, did not constitute deficient service. Likewise, in *R.C. Sharma v. Jage Ram*,⁵⁶ the National Commission held that the two year delay on part of the Central Board of Secondary Education, in declaring examination results of the complainant's son, did not amount to deficiency of service, on the aforementioned grounds.

However, in respect of the issuance of roll numbers, certificates and the like, the judicial view has been less consistent. For e.g., in *Sachida Nand Sharma v. CBSE*,⁵⁷ it was held by the NCDRC that the negligent issuance of identical roll numbers to multiple candidates as a result of which, the complainant's results were not declared, did not amount to deficient service. On the other hand, in *Himachal Pradesh University v. Sanjay Kumar*,⁵⁸ the NCDRC held that the failure (due to negligence) on part of the University to allot the roll number to a candidate, in time, so as to enable him to participate in the exam,

⁵² Gujarat Secondary Education Board v. Bharat Narottam Thakkar, (1994) 1 CPJ 187 (NC).

⁵³ University of Bombay v. Mumbai Grahak Panchayat, (1994) 1 CPJ 146 (NC).

⁵⁴ Maharshi Dayanand University v. Ruchika Jain, 2006 SCC OnLine NCDRC 43 : (2006) 3 CPR 18 (NC).

⁵⁵ University of Jammu v. Brinder Nath, 1999 SCC OnLine J&K 16 : AIR 2000 J&K 93.

⁵⁶ R.C. Sharma v. Jage Ram, (2003) 1 CPJ 248 (NC).

⁵⁷ Sachida Nand Sharma v. CBSE, (2003) 1 CPJ 251 (NC).

⁵⁸ Himachal Pradesh University v. Sanjay Kumar, (2003) 1 CPJ 273 (NC).

which failure caused him to be disallowed from participating in the exam and consequently lose a year, amounted to deficiency of service. The NCDRC in this case did not overrule its previous decisions⁵⁹ which held that statutory functions of boards of examination were outside the scope of the 1986 Act, but held instead, making a distinction between the statutory functions themselves and administrative activities concomitant thereto, which themselves were not statutory functions, that the former were outside the scope of the 1986 Act, but not the latter. In this regard, the NCDRC's position differed than in *Sachida Nand Sharma v. CBSE*,⁶⁰ which held to be outside the purview of the Act, not only the statutory activities themselves, but also other acts or omissions concomitant thereto. The position laid down in these cases was followed by multiple subsequent decisions,⁶¹ and was subsequently approved by the Supreme Court, in Bihar School Examination Board,⁶² and in Surjeet Kaur.⁶³ However, the Supreme Court in Bihar School Examination Board obviated the distinction espoused by some decisions of the National Commission and the State Commissions between activities in respect of examinations, which were themselves statutory, and activities that were merely incidental thereto, and therefore not themselves statutory – holding that the activities in respect of examinations, to the extent that they were statutory, were not thus separable.

2. Activities in respect of fees

This section shall deal with the amenability of activities of educational institutes in respect of fees. For the avoidance of doubt, it is hereby clarified that the fees contemplated under this section are different from the fees payable or paid, in respect of activities relating to examinations, which have already been dealt with in the preceding section. In this section, the issues covered, are in respect of refusal to refund fees which upon remission, had been retained without justification. The view, which has consistently been expressed by the consumer commissions at all tiers, is that the fees remitted by a student,

⁵⁹ See *infra* text accompanying note 61.

⁶⁰ *Sachida Nand Sharma v. CBSE*, (2003) 1 CPJ 251 (NC).

⁶¹ See *Jawaharlal Nehru University v. Consumer Disputes Redressal Forum*, 2005 SCC OnLine Del 635 : (2005) 82 DRJ 552 (where the incorrect evaluation of examination papers was held to not constitute deficiency of service); *Surya Prakash Mahapatra v. Sambalpur University*, (2008) 1 CPJ 258 (NC), (where the NCDRC held the incorrect declaration of the examination results of the complainant and subsequent fourteen year delay in remedying the same, did not constitute deficiency of service); *Sachida Nand Sharma v. CBSE*, (2003) 1 CPJ 251 (NC), (where the NCDRC held that the negligent issuance by the CBSE of identical roll numbers to multiple candidates, and the consequent failure to declare the results of the complainant in a timely manner, was held to not constitute deficiency of service for the purpose of the 1986 Act); *Bangalore University v. Dattari*, (2010) 1 CPJ 111 (NC), (where the NCDRC held, reversing the decision of the SCDRC that the incorrect declaration of the complainant's results, which necessitated his taking the supplementary exam, did not constitute deficient service for the purpose of the 1986 Act); *See also Parveen Rani v. Punjab School Education Board*, (2003) 3 CPJ 164 (NC); *Kota Open University v. Raj Kumari Yadav*, 2009 SCC OnLine NCDRC 203.

⁶² *Bihar School Examination Board v. Suresh Prasad Sinha*, (2009) 8 SCC 483.

⁶³ *Maharshi Dayanand University v. Surjeet Kaur*, (2010) 11 SCC 159.

ought to be refunded by the institute, if the student unenrolls from it – where the vacancy created by such unenrollment is subsequently filled by the institute, but not otherwise.

In *Birla Institute of Technology & Science v. Abhishek Mengi*⁶⁴ ('Birla Institute of Technology'), the National Commission was tasked with the determination, of whether the retention by the opposite party university of the fees remitted by a person, even after having withdrawn from the university, having secured admission in another institute, and consequent refusal to refund more than a small part of such fees, upon the request of such person, amounted to deficient service for the purpose of the 1986 Act. Holding that it did, the National Commission observed, regarding the patent unreasonableness of policies which entitled institutes to cause to be forfeited, fees remitted to them by students, either in part or in full:

“In our view, the service provider cannot forfeit the fees (in full or in part) for the services, which it has neither provided, nor the student has received such services and as such, the forfeiture of such fees is not only a deficiency in service but also an unfair trade practice and if there is any such term of the contract to the contrary the same is surely an unconscionable contract and therefore, void and not binding on the complainant.”⁶⁵

The National Commission thus held the opposite party university to be liable for deficient service, and directed to it to return in full, the fees which had been remitted to it. This position was reiterated in *Saravpreet Singh v. Lala Lajpat Rai Institute of Engg. & Technology*,⁶⁶ and subsequently, in *National Institute of Fashion Design v. Palu Jain*.⁶⁷

In *Guru Gobind Singh Indraprastha University v. Vaibhav*,⁶⁸ the National Commission was tasked with the determination of whether the

⁶⁴ *Birla Institute of Technology & Science v. Abhishek Mengi*, 2013 SCC OnLine NCDRC 394 : (2013) 2 CPJ 681 (NC).

⁶⁵ *Id.*, ¶12 (contrast this view, however with the view adopted by the NCDRC in the FIITJEE cases, where it held that the mere policy of not-refunding the entire fee remitted or even a part thereof, upon subsequent withdrawal of the student did not per se constitute an unfair trade practice, as defined in the 1986 Act, especially when the institute did not fill up the vacancy which arose subsequent to such withdrawal. See in this regard, text accompanying note 86; there is no real conflict between the two decisions however. The issue was never brought up in Birla Institute of Technology – as to whether the seat vacated was subsequently filled, and thus, on the assumption that it was, the NCDRC's decision therein cannot be accused of being inconsistent).

⁶⁶ *Saravpreet Singh v. Lala Lajpat Rai Institute of Engg. & Technology*, 2010 SCC OnLine NCDRC 305.

⁶⁷ *National Institute of Fashion Design v. Palu Jain*, 2007 Indlaw SCDRC 1884.

⁶⁸ *Guru Gobind Singh Indraprastha University v. Vaibhav*, 2009 SCC OnLine NCDRC 119.

retention by the university, of fees remitted by a person, even after he unenrolled from the university, having secured admission in another institute, on grounds that the refund of fees was sought after the stipulated last date to file for the refund of the fees remitted, constituted deficient service. The Commission held that it was impermissible for an institute to retain fees remitted by persons, who had unenrolled therefrom, especially if the seat vacated as a result, was filled by another student, thereby not occasioning any loss to the institute. The National Commission thus held the impugned conduct of the university to constitute deficient service.

In *Indian Institute of Hotel Management v. Reshma Dutta*,⁶⁹ the National Commission was tasked with the determination of whether the retention, by the institute, of the fees remitted by the student, even after she unenrolled therefrom, having found the course unsatisfactory, and having secured a job in a city, far away from the institute, constituted deficient service. In this case, the opposite party institute had invited applications for admission into its course midway through the semester through advertisements in a daily newspaper, without revealing that the semester had commenced already. The complainant, thus unaware of the semester having commenced months ago, enrolled herself into the institute only to unenroll subsequently upon finding the backlog too difficult to cope with, the course highly unsatisfactory, and having in the meantime secured a job in a different city; she therefore sought a refund of the fees remitted, which the institute refused to grant. The National Commission held such retention of the fees to constitute deficient service. It further rejected the contention advanced for the institute that the question of whether the seat vacated as a result, was filled subsequently, or remained vacant, and whether therefore, the institute suffered any loss, for the determination of the permissibility of retention by the institute of fees remitted, holding instead that such an inquiry was absolutely relevant to make that determination. This position was reiterated by the National Commission in *Andhra University v. Janjanam Jagedeesh*.⁷⁰

In *Mandsaur Institute of Technology v. Akshat*,⁷¹ the issue which arose before the National Commission was whether the refusal of the opposite party institute to refund fees corresponding to three years, upon the complainant transferring out to a different institute, where it had collected up front, the fees corresponding to all four years of the degree in which the complainant had enrolled, constituted deficiency of service. The Commission held that even if it was the case that the seat in the institute vacated by the withdrawal of the student would continue to remain vacant throughout the remainder of the course, that in itself does not entitle an institute to charge upfront, the entire fee of the

⁶⁹ *Indian Institute of Hotel Management v. Reshma Dutta*, 2011 SCC OnLine NCDRC 190.

⁷⁰ *Andhra University v. Janjanam Jagedeesh*, 2010 SCC OnLine NCDRC 181.

⁷¹ *Mandsaur Institute of Technology v. Akshat*, 2011 SCC OnLine NCDRC 481 : (2011) 4 CPI 376 (NC).

course, that an institute could only charge upfront the fees corresponding to a year, at the maximum, and therefore that the impugned retention of fees by the institute constituted deficiency of service.⁷² However, it held that the complainant was not entitled to refund of fees corresponding to three years and that he was only entitled to refund of fees corresponding to two years, the fees for the year, midway through which, he was transferring out, being forfeited to the institute.

In *FIITJEE Ltd. v. S. Balavignesh*,⁷³ the issue that arose before the National Commission was whether the retention, by the opposite party coaching institute of fees remitted by a person, even upon such person leaving the institute, constituted deficient service, especially where the student had signed an undertaking forfeiting fees remitted if he were to unenroll therefrom at a subsequent stage. The Commission held the retention of fees by the opposite party institute as not constituting deficiency of service, as the vacancy occasioned by the withdrawal of the student was not subsequently filled, and the institute would, if compelled to refund the fees remitted respecting students who unenrolled from the course at a subsequent stage, operate at a loss. On the same ground, the Commission also rejected the contention advanced in respect of the complainants that the term in the undertaking, which entailed the forfeiture of fees remitted in the event of withdrawals, constituted unfair trade practice, holding that it did not in itself constitute unfair trade practice under the 1986 Act.⁷⁴

⁷² See *Brilliant Tutorials v. Shubho Chakravarty*, 2008 Indlaw SCDRC 394, ¶ 4 (the State Commission observed: “No institute or coaching center can charge lump sum fees for the entire duration of course and thereby bind the student to attend [it] or continue [using its services] even if he finds the standard of coaching not up to the mark and that too at the cost of his career and wastage of time.”); *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697.

⁷³ *FIITJEE Ltd. v. S. Balavignesh*, 2015 SCC OnLine NCDRC 1527 : (2015) 3 CPJ 112 (NC); See also *FIITJEE Ltd. v. S. Balavignesh*, 2015 SCC OnLine NCDRC 1527 : (2015) 3 CPJ 112 (NC) (the reason which occasioned the complainant’s withdrawal from the institute was the onset of an illness which precluded him from attending classes); *FIITJEE Ltd. v. Mayank Tiwari*, RP No. 4335 of 2014, decided on 8-12-2014 (NC) (the withdrawal of the complainant was because of their dissatisfaction with the quality of the course); *FIITJEE v. Parminder Singh*, 2015 Indlaw SCDRC 38 (it was because the change of venue of the center where the classes were conducted precluded the complainant from being able to attend the same). In all of these cases, the respective Commissions held that FIITJEE was not liable for rendering deficient service, by virtue of its retention of fees pursuant to the undertaking.

⁷⁴ *Id.*, ¶ 10 (The NCDRC held, in this regard:

“As regards the term stipulating that the student withdrawing from the coaching class midway will not be entitled to seek any refund of the fee deposited by him being an unfair trade practice, we are of the view that in a case where the seat vacated on account of withdrawal by a student during the currency of the course remains vacant and no other student is admitted against the vacant seat/the refusal of the coaching institute to refund the fee cannot be said to be an unfair trade practice, though, such a term may constitute an unfair trade practice in a case where the coaching institute admits a student in place of the student who withdraws midway from the coaching course and thereby suffers no financial loss.”).

C. TERTIARY EDUCATIONAL ACTIVITIES

Tertiary educational activities are those activities, which are ancillary to the actual impartation or facilitation of education, and are as such unrelated to such impartation or facilitation, but which nevertheless constitute an integral part of the services rendered by the institute. They include the provision of accommodation (in the form of hostels), food (in the form of a mess or canteen etc.), recreational facilities (such as sports grounds, gymnasiums etc.) and health facilities (such as an in house doctor or nurse). Furthermore, duties of institute's staff that are classifiable neither as primary services, nor as secondary services, but which involve a duty of care by the staff in respect of the students are also classifiable as tertiary services. Hypothetical situations in respect thereof, which could possibly constitute a valid claim for deficiency of service, in respect of tertiary services are: in respect of accommodation: uninhabitable living conditions due to, for example, dysfunctional or unhygienic bathrooms in the accommodation, the presence of rodents, insects and/or other pests in large numbers, lack of proper housekeeping staff, dysfunctional plumbing and the overall lethargy of the institute in remedying any of these; in respect of recreational facilities: the provision of, for example, defective equipment (the provision of which can be reasonably foreseen to occasion upon the user thereof, damage), the omission to employ (especially in case of physically intense contact sports) qualified support personnel, etc.; in respect of health facilities: the employment of a person without the necessary qualifications as a nurse or a doctor, etc. to stock expired medicines, which are to be administered to students in need of medication etc. Judicial pronouncements in respect of tertiary services are relatively scant, especially at the higher level; due to the absence of claims instituted in their respect; however, the position in law respecting the same can be fairly ascertained through a perusal of the relevant decisions which have been rendered.

1. Provision of infrastructure

In *Swami Parmanand Para-Medical & GNM School of Nursing v. Pardeep Kaur*,⁷⁵ the State Commission was tasked with the determination of whether the refusal of the opposite party institute to refund the fees when the complainant, dissatisfied with the quality of the accommodation and food provided to her by the institute, did not wish to remain a residential student, and instead become a day student, and in lieu of such conversion, sought a refund, constituted deficient service. The State Commission held that complaints, in respect of the quality of accommodation and food provided by the institute, or fees remitted, are not within the purview of the 1986 Act, and therefore that the institute was not liable for deficient service.

⁷⁵ *Swami Parmanand Para-Medical & GNM School of Nursing v. Pardeep Kaur*, FA No. 1765 of 2009, decided on 24-1-2014.

2. Duty of care cases

In *Madan Lal Arora v. Mahashya Chuni Lal Saraswati Bal Mandir Senior Secondary School*⁷⁶ ('Madan Lal Arora'), the issue which arose before the National Commission was whether the omission of the teachers of the school to personally accompany a student, or otherwise ensure his safety, while he took a bath in the river during the school excursion, where the student ended up slipping into the river and drowning, and the subsequent failure in promptly initiating rescue efforts amounted to deficient service, on part of the school, on grounds of being a breach of duty to care, of the teachers, especially since the student had signed an undertaking, absolving the school of responsibility, in respect of the materialisation of unforeseen accidents or injuries. The National Commission held that the aforementioned omissions constituted deficient service on part of the school. However, this case must be contrasted with that of *Fakhre Alam v. Amity Business School*⁷⁷ ('Fakhre Alam'), where the opposite party university was not held liable for deficient service, in respect of a fact situation which was almost identical to that of Madan Lal Arora, the difference however, being the age of the deceased – the deceased in Fakhre Alam, was a major, and in Madan Lal Arora, a minor.

In Fakhre Alam, the issue which arose for adjudication before the National Commission was whether the conduct of the faculty of the opposite party university, in permitting students (who were adults) to go to the beach as part of their trip/excursion, without accompanying them or otherwise ensuring their safety, where the students ultimately drowned at sea, constituted deficient service on part of the university, on grounds of being a breach of duty to care, of the teachers. The National Commission held that there was no such duty of care on part of the teachers, in respect of adult students, and that it was unreasonable to expect them to accompany the students to the beach or otherwise ensure their safety by arranging for life-guards etc. and that therefore, there existed no valid claim of deficient service against the university.

D. MISREPRESENTATION BY EDUCATIONAL INSTITUTES

Primary, secondary and tertiary activities aside, valid claims against educational institutes can lie in respect of misrepresentations made by them, which induced and occasioned the enrolment of the student in the university, and subsequently the remission of fees by such student. While these cases do not come under the banner of 'educational activities', they do constitute an important chunk of the cases relating to educational institutes, which arise for

⁷⁶ *Madan Lal Arora v. Mahashya Chuni Lal Saraswati Bal Mandir Senior Secondary School*, 2013 SCC OnLine NCDRC 363 : (2013) 2 CPJ 450 (NC).

⁷⁷ *Fakhre Alam v. Amity Business School*, 2015 SCC OnLine NCDRC 1839.

adjudication before courts and consumer forums, and therefore require perusal in this article.

In *Mukesh Gupta v. Kiran Thakur*,⁷⁸ the issue which arose before the National Commission was, whether the false representation of the opposite party institute that its course in organic agriculture management was in joint collaboration with the National Productivity Council, and that the students enrolled therein would get a certificate from the National Productivity Council, upon completing the course therein, amounted to deficient service, and whether therefore, fees remitted by students, who had in reliance of such false representation, joined the course, was refundable to them. The National Commission held that the misrepresentation of the opposite party institute amounted to deficient service under the 1986 Act.

In *Dr. Alexander Educational Foundation v. B. Chandrasekaran*,⁷⁹ the issue which arose before the State Commission of Pondicherry was whether the false representation of the opposite party institute that its course was affiliated to the Pondicherry University, in advertisements in daily newspapers, amounted to deficient service and whether therefore, fees remitted by students, who had in reliance of such false representation joined the course, was refundable to them. The State Commission held that the misrepresentation by the opposite party constituted deficient service, and further, rejecting the contention that activities of an institute are not within the purview of the 1986 Act, that the fact of admitting students in exchange for monetary consideration constituted service, in respect of the performance of which an action could be maintained under the 1986 Act. This position was reiterated by the National Commission in *IT&T Learning Solutions Ltd. v. Gaurav Malik*⁸⁰ and by State Commission of Andhra Pradesh in *Ramayanam Varun Kumar v. Gannavaram Technical Training Centre*.⁸¹

In *Dhirendra Kumar v. M.R. Sarangapani*,⁸² the opposite party institute had, in its advertisement, made multiple false representations in respect of itself as well as its undergraduate programs – that it was recognised by and affiliated to multiple renowned universities abroad, which universities, it represented would accept students from itself, for graduate studies, that it had a placement cell that had successfully placed multiple students in key positions across the globe. Furthermore, the Dean of the institute went to the extent of bringing in the director of an American university to address the parents of prospective students, to falsely represent to them, that the institute was

⁷⁸ *Mukesh Gupta v. Kiran Thakur*, 2010 SCC OnLine NCDRC 218 : (2010) 3 CPJ 400 (NC).

⁷⁹ *Dr. Alexander Educational Foundation v. B. Chandrasekaran*, 1994 Indlaw SCDRC 12329.

⁸⁰ *IT&T Learning Solutions Ltd. v. Gaurav Malik*, 2011 SCC OnLine NCDRC 207 : (2011) 3 CPJ 105 (NC).

⁸¹ *Ramayanam Varun Kumar v. Gannavaram Technical Training Centre*, (2015) 1 CPJ 1 (AP).

⁸² *Dhirendra Kumar v. M.R. Sarangapani*, 2015 SCC OnLine NCDRC 1410.

affiliated to that university, and that the students would receive a diploma therefrom upon completing their degree. Further, the institute falsely represented to having well qualified faculty, a well-stocked library, and highly specialised laboratories. The institute charged extremely high fees, one of the justifications tendered for which, was that the examination papers were being prepared and conducted by foreign universities and the answer sheets of the students were being evaluated by professors from foreign universities. The unsuspecting students, swayed by the false representations of the institute, enrolled in it only to discover that they had been duped. The institute had no relationship whatsoever with any of the universities they claimed to be affiliated to; there were practically no libraries, the ones which were present were dysfunctional to the point of otiosity, the library had scarcely any books, the course, which was claimed to be structured was haphazardly taught by unqualified teachers etc. In order to secure a refund of the moneys remitted to the institute and compensation for the money and time wasted, the complainants instituted a complaint. The National Commission held, allowing the complaint that, the institute was liable under the 1986 Act, for deficient service, on grounds of having made flagrant misrepresentations.

The position in this regard, therefore, has consistently been that educational institutes shall be liable for deficient service for inducement of enrolment as well as remission of fees through misrepresentation as to affiliations, accreditations and recognitions that they may have.⁸³

VI. SUPREME COURT CASES EXCLUDING EDUCATION FROM THE PURVIEW OF THE 1986 ACT

Up until 2009, the Supreme Court did not tackle the issue of whether educational institutes and the educational activities they performed were amenable to the provisions of the 1986 Act. It, however, over the course of three of its decisions, namely, Bihar School Examination Board, Surjeet Kaur and PT. Koshy, started the trend of excluding from the purview of the 1986 Act, educational institutes and educational activities performed by them, with P.T.

⁸³ See also Satheesan v. TKVTSS Medical and Charitable Trust, 1997 Indlaw SCDRC 117, (here the opposite party college was held to be liable for deficient service for having misrepresented as being affiliated to MGR University); DAV Institute of Physiotherapy v. Navleen Kaur, 1998 Indlaw SCDRC 339; Mantosh Kumar v. National Institute of Visually Handicapped, 2013 Indlaw SCDRC 220 (the opposite party college was held to be liable for deficient service for having misrepresented that it was affiliated to the Uttarakhand Technical University); Indian Institute of Aeronautics v. Diwakar Dhyani, 2008 Indlaw SCDRC 1033; Blue Mountain College of Teachers Education v. Neelu Verma, 2014 Indlaw SCDRC 1210; See Regional Institute of Cooperative Management v. Naveen Kumar Chaudhary, 2014 SCC OnLine NCDRC 164 : (2014) 3 CPJ 120 (NC).

Koshy ostensibly excluding education from the purview of the Act altogether. All three of these decisions shall be detailed in this section.

A. BIHAR SCHOOL EXAMINATION BOARD V. SURESH PRASAD SINHA⁸⁴

*Bihar School Examination Board v. Suresh Prasad Sinha*⁸⁵ ('Bihar School Examination Board') was the first Supreme Court decision which excluded from the purview of the 1986 Act, educational institutes and the educational activities performed by them. The issue which arose for adjudication in this case was whether the incorrect issuance, by the Bihar Board of Secondary Education, of identical roll numbers to three different candidates, in respect of the Board Examination, and subsequent failure in declaring the results of one of the candidates, amounted to deficient service. The Supreme Court held, first, that the 1986 Act was not applicable in respect of the discharge of statutory functions by statutory bodies, that the Board, being a statutory body, did not, in conducting and administering exams, evaluating the answer scripts thereof, and publishing results subsequent to such evaluation, all of which were done in discharge of its statutory functions did not provide services for hire; second, that the fees paid or payable for the performance by the board, of its examination related activities did not constitute consideration, that it was merely the charge to be paid for the privilege of writing the examination and therefore; third, that students, who participate in examinations cannot be regarded as consumers. In support of the first holding, the Court observed that the 1986 Act did not contemplate as being within its ambit, the discharge, by statutorily established bodies, of their statutory functions, and to this end, it interpreted Lucknow Development Authority, very restrictively, holding it to be applicable only to fact situations, which involve services relating to housing constructions. Thus, it merely reiterated the position that had been established in this regard by the National Commission. Furthermore, the Court obviated the distinction espoused by some decisions of the National and State Commissions between activities in respect of examinations, which were themselves statutory and administrative activities that were incidental thereto, and not themselves statutory – holding that the multifarious activities in respect of examinations, constituted different stages of a single statutory non-commercial function, which cannot be separated into parts, some of which were statutory, and some of which were not, which were purely administrative.

⁸⁴ *Bihar School Examination Board v. Suresh Prasad Sinha*, (2009) 8 SCC 483.

⁸⁵ *Id.*

B. MAHARSHI DAYANAND UNIVERSITY V. SURJEET KAUR⁸⁶

Maharshi Dayanand University v. Surjeet Kaur ('Surjeet Kaur') was the second of the three cases whereby the Supreme Court excluded educational activities from the purview of the 1986 Act. In that case, a student had enrolled in two courses simultaneously, one full time course and one correspondence course. Such enrolment being in contravention of the rules, the university directed her to unenroll from one of the courses, pursuant to which she unenrolled from the correspondence course. However, she participated in the supplementary exam in respect of the correspondence course, despite having cancelled her enrolment therein, and passed it. However, her having taken the exam for the correspondence being in contravention of the university rules, the university refused to confer the degree on her. One of the issues, which arose before the Court in Surjeet Kaur, was whether in conducting examinations, universities rendered a service in respect of the rendition of which a complaint under the 1986 Act was maintainable. The Supreme Court held, following Bihar School Examination Board, that Universities, to the extent that they are statutorily established, did not, by performing examination related activities, perform any service.

Surjeet Kaur, therefore, ostensibly expanded the ratio of Bihar School Examination Board, holding not only activities in respect of board examinations, but examinations by every statutorily established institute, to be beyond the purview of the 1986 Act. However, it is merely a reiteration of the stance, which had been adopted by the National Commission, in its earlier decisions.

C. P.T. KOSHY V. ELLEN CHARITABLE TRUST⁸⁷

P.T. Koshy was the third and last occasion that the Supreme Court dealt with the issue of whether educational activities were within the purview of the 1986 Act. Rejecting the special leave petition from the National Commission, the Supreme Court held, in a brief order that educational institutes do not, through the performance of educational activities, render any service, in respect of which a complaint of deficiency could be maintained, and that consumer forums did not have the jurisdiction to adjudicate them.⁸⁸

Its brevity and ostensible simplicity are deceptive: P.T. Koshy is highly problematic – in as much as its import and ratio are hard to decipher conclusively. On one hand, it purports to merely follow Surjeet Kaur, which was

⁸⁶ *Maharshi Dayanand University v. Surjeet Kaur*, (2010) 11 SCC 159.

⁸⁷ *P.T. Koshy v. Ellen Charitable Trust*, (2012) 3 CPC 615 (SC).

⁸⁸ *Id.*

the sole decision it cited to support its holding, but on the other, it holds educational institutes in general, sans any qualification as to the mode of origination thereof, which qualification was implicit in Surjeet Kaur, (which held services rendered by only by statutorily established institutes, and not all educational institutes, to be outside the purview of the 1986 Act). There is thus, a conflict between the express phraseology of the order, and the ratio of the decision it purports to follow without substantively altering, which makes the discernment of its scope highly problematic. P.T. Koshy can be interpreted in two ways: first, in an expansive manner – that it places a blanket embargo in respect of the classifiability of educational activities of every kind as services, as defined in the 1986 Act, thereby taking them as well as the educational institutes that render them, completely beyond the purview of the Act, second, in a limited manner – in that it excludes from the purview of the 1986 Act, only the educational activities of statutorily established educational institutes, and not non-statutorily established institutes. The expansive interpretation is supported by the express phraseology of the order, while the limited interpretation is consonant with the ratio of Surjeet Kaur. Some insight, as to which interpretation is correct, can be gleaned from a perusal of subsequent treatment of P.T. Koshy, by other judicial authorities, which perusal shall be undertaken in the next section of this essay.

VII. POST P.T. KOSHY: CURRENT POSITION IN LAW

As was noted above, the import of P.T. Koshy is hard to decipher conclusively, and this problem is exacerbated by the conflicting decisions rendered by Consumer Dispute Redressal Commissions. Some decisions have omitted altogether, to consider P.T. Koshy, while adjudicating upon the issue which arose therein, whilst the decisions, which did refer to P.T. Koshy, interpreted the same expansively, as to exclude from the purview of the 1986 Act, even privately established and run educational institutes. This section shall peruse the various decisions, which have been rendered post P.T. Koshy, and try to determine the current position of law, to thus determine the true scope of P.T. Koshy. This exercise is absolutely essential to the article, for the subsequent determination, of the practical ramifications that shall stem from the exclusion of education from the purview of the 1986 Act.⁸⁹

⁸⁹ For a more detailed analysis of the practical implications, which are likely to ensue consequent to the exclusion of educational institutes, and their educational activities from the purview of the 1986 Act, refer to Part VIII(B) of this essay.

A. DECISIONS HOLDING EDUCATIONAL ACTIVITIES AS SERVICES

In *K. Rajendran v. CSI Ewart Matriculation Higher Secondary School*,⁹⁰ the question, arose before the National Commission, as to whether the extolment of fees under false pretences by the school as a precondition to secure admission therein constituted deficient service; whether therefore, the school was liable to refund the moneys so extolled. In that case, the school, in which the complainant had enrolled his daughter extolled as a precondition for enrolment, a large amount of money, as fees purportedly to be used for the construction of a new auditorium in the school premises, but which it subsequently misappropriated, labelling it as a donation. The school refused to clarify the dichotomy between the actual and purported use of the impugned funds and to refund the same upon the request to that effect by the complainant. The National Commission held that the misappropriation of funds and forcible extraction of fees as a precondition for admission into the school, was a clear instance of deficient service, and directed the school to refund the impugned moneys in full to the complainant.

In *Frankfinn Institute of Air Hostess Training v. Ashwini G.*,⁹¹ the issue which arose for adjudication before the National Commission was whether the failure, by the institute to provide the thirty-hour in-flight training to the complainant, which constituted an essential part of the curriculum of airhostess training of the institute, amounted to deficiency of service. It was contended by the institute, that disputes having arisen between the institute and the owner of the airbus fuselage, it had become impossible for the institute to provide the in-flight training, and further that the institute had in the subsequent year, offered to, at its own expense, provide the same to the complainant, which offer had not been responded to, by the complainant, and therefore, that it could not be held liable for deficient service. The National Commission held, rejecting those contentions, that the failure to provide the requisite training to the complainant in the year of her enrolment constituted deficiency of service, notwithstanding the circumstances which had precluded the provision of such training.

In *Indian Institute of Banking and Finance v. Mukul Srivastava*,⁹² the question arose before the NCDRC, as to whether a person, who appeared for an examination conducted by the IIBF was a consumer and whether the holding of the examination itself, by the IIBF, constitutes a service, in respect of whose rendition, a complaint of deficiency can be instituted under the 1986 Act. In that case, the complainant was a candidate who appeared for the JAIIB

⁹⁰ K. Rajendran v. CSI Ewart Matriculation Higher Secondary School, 2012 SCC OnLine NCDRC 468.

⁹¹ Frankfinn Institute of Air Hostess Training v. Ashwini G., 2009 SCC OnLine NCDRC 79.

⁹² Indian Institute of Banking and Finance v. Mukul Srivastava, 2013 SCC OnLine NCDRC 14 : (2013) 1 CPJ 403 (NC).

examination conduct by the IIBF. The exam was to be administered on a computer, provided to the candidates by IIBF. During the examination, technical difficulties arose, which necessitated the assignment of a different computer, to the complainant, albeit at a different examination center. Subsequently, the complainant requested the IIBF to grant him either five marks as grace marks, or permission to retake the examination, claiming that the change of examination centres and the ensuing confusion and haste adversely affected his performance, and that he ought to be afforded the chance to remedy the same. IIBF rejected the request, inducing the complainant to institute a complaint. The National Commission held, that since the opposite party in the present case is a private body, and not a statutory body, services rendered by it are subject to the provisions of the 1986 Act, remanded the issue back to the State Commission to decide on merits. Likewise, in *Dhirendra Kumar v. M.R. Sarangapani*,⁹³ the National Commission held to amount to deficient service, the blatant false representations made by the opposite party institute in respect of its affiliations, recognitions and infrastructure.

It should be noted that none of the aforementioned decisions considered P.T. Koshy in deciding the issues which arose before them for adjudication; whether their omission to consider P.T. Koshy in itself constitutes a per incuriam is debatable. It was held for instance, that the mere fact that P.T. Koshy was not a judicial decision stricto sensu, but merely an order did not in any way diminish its precedential value; on the other hand, however, the scope of P.T. Koshy is not clear, as has already been noted and therefore its applicability in respect of the fact situations, which the aforementioned decisions dealt with, is questionable.⁹⁴ Therefore, to outrightly dismiss these decisions as being per incuriam is erroneous.

B. DECISIONS HOLDING EDUCATIONAL ACTIVITIES AS NOT SERVICES

In *Regional Institute of Cooperative Management v. Naveen Kumar Chaudhary*,⁹⁵ the issue which arose before the National Commission was, whether the false representation of the opposite party institute that it was affiliated to Vaikunth Mehta National Institute of Co-operative Management, Pune University, and that the aforesaid university was the parent university of

⁹³ *Dhirendra Kumar v. M.R. Sarangapani*, 2015 SCC OnLine NCDRC 1410. This case has been discussed in detail in Part V(D) of the essay.

⁹⁴ As was noted earlier (in Part VI of this essay), the applicability of P.T. Koshy to fact situations not appertaining to non-statutorily established educational institutes is questionable, given that it purports to follow Surjeet Kaur, which is applicable only in respect of the activities performed by statutorily established educational institutes, and not amend or augment the same, notwithstanding the expansive interpretation afforded to P.T. Koshy, by subsequent lower court decisions.

⁹⁵ *Regional Institute of Cooperative Management v. Naveen Kumar Chaudhary*, 2014 SCC OnLine NCDRC 164 : (2014) 3 CPJ 120 (NC).

the opposite party institute, and that its diploma program was equivalent to an MBA and was recognised as such by the Association of Indian Universities, amounted to deficiency of service and therefore whether the institute was liable to refund the fees remitted by students, who in reliance of its misrepresentation, had joined it, and additionally, to compensate them. The National Commission held, on the basis of P.T. Koshy, that educational institutes do not render service, and therefore, a complaint alleging deficiency of service is not maintainable against them. This stance was reiterated in FIITJEE cases,⁹⁶ where P.T. Koshy was expansively interpreted as being applicable even in respect of private educational institutes, in matters relating to the refund of fees; which type of cases were generally held to be within the purview of the 1986 Act, prior to P.T. Koshy.

In *Swami Parmanand Para-Medical & GNM School of Nursing v. Pardeep Kaur*,⁹⁷ the State Commission was tasked with the determination of whether the refusal of the opposite party institute to refund the fees when the complainant, dissatisfied with the quality of the accommodation and food provided to her by the institute, did not wish to remain a residential student, and instead become a day student, and in lieu of such conversion, sought a refund, constituted deficient service. The State Commission held, on the basis of P.T. Koshy, that complaints, in respect of the quality of accommodation and food provided by the institute, or fees remitted, are not within the purview of the 1986 Act, and therefore that the institute was not liable for deficient service.

It is imperative to note here, that the mere fact that some subsequent decisions have expansively interpreted P.T. Koshy, does not in itself necessarily make it absolute that it ought to ordinarily be similarly expansively interpreted. The subsequent treatment, by a lower court, of the decision of a higher court, cannot either augment its real import, or otherwise whittle it down. Until such time the Supreme Court clarifies, upon its own volition, the true import of P.T. Koshy, it would be both impossible and imprudent to attempt to speculate upon the scope of its applicability. For the present, all that can be said is that courts have the freedom to interpret P.T. Koshy both ways; but neither one way is necessarily the ‘correct’ way.

C. CURRENT POSITION IN LAW

The current position in law therefore in respect of the classifiability of educational activities, which are performed by educational institutes as service under the 1986 Act, post P.T. Koshy, is that the educational activities performed by statutorily established bodies (including boards of examination, universities and other educational institutes), do not amount to service, and

⁹⁶ See *supra* text accompanying note 73.

⁹⁷ *Swami Parmanand Para-Medical & GNM School of Nursing v. Pardeep Kaur*, FA No. 1765 of 2009, decided on 24-1-2014 (Unreported).

are thus outside the scope of the 1986 Act. The position in respect of activities rendered by private institutes is yet unclear, with some precedents holding them to be also excluded, as in the case of statutory bodies, from the purview of the Act, while others without directly mentioning P.T. Koshy, continue to hold educational activities performed by private institutes as constituting service under the Act.

VIII. CRITICAL ANALYSIS

Having perused the various judicial pronouncements determining the current position of law respecting the classifiability of educational activities as service as defined in the Act, it is now essential to determine the tenability of the current position. This requires two things, first, a critical appraisal of the legal correctness and logical soundness of this position, and second, and perhaps more importantly, a determination of the practical implications that are bound to ensue therefrom. These shall respectively be dealt with in Part A and Part B of this section respectively.

A. *LEGAL ASPECTS*

There are four key arguments which have been advanced, which courts have used to buttress the exclusion of educational institutes, and educational activities performed thereby, from the purview of the 1986 Act. The first argument, based on the distinction between statutory and non-statutory bodies, and the premise that the former, and the activities performed by them, in discharge of their statutory functions ought to be accorded exemption from the provisions of legislations, of the kind of the 1988 Act, is that educational activities, to the extent that they are rendered by institutes that are statutorily established, do not constitute service, in respect of which a complaint of deficiency can be maintained under the 1986 Act. I shall christen this argument as the 'Argument of statutory body exemption'. The second argument is a far more complex one – complex not in the sense that it is difficult to rebut; as it happens, it is perhaps easier to rebut than the others, due to more blatant errors of reasoning, which are quickly discernible – but complex in the sense that it is layered, i.e., it has several layers, each of which constitutes a minor variation in the averment being articulated, but the rebuttal of all of which is absolutely necessarily to dispose of the argument concussively. The key assertion of this argument is that education is not a commercial activity, that educational institutes are not commercial enterprises. This assertion is sought to be supported by three different propositions, viz. first, that education, is at the rudimentary level, of a different mettle than trade or business, further that education is inherently not susceptible to commercialisation, and therefore, that it is incorrect to classify it as a commercial activity, second, that the ascription of education as a commercial service, being a commodification thereof, is incongruous with traditionalist

ethos of Indian culture, and therefore that, education is not, and ought not to be classified as a service, third, that educational institutes, not being commercial enterprises, and the educational activities performed thereby, not being rendered with a view of profiteering, such educational activities do not constitute commercial service, nor are the institutes performing them constitutive of providers of commercial service providers, fourth, that education is not capable of marketisation, and thus is not classifiable as a commercial service. The cumulative effect of these four propositions is that services respecting education, not being commercial services, are thus not within the scope of the 1986 Act. I shall christen this argument as the 'Argument of Non-Commerciality'. The third argument, a rather feeble argument is that the fees payable by the students, or on their behalf, in respect of the performance of educational activities, especially in case of examinations, does not amount to consideration, and therefore such activities, even if classifiable as services, would be services rendered without consideration, and therefore be hit by the exclusionary clause of the definition of service – and would therefore be beyond the purview of the 1986 Act. I shall christen this argument as the 'Argument of fees not amounting to consideration'. The fourth argument, also a very feeble one, is that the performance of educational activities of some classes, such as examinations does not confer upon the student, any benefit, and that therefore, it, having failed the test to determine the classifiability of an activity as a service, cannot be regarded as a service, for the purposes of the 1986 Act. The fifth argument, also a feeble one, is that education not being expressly mentioned among the other enumerated activities, in the inclusionary part of the definition of service under the 1986 Act, indicates that it is not included and is in fact excluded from the purview of the 1986 Act. All five of these arguments are specious and susceptible to rebuttals, as shall be demonstrated in this part of the essay. In addition, a few other minor arguments have been propounded in support of the aforementioned exclusion, which shall be addressed collectively under the sixth header of this section named 'Miscellaneous Arguments'.

However, before proceeding to evaluate the soundness, both legal and logical, of these arguments, it is imperative to evaluate whether on an ordinary reading of the relevant provisions of the Act, educational activities amount to service as defined in §2(1)(o) of the Act, and whether students (or their parents, guardians or sponsors as the case may be, who bear the expenses incurred in respect of the provision of such educational activities to the students) are consumers as defined in §2(1)(d) of the Act.

The test, of whether an activity constitutes a service as defined in §2(1)(o) of the 1986 Act is, as has been noted,⁹⁸ is if its nature corresponds to that of a service, in that its rendition results in the accrual of any benefit upon the person or persons, in respect of whom its rendition is directed; and if it does

⁹⁸ See Part III of the essay.

not constitute a class of services expressly excluded from the purview of the 1986 Act. The rendition of educational activities of all three classes – primary, secondary and tertiary indubitably does confer multifarious benefits upon the persons, in respect of whom their renditions are directed, i.e. the students. The benefits conferred by primary educational activities are fairly obvious; it entails the impartation of knowledge, the fostering of intellectualism, and the application of the student's mind among many other such benefits. The benefits conferred by secondary educational activities is a little less self-evident, but they do exist; the conducting of examinations in many a case, is an important, and occasionally the sole incentive for students to peruse their assigned texts, and learn the information which it contains, furthermore, the certification obtained upon successfully passing the examinations often determines the career trajectory of the student.⁹⁹ The benefits, which are conferred by tertiary educational activities is, as with primary activities, fairly self-evident; the provision of accommodation, or food, are of crucial importance to students, the provision of other infrastructural facilities such as sporting facilities, health-care facilities etc. are also of importance, and do confer upon the students, various benefits. Therefore, unless educational activities belong to one of the two classes of services excluded from being classified as service in the exclusionary clause, they would ordinarily, be classifiable as services, for the purpose of the Act. The excluded classes of services are personal services and gratuitous services. Educational activities are neither. Therefore, the inescapable conclusion is that educational activities are services for the purpose of the 1986 Act. Having established this, I shall proceed to rebut the various arguments which have been delineated above and conclusively establish their legal and logical erroneousness.

1. Argument of statutory body exemption

Multiple National Commission and High Court decisions espoused the exclusion of activities of statutorily established educational institutes in respect of examinations administered by them, from the purview of the 1986 Act, on the basis of the premise that activities performed in discharge of statutory duties and functions were not within the purview of the 1986 Act, further that they could not be considered to be services for hire rendered in exchange for consideration, and that consequently complaints alleging deficiency in respect of the performance of such duties were not maintainable before consumer forums.¹⁰⁰ This view was upheld by the Supreme Court in Bihar School Examination Board.

⁹⁹ This aspect is discussed in much greater detail in the rebuttal of the premise of the Supreme Court that the exams do not confer any benefit upon students, *infra*.

¹⁰⁰ Sachida Nand Sharma v. CBSE, (2003) 1 CPJ 251 (NC); Jawaharlal Nehru University v. Consumer Disputes Redressal Forum, 2005 SCC OnLine Del 635 : (2005) 82 DRJ 552; Board of Matriculation Examination v. S.R.C. Bhandari, 2003 SCC OnLine Mad 652 : (2004) 1 LW 463 (for a complete list of cases following this, refer to Part V of the article).

One of the key holdings in Bihar School Examination Board was that the Bihar Board, having been statutorily established, was not amenable to the provisions of the 1986 Act; and that likewise, other statutory boards which administered board examinations were not amenable to the provisions thereof, and therefore that complaints alleging deficiency respecting their performance could not be maintained before the consumer forums.¹⁰¹ This position was reiterated by the Supreme Court in Surjeet Kaur, which extrapolated the same principle to examinations held by statutorily established universities, as well as the other educational activities rendered by such statutorily established universities and educational institutes. In light of these decisions, it is essential to evaluate whether the mere fact of statutory origination of an educational institute can exempt it from the purview of the 1986 Act, especially given that no such exemption can be found in the express text of the definition of service thereunder.

The Supreme Court considered the issue of whether statutory bodies, and the activities performed by them, in discharge of their statutory functions, would be within the purview of the 1986 Act for the first time in Lucknow Development Authority. The Court decided the issue in the affirmative therein, rejecting the contention advanced on behalf of the Lucknow Development Authority that statutory bodies such as itself, and the activities performed by them in discharge of their statutory powers/functions was not within the purview of the 1986 Act. The Court observed:

“In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the [1986] Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A nationalized bank renders as much service as a private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made mainly, by the statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.”¹⁰²

The Court then went on to state, holding that public authorities would be accountable to the same extent private entities would, in respect of any injurious, negligent or oppressive acts or omissions:

¹⁰¹ Bihar School Examination Board v. Suresh Prasad Sinha, (2009) 8 SCC 483, ¶ 10.

¹⁰² *Id.*, ¶ 4.

"The law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. Under our Constitution sovereignty vests with the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself ... [and] ... are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy [of Consumer Dispute Redressal Commissions] in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation.

...This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to the provisions of the [1986] Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. Any attempt therefore to exclude services offered by statutory bodies to the common man would be against the provisions of the Act and the spirit behind it. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service...."¹⁰³

The Supreme Court thus held that the mere fact of an authority having been statutorily established does not preclude its subjection to the provisions of the 1986 Act, and that since the Act itself did not contemplate expressly any distinction in respect of the amenability of public and private entities to its provisions, nor could such a distinction be reasonably inferred from the stated objectives and purpose of the 1986 Act, the Court could not of its own accord create such a distinction, and thus infer into the definition of service, a restriction in respect of its applicability to statutory bodies. To do so would be against the provisions of the 1986 Act, and the spirit behind it. The Court thus

¹⁰³ *Id.*, ¶ 5.

categorically vetoed the contention that public bodies ought to be exempt from subjection to statutes, such as the 1986 Act, the overarching objective of which was to engender accountability in such authorities, in respect of the discharge of their duties.

In respect of the contention that statutory bodies, in discharge of their statutory duties and functions did not render any service as defined in the 1986 Act, the Supreme Court held:

“... [A] statutory authority...while performing statutory duty renders service to the society in general and individual in particular. The entire approach ... that power exercised under a statute could not be stretched to mean service proceeded on misconception.”¹⁰⁴

Therefore, the Court held that even statutory authorities, while discharging their statutory functions render services on two levels, first, in general, towards the society, whose betterment is sought to be facilitated through such a rendition, and secondly, in particular, the specific individual, upon whom the benefit is sought to be conferred, through such rendition. The mere fact of their statutory origination does not and cannot preclude the classifiability of their activities as services, or negate such activities being services where their nature corresponds to that of a service. In the same vein, the Court emphasised that the 1986 Act aims not only to protect consumers from the malpractices and omissions of private bodies, but also from the malpractices and omissions of public bodies, some of which might very well have been statutorily established. The Supreme Court reiterated this position in 2004 in *Ghaziabad Development Authority v. Balbir Singh*,¹⁰⁵ where it held that statutory authorities were not above subjection to the 1986 Act and observed:

“Thus the law is that the [1986 Act] has a wide reach and the Commission has jurisdiction even in cases of service rendered by statutory and public authorities. Such authorities become liable to compensate for misfeasance in public office i.e. an act which is oppressive or capricious or arbitrary or negligent provided loss or injury is suffered by a citizen. The Commission/Forum must determine that such sufferance is due to mala fide or capricious or oppressive act. It can then determine the amount for which the authority is liable to compensate the consumer for his sufferance due to misfeasance in public office by the officers. Such compensation is for vindicating the strength of the law. It acts as a check on arbitrary and capricious exercise of power. It helps in curing

¹⁰⁴ *Id.*, ¶ 6.

¹⁰⁵ *Ghaziabad Development Authority v. Balbir Singh*, (2004) 5 SCC 65.

social evil. It will hopefully result in improving the work culture and in changing the outlook of the officer or public servant. No authority can arrogate to itself the power to act in a manner which is arbitrary. Where there has been capricious or arbitrary or negligent exercise or non-exercise of power by an officer of the authority, the Commission/Forum has a statutory obligation to award compensation. If the Commission/Forum is satisfied that a complainant is entitled to compensation for loss or injury or for harassment or mental agony or oppression, then after recording a finding, it must direct the [statutory] authority to pay compensation and then also direct recovery from those found responsible for such unpardonable behaviour.”¹⁰⁶

The Supreme Court emphatically reiterated therefore that the fact of origination of an authority in a statute could not exculpate it from the rigours and standards of law to which non-statutory entities would be subjectable, and it would therefore not preclude its subjection to the 1986 Act. Consumer Dispute Redressal Commissions therefore have the jurisdiction to adjudicate upon the rendition of services, or the lack of rendition thereof, by statutory authorities. The decision of the Court in Bihar School Examination Board therefore, is in contravention of the principle established by itself in these two decisions. Further, the narrow interpretation in Bihar School Examination Board, of the ratio of Lucknow Development Authority, insofar as its holding that statutory authorities were subjectable to the 1986 Act, was only applicable in cases pertaining to housing construction can be conclusively taken as erroneous, based on the language of the aforementioned paragraphs, from Lucknow Development Authority, as well as the interpretation of the ratio thereof, in other cases, evidencing the generality of its holding.¹⁰⁷ Lucknow Development Authority has been relied upon by courts in cases involving statutory authorities other than development authorities, where authorities and the discharge of their statutory functions and duties were held to be well within the purview of the 1986 Act. For instance, in *Regl. Provident Fund Commr. v. Shiv Kumar Joshi*,¹⁰⁸ the Provident Fund Commissioner, a statutory authority, was held to be amenable to the provisions of the 1986 Act; and the duties performed by the Commissioner under the Employees Provident Fund Scheme, as well as the various facilities provided thereunder to constitute service as defined in the 1986 Act.¹⁰⁹ The intent of the Court in Lucknow Development Authority was to eschew the public-private distinction in general, not just in respect of services

¹⁰⁶ *Id.*, ¶ 11.

¹⁰⁷ See Jodhpur Development Authority v. State Consumer Disputes Redressal Forum, 2011 SCC OnLine Raj 1864 : ILR (2012) 1 Raj 497, ¶¶ 32-33.

¹⁰⁸ Regl. Provident Fund Commr. v. Shiv Kumar Joshi, (2000) 1 SCC 98.

¹⁰⁹ *Id.*, ¶ 12.

appertaining to housing construction is evident from their quotation in the subsequent part of the judgment, with approval, the following paragraph:

“It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between government and non-governmental functional, but the nature and form of the activity in question.”¹¹⁰

It is evidently clear therefore that the Supreme Court’s interpretation in Bihar School Examination Board of Lucknow Development Authority, was completely erroneous, and proceeded on a misapprehension of the substantive entailment thereof.

Admittedly, it would have been an entirely different situation, had in Bihar School Examination Board the Court sought to overrule Lucknow Development Authority, as it very well could have, both decisions having been rendered by a bench of the same numerical strength. The problem arises because of the attempt by the Court in Bihar School Examination Board, to arbitrarily whittle down the import of the ratio of Lucknow Development Authority, despite such narrow interpretation being flagrantly in contravention to the import of Lucknow Development Authority, as is evincible from a perusal of the text of the judgment thereof.

While construing a definition, courts must neither arbitrarily expand the scope of the definition beyond its natural import, and therefore subject it to unrestrained expansionism, nor truncate its obvious amplitude, thereby whittling down its scope, just to reconcile it with their subjective perception, philosophy or prejudices. Courts must abstain from on one hand, straining the language of the definition, to accommodate within its scope, something that ordinarily cannot reasonably be accommodated, and likewise, abstain from reading into the provisions such restrictions, which are not contemplated by the statutory language, either in letter or spirit, merely to import into it a limit which they find desirable therein.¹¹¹ In Bihar School Examination Board, the Court tried to interpolate into the definition of service a restriction, on the basis of a distinction it considered to be fit, which distinction however, could not be

¹¹⁰ *Id.*, ¶ 8.

¹¹¹ *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, (1978) 2 SCC 213 (This sentiment was echoed by Justice Cardozo, who observed in this regard: “The judge is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of its ideal of beauty or of goodness.” as cited in *Idul Hasan v. Rajendra Kumar Jain*, (1989) 4 SCC 550 : AIR 1990 SC 678, 8).

traced back to the text of the Act, or the legislative intent behind it, with a view to align the decisions with its preconceived notions, in respect of the matter which arose for adjudication before it.

However, the flaw of the Court's legal reasoning in Bihar School Examination Board aside, its reasoning is questionable on one other ground – it seeks to exempt an entire class of bodies, on the basis of the mode of their origination, from the purview of a social welfare legislation, the basis of which exemption is sought to be justified through recourse to a doctrine, the relevancy of which, to contemporary society, has come under question.¹¹² The distinction is ante-diluvian and obsolete; there is no reason why the state ought to be subjected to a lesser standard, in respect of activities, that it renders – no reason, why lapses ascribable to it be granted concession, that would never be accorded to non-state actors. The feudalistic conception that the sovereign is infallible can bear no merit in a pluralistic society based on democratic principles, where the sovereignty ultimately vests in the citizens of the state.

2. Argument of non-commerciality of education

Another contention which has been given judicial sanction, in respect of supporting the exclusion of education from amenability to the 1986 Act, is that education is not a commercial activity. This assertion is sought to be supported by three different propositions, viz. first, that education, is at the rudimentary level of a different mettle than trade or business, further that education is inherently not susceptible to commercialisation, and therefore, that it is incorrect to classify it as a commercial activity, second, that the ascription of education as a commercial service, being a commodification thereof, is incongruous with traditionalist ethos of Indian culture, and therefore that, education is not, and further ought not to be classified as a service, third, that educational institutes, not being commercial enterprises, and the educational activities performed thereby, not being rendered with a view of profiteering, such educational activities do not constitute commercial service, nor are the institutes performing them constitutive of providers of commercial service providers, fourth, that education is not capable of marketisation, and thus is not classifiable as a commercial service. The cumulative effect of these propositions is that services relating to education, not being commercial services, are thus not within the scope of the 1986 Act, and therefore, neither educational institutes,

¹¹² See Amardeep Garje, *Sovereign Immunity – No Defense in Private Law*, available at <http://ssrn.com/abstract=1347948> (Last visited on February 15, 2016) ("It is being gradually realized everywhere that the concept of sovereign immunity is an anachronistic and outdated justification in a republican nation which guarantees life and liberty as well as rule of law. There seems to be no reason why the State should not compensate the victims of its actions under sovereign powers, because the benefit of such action accrues to all citizens, and it is highly unfair to put the burden on just a few."); See also, Smriti Pradhan, *Immunity to Sovereign Functions*, available at: <http://www.cci.gov.in/images/media/ResearchReports/SmritiPradhan.pdf> (Last visited on February 15, 2016).

nor the educational activities they perform can be said to be amenable to the provisions of the 1986 Act. These assertions are demonstrably both logically fallacious and legally erroneous. The fallacy of these arguments is fairly self-evident – they suffer from fallacies of weak induction, and some of them are based on manifestly false assumptions; nevertheless, they shall be rebutted in detail in this section of the essay. Funnily enough, some of these very contentions had been advanced before the Supreme Court, in *Bangalore Water Supply & Sewerage Board v. A. Rajappa*¹¹³ ('Bangalore Water Supply'), to support the preclusion of educational institutes from being classified as industry, all of which arguments were squarely rejected by the Supreme Court as being flawed.

In Bangalore Water Supply, the Supreme Court had considered among other things, the classifiability of educational institutes as 'industry' as defined in §2(j) of the Industrial Disputes Act, 1947, while determining the import of the aforementioned term. Holding education to be an industry, the Court rebutted multiple lines of reasoning, which had been propounded in its earlier decisions, to buttress the conclusion that education is not classifiable as an industry. The rebuttals of the Court therein, can be extrapolated in their entirety to the present issue. In respect of the contention that education is not a commercial activity, but rather a noble vocation, and that therefore, it could not be classified as an industry,¹¹⁴ the Court observed:

“... [T]he ground accepted by the Court is that education is a mission and vocation, rather than a profession or trade or business. The most that one can say is that this is an assertion which does not prove itself. To christen education as a mission, even if true, is not to negate its being an industry. We have to look at educational activity from the angle of the Act, and so viewed the ingredients of education are fulfilled. Education is therefore an industry and nothing can stand in the way of that conclusion. It may well be said by realists in the cultural field that educational managements depend so much on governmental support and some of them charge such high fees that schools have become trade.... Whether this will apply to universities or not, schools and colleges

¹¹³ Bangalore Water Supply & Sewerage Board v. A. Rajappa, (1978) 2 SCC 213.

¹¹⁴ N. Taneja v. Calcutta District Forum, 1991 SCC OnLine Cal 241 : AIR 1992 Cal 95, ¶ 19 (The Calcutta High Court observed:

“[I]mparting of education is in the nature of a mission or a noble vocation. A teacher educates children, he moulds their character, builds up their personality and makes them fit to become a responsible citizen. Children grow under the care of teachers the clerical work, if any they may do, is only incidental to their principal work of teaching... [T]he very conception of the contract cannot be forced into [1986 Act] so far as education, teacher and student are concerned.”).

have been accused, at least in the, private sector, of being tarnished with trade motives.”¹¹⁵

The Court thus held that even if the contention that education is a mission or a vocation, and not a commercial enterprise, (which contention is demonstrably false, as will be evidenced from the next paragraph specifically designated with the elucidation of its falsehood), that in itself does not either preclude the classifiability thereof as an industry, nor does it negate its industrial character, where it satisfies the three prong test to determine whether an activity constitutes an industry.¹¹⁶ In other words, the mere absence of profit motives behind the performance of the impugned activity does not preclude its classifiability as an industry, nor does it negate its industrial character, where it satisfies the three prong test. The presence or absence of a profit motive in performing any activity is extraneous and irrelevant to the determination of whether an activity is classifiable as an industry.¹¹⁷ It is the character of an activity, not the motive which occasioned its performance, which is the determinant of such classifiability.¹¹⁸ The same can be stated even in respect of educational institutes and their educational activities. Therefore, where an educational institute performs an activity, the nature of which manifestly corresponds to that of a service, in that it confers a benefit upon the recipient thereof, the mere fact that it lacks a profit generating motive shall not affect the status of it being a service. This is because, there is neither a prescriptive, nor a proscriptive requirement of the motive of profit generation in the definition of service, nor can such a requirement be read into the same, as being a reasonable implication. Moreover, the definition does not contain any stipulation of commerciality, in respect thereof either. The singular mention of commerciality in the aforesaid definition is in the exclusionary clause thereof, and in respect of the purpose

¹¹⁵ *Id.*, ¶ 98-99.

¹¹⁶ *Id.* (The Court had constituted a three prong test or “triple test” to determine whether an activity constitutes for the purpose of the 1947 Act, an industry as defined in §2(j) thereof. The three prongs were: Firstly, the activity should be undertaken in a systematic and organised manner, secondly, that the activity should involve the cooperation of the employers and the employees, and thirdly, that the activities should yield material goods or services, for the utilisation of society).

¹¹⁷ *Id.*, 63 (The Court observed:

“The ruling tests are clear.....The ‘analogous’ species of quasi-trade qualify for becoming ‘industry’ if the nature of the organized activity implicit in a trade or business is shared by them... The pith and substance of the matter is that the structural, organizational, engineering aspect, [and] characteristic business methods (not motives) in running the enterprise, govern the conclusion. Presence of profit motive is expressly negated as a criterion. If the nature of the activity is para-trade or quasi-business, it is of no moment that it is undertaken in the private sector, joint sector, public sector, philanthropic sector or [the] labour sector. It is [an] industry...”).

¹¹⁸ *Id.* (Another flaw in this line of reasoning (that education is a mission or vocation, as opposed to a trade or an industry) exists, which the Court did not expressly address - it is premised upon the assumption that a mission and an industry are mutually exclusive, and incapable of coexistence; that an activity cannot simultaneously be both a vocation and an industry. Such an assumption is manifestly false. One certainly can pursue simultaneously an altruistic endeavour, coupled with a profiteering motive).

for which the service is availed of, whereby services, which are hired for a commercial purpose are excluded from the purview of the 1986 Act.¹¹⁹ Thus, the qualification of commerciality is not in respect of the rendered services themselves, but in respect of the purposes for which they are hired or availed of. Nonetheless, courts have held that services in respect of the rendition of which complaints can be instituted under the 1986 Act, ought to be of a “commercial” or “trade-oriented nature”.¹²⁰ However, it has been clarified that the term commercial as used in respect of services means solely that its rendition is in reciprocity to consideration, i.e. the service is not gratuitous.¹²¹ Therefore, the term commercial used in relation to services does not connote the presence of any profit motive occasioning the rendition of such services. In any event, it has been held by the Supreme Court in Lucknow Development Authority, that even such activities, which though not commercial in the same sense of day-to-day buying and selling activities, as are undertaken by laypersons, resulted in the conferment of some benefit on the consumer, are service for the purpose of the 1986 Act. It is thus inescapably evident that educational activities that are rendered for consideration irrespective of the presence or absence of profiteering motives behind the rendition thereof, or the commercialisation or lack of it thereof, are classifiable as service, as defined in the 1986 Act.

In any event, the premise that education is inherently incapable of being a trade is manifestly false. Education thrives on private enterprise and commercialisation.¹²² A large number of private schools and universities function, many of which are premised upon profit motives. This is especially true in a country like India, where, given the almost manic competition in the employment market, ascribable to its vast population and the massive deficit in the number of available jobs, prospective employees need or want to secure every conceivable advantage that they can, over the next person, notwithstanding the diminutiveness of such advantages, to increase their employability, to cater to which a plethora of coaching centres and/or tuition centres have burgeoned, which thrive on preparation for competitive exams to secure.¹²³ Such

¹¹⁹ The sole mention of the word ‘commercial’ in the definition of ‘service’ as defined in §2(1)(o) of the 1986 Act or ‘consumer’ as defined in §2(1)(d) of the 1986 Act is in respect of the purpose for which such a service was hired. For the definition of ‘service,’ refer to Part III of the article.

¹²⁰ See Regl. Provident Fund Commr. v. Bhavani, (2008) 7 SCC 111 (The Court observed:

“The combined reading of the definitions of “consumer” and “service” under the Act and looking at the aims and objects for which the Act was enacted, it is imperative that the words “consumer” and “service” as defined under the Act should be construed to comprehend consumer and services of commercial and trade oriented nature only. Thus any person who is found to have hired services for consideration shall be deemed to be a consumer...”).

¹²¹ Bangalore Water Supply & Sewerage Board v. A. Rajappa, (1978) 2 SCC 213 (Admittedly, this is an inference, though an inescapable one).

¹²² However, while privatisation is ubiquitous in all aspects of the education sector, there is a statutorily imposed bar, in respect of the higher education sector, for profiteering.

¹²³ Central Academy Educational Society v. Gorav Kumar, (1996) 3 CPJ 230, (the SCDRC observed, in this regard:

extra-school coaching centres aside, even in the arena of conventional educational institutes (viz. schools and universities), the private sector, the primary object of which is profit generation and profit maximisation, plays a mammoth role.¹²⁴ 25 per cent of all K-12 schools in India are private schools, accounting for a 40 per cent share in student enrolment.¹²⁵ The private sector plays a much greater role in the higher education sector, constituting over 63 per cent of the higher education institutes, accounting for a 52 per cent share in student enrolment,¹²⁶ which share has increased and shall continue to increase with the progression of time.¹²⁷ It is thus abundantly and irrefutably clear from these statistics, that private players are the norm rather than exception in the education sector and that privatisation of higher education is now an irreversible trend in India.¹²⁸ The fact that it is a ‘social good’ neither can, nor does in fact make it innately any less susceptible to commercialisation or penetration by the private sector. Ironically enough, India has a much higher rate of privatisation in the education sector, compared to developed countries such as the United States

“Operation of Coaching of preparatory classes has become highly marketable in the society with high charges even taking admission on capitation fee or donations. It may be covered under the term “service” as defined in the [1986] Act. However, charging only a nominal fee will not constitute “service” for consideration.”).

See also, Anand Sudharshan & Sandhya Subramanian, *Private Sector’s Role in Indian Higher Education*, 179, 2012, available at http://www.idfc.com/pdf/report/2012/Chapter_16.pdf (Last visited on February 15, 2016) (The authors observe:

“Over last two decades, a rapidly growing Indian economy has led to a huge demand for an educated and skilled labour force. To meet the manpower needs of a dynamic economy, not surprisingly, private enterprises have cropped up to complement public educational institutions, plagued as they are by capacity constraints. In fact, over the past few decades, it has been the private sector that has really driven capacity-creation in Indian higher education. Private presence in higher education got a fillip starting the mid-1980s, coinciding with the reducing investment by Government of India and the states. In 2001, when private unaided institutes made up 42.6 per cent of all higher education institutes, 32.8 per cent of Indian students studied there. By 2006, the share of private institutes went up to 63.2 per cent and their student share went up to 51.5 per cent.”).

¹²⁴ Sudharshan & Subramanian, *id.*

¹²⁵ FICCI-EY Report, *Private Sector’s Contribution to K-12 Education in India Current Impact, Challenges and Way Forward: March 2014*, 9, 28-30, available at <http://www.ficci.com/spdocument/20385/ey-ficci-report-education.pdf> (Last visited on February 15, 2016); (‘FICCI-EY Report 1’) (The report further noted that the share of private schools enrolment at the primary level is 30.6% and 37.1% in upper primary levels. Secondary education accounts for 54.4% in the junior secondary level and 60.3% in the senior/higher secondary level. The statistics and their breakdown can be found in the report. At this juncture it is imperative to note that private institutes are not necessarily always completely independent entities).

¹²⁶ FICCI-EY Report, *Private sector participation in Indian higher education FICCI Higher Education Summit 2011*, (‘FICCI-EY Report 2’), 19-20, available at <http://www.blueshift.net.in/gallery/Education%20Report.pdf> (Last visited on February 15, 2016) (In fact, private penetration in some professional courses like engineering, hotel management, physiotherapy, pharmacy etc. where the majority of the institutions offering such programs have been established by the private sector is in excess of 90 percent of the total market share); *See also*, Sudharshan & Subramanian, *supra* note 123.

¹²⁷ *Id.* (Private schools are growing at a CAGR of 4% as opposed to public schools which are growing at a CAGR of 1.5%. For example, in a span of 6 years (2006 to 2012), private schools’ enrolment share in rural India has increased from 18.7% to 28.3%).

¹²⁸ Sudharshan & Subramanian, *supra* note 123.

or the United Kingdom.¹²⁹ To aver therefore, that education is beyond the pale of commercialisation, would be a statement rooted in a deep-seated and unclenching ignorance. Factual incorrectness aside, the view that education either inherently is or ought to be ‘protected’ or ‘shielded’ from commercialisation or privatisation is a nefarious one, detrimental to the amelioration of the education sector.¹³⁰ Some of the best educational institutes in the world, be it schools or universities are privately run for profit. The notion therefore, that the permissibility of profit maximisation in the education sector would necessarily occasion the dilution in the quality of the education being provided is manifestly false. Thus, the line of argument in this regard stands adequately rebutted.

Another contention advanced in respect of holding education as not being a commercial activity is that education is an activity, the primary concern of which is to ‘develop the personality of pupils’, imbuing in them a ‘rational progressive outlook on life’, and to refer to it as an industry, would a grotesque mischaracterisation and vulgarisation incongruous with the social perception of education. This line of reasoning was articulated in *Unni Krishnan, J.P. v. State of A.P.*¹³¹ where the Supreme Court observed:

“Education has never been commerce in this country. Making it one is opposed to the ethos and traditions and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since time immemorial. It has been treated as a religious duty.”

This sentiment has been echoed by the Madras High Court in *University of Madras v. Union of India*.¹³² The Court there, after waxing eloquent about how some poets in ancient India regarded education as being a divine activity, and quoting a plethora of judicial decisions of the Supreme Court holding education to not be classifiable as a trade-oriented activity, proceeded to paint the following romanticised picture of education:

“The function of a teacher is not merely to deliver lectures in a class room, but to bring out the talent of the student, build up his character and develop him into a full person. That is why it said that a person blossoms into a full man only by the blessings of a teacher. Educational institutions should be interested in developing the personality of the students. The relationship of ‘alma mater’ and the ‘alumni’ can never be

¹²⁹ *Id.*, 26 (of course a large part of this is ascribable to the significantly higher population count of India, as compared to the US or the UK).

¹³⁰ FICCI-EY Report 2, *supra* note 126.

¹³¹ *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645.

¹³² *University of Madras v. Union of India*, 1994 SCC OnLine Mad 501 : (1995) 2 MLJ 367.

equated or even compared to that of a trader and a consumer. The expression ‘alma mater’ means foster mother while ‘alumnus’ means foster child. It may be that unscrupulous men might have attempted to make a business out of education and convert the institutions into teaching shops. But the Indian Legislature has never attempted to do so; nor has the judiciary ever allowed it. Courts in this country have always been vigilant in weeding out the “Masked Phantoms” established as business ventures from the field of education.”¹³³

Likewise, in N. Taneja, the Calcutta High Court observed:

“[T]here is no contract of personal services as far as the teaching of a student in an educational institution is concerned... [I]mparting of education is in the nature of a mission or a noble vocation. A teacher educates children, he moulds their character, builds up their personality and makes them fit to become a responsible citizen. Children grow under the care of teachers... [T]he very conception of the contract cannot be forced into the [1986] Act so far as education, teacher and student are concerned.”

The implication of such a line of reasoning has been that education is not classifiable as a service as defined under the 1986 Act. In response to a similar contention advanced before it, in respect of the classifiability of education as industry, the Supreme Court in Bangalore Water Supply observed:

“The next argument which has appealed to the Court in that case is that education develops the personality of the pupil and this process, if described as industry, sounds grotesque. We are unable to appreciate the force of this reasoning, if we may respectfully say so. It is true that our social values assign a high place of honour to education, but how does it follow from this that education is not a service is not easily discernible. The pejorative assumption seems to be that “industry” is something vulgar, inferior, disparaging, and should not be allowed to sully the sanctified subject of education. In our view, industry... embraces even the most sublime activity.”¹³⁴

Thus, the Court held that the mere fact that an activity is accorded respect bordering on reverence by society does not negate its industrial

¹³³ *Id.*, ¶ 28.

¹³⁴ *Id.*, ¶ 113 (The Court observed: “Why is it strange to regard education as an industry? Its respectability? Its lofty character? Its professional stamp? Its cloistered virtue which cannot be spoiled by the commercial implications?”).

character, where on facts it must be regarded as an industry, by virtue of it fulfilling the requisite criteria. It is the character of an activity, or its nature, and not the social perception thereof, which determines the classifiability of that activity as an industry.¹³⁵ Mere societal distaste towards the commodification of education and the consequent perceived vulgarisation does not negate its industrial character; the subjective social perception as to the classifiability of an activity as an industry cannot override the objective determination thereof.¹³⁶ Thus, the mere fact that christening education to be a service of a commercial nature, capable of being marketed is in some way or the other is incongruous with or repugnant to the societal perspicacity in respect of education cannot justify the preclusion of education from being classified as a service.

There is no logical basis for the traditional view that education is or otherwise ought to be immune to the ‘evils’ of commercialisation; as has been observed in the rebuttal to the previous argument, private enterprise and commercialisation are the backbone of education in contemporary society. To say therefore that education is, either due to some innate quality, or due to societal reverence (which would purportedly decline due to the purported trivialisation of education that would surely ensue consequent to the commodification of education) is nothing short of an exercise in futility to cling on to a romanticised version of education which is grossly inconsistent with reality. It is high time such notions be discarded in favour of more modern and progressive conceptions in respect of sectors which were not regarded as industrious in traditional perspicacity. Therefore, the argument that the incongruity of the commodification of education with traditionalist societal perspicacity in respect of education precludes the classifiability thereof, as a service, fails, and stands rebutted.

3. Argument of fees not amounting to consideration

The third assertion in respect of education not being a commercial activity is that the provision of educational services is not in reciprocity to consideration and that therefore, such services fall within the pale of the exclusionary part of the definition of service under the 1986 Act.

Educational institutes charge students enrolled in them, a huge amount of fees, for various purposes, in respect of their primary, secondary and tertiary educational activities, upon the payment of which, only, can the student avail of such services. An essential question, upon the determination of which is contingent, the determination of the classifiability of such educational activities as service as defined in the 1986 Act, is whether the fees payable or paid by the student, or on his/her behalf, by a third person to educational institutes

¹³⁵ *Id.*, ¶ 122.

¹³⁶ *Id.*, ¶ 15.

respecting the rendition of educational activities thereby, constitutes valuable consideration, and whether therefore such student and/or his/her sponsor can be regarded as consumers as defined in the 1986 Act.

Courts have considered this issue in a catena of cases though mainly in respect of examinations. While the Supreme Court has, in the two cases discussed above,¹³⁷ held such fees payable as not constituting consideration, the law in that respect was never settled in a dispositive manner – with there being multiple decisions, which held that such fees payable to be consideration, as well as not to be consideration. A determination shall be made here, as to which view, i.e. that the fees payable in respect of educational activities rendered by the educational institutes amounts to consideration, or the opposite view, that it does not, is the more sound view, from a legal and logical standpoint.

Before determining the issue of whether the fees payable and thus paid, by the student, or on behalf of the student, amounts to consideration, for the purposes of the 1986 Act, it is imperative to first define consideration. The 1986 Act does not expressly define the term consideration. However, given that the consideration referred to therein is in respect of goods and services, the provision of which to the user or potential user thereof, is consequent to a contract between the purchaser of the goods or services, it would be apt to refer to the definition provided for the term, under the Indian Contracts Act, 1872 ('1872 Act'). §2(d) of the 1872 Act defines the term consideration as an act or abstention, by a party, or a promise thereof, at the desire of the other party to the contract. In other words, it is the price for which the performance sought by the first party from the other party, is bought, by the first party, and vice versa.¹³⁸ It is thus the quid-pro-quo of a promise. It is essential that the consideration furnished have some value, in that it entails the transference of some benefit, right, interest or profit from one party, at the expense of that party, to the other party.¹³⁹ However, it is neither necessary for the consideration furnished to be pecuniary,¹⁴⁰ nor is it necessary for it to be commensurate in value to the performance sought from the other party.¹⁴¹ Thus, for an act or abstention to be regarded as consideration, it must fulfil the following criteria, namely: first, it must entail the transference of an ascertainable, if not quantifiable benefit, having at least a nominal value, from the party desiring a specific performance,

¹³⁷ Bihar School Examination Board v. Suresh Prasad Sinha, (2009) 8 SCC 483; Ghaziabad Development Authority v. Balbir Singh, (2004) 5 SCC 65.

¹³⁸ The Indian Contract Act, 1872, §2(d).

¹³⁹ Eleanor Thomas v. Benjamin Thomas, (1842) 2 QB 851, 859 : 114 ER 330; Currie v. Misa, (1875) LR 10 Ex 153, 162.

¹⁴⁰ Chappell & Co. Ltd. v. Nestle Co. Ltd., 1960 AC 87 : (1959) 3 WLR 169 : (1959) 2 All ER 701 HL(E); Lipkin Gorman v. Karpnale Ltd., (1991) 2 AC 548 : : (1991) 3 WLR 10 : (1992) 4 All ER 512 (however, while there is no threshold in respect of the value of the consideration furnished, it is essential that the consideration furnished be real, and not illusory).

¹⁴¹ *Id.*

to the party from which such performance is sought and, second, such transference must be at the behest of the party, requiring as a precondition to the performance sought, the completion of such act or abstention.

In light of the above exposition of the definition and concept of consideration, the impugned issue can be determined. It is evident that the fees payable or paid are requisites, upon the payment of which is contingent, the rendition, by the educational institute, of the educational activities. It was held in Bihar School Examination Board that the fees paid in respect of board examinations did not constitute consideration, in support of which, the Supreme Court advanced the argument, that the fees paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.¹⁴² This argument is specious; the concept of privilege requires that there be a modicum of exclusivity, in that the conferment of benefit, which it entails, must be in respect of only of a select group.¹⁴³ This is decidedly not the case in respect of students, who participate in the public board examinations; any student enrolled in a school which is affiliated to the concerned board, can upon tendering the requisite fee, participate in such exams conducted by that examination board. The mere fact of affiliation to the board cannot be regarded as conferring the requisite exclusivity, to the transaction, for it to be christened as being privileged. The use of the term privilege here is therefore, a misnomer. Even if it were not so, i.e. if by paying the examination fee, the student were to be paying for the privilege of writing the exam, that does not preclude such examination fee from being classified as consideration, if on the test of its nature, such fees can be classified as consideration. It is evident that the remission of the requisite fees, in respect of being allowed to participate in the examinations is at the desire of the examination board and such remission is a precondition to being allowed to participate in the examination, and having one's answer sheets evaluated, results published etc. The inescapable conclusion follows therefore, that the fees payable and paid in respect of examinations does constitute valid consideration. The National Commission held, in a string of decisions, before Bihar Board of Secondary Education, that the performance by the educational institutes of activities in respect of examinations cannot be regarded as services provided for hire, and therefore, fees remitted in respect thereof, cannot be regarded as consideration; it did not, however, explain the reasons behind such a conclusion. There is not any – as has been demonstrated, fees payable and thus paid, in respect of examinations clearly constitute consideration. The same can be said of fees, payable or paid to any educational institute respecting the rendition of educational activities by it.

¹⁴² *Id.*, ¶¶ 10, 11.

¹⁴³ Merriam-Webster's defines privilege as being "a right or benefit that is given to some people and not to others"; MERRIAM-WEBSTER'S DICTIONARY, available at <http://www.merriam-webster.com/dictionary/privilege> (Last visited on February 15, 2016).

The Supreme Court rightly observed in this regard, in *Buddhist Mission Dental College and Hospital (I) v. Bhupesh Khurana*:¹⁴⁴

“Imparting of education by an educational institution for consideration falls within the ambit of ‘service’ as defined in the [1986 Act]. Fees are paid for services to be rendered by way of imparting education by the educational institutions. If there is no rendering of service, question of payment of fee would not arise. The complainants had hired the services of the respondent for consideration so they are consumers as defined in the [1986 Act]”

The obvious conclusion which thus follows, is that the student, and/or his/her parent, guardian or sponsor, as the case may be, are consumers of the services provided by the educational institutes. Thus, all four of the subsidiary arguments of the argument of non-commerciality stand adequately rebutted.

4. Argument of non-accrual of benefit

One of the Supreme Court’s key averments in Bihar School Examination Board, to buttress its conclusion that the activities of the Board in respect of examinations are not services as defined in §2(1)(o) of the 1986 Act, was that conducting and administration of exams, evaluation of answer scripts, publication of results subsequent to evaluation, issuance of certificates etc. by educational institutes did not result in the conferment of any benefit upon students.¹⁴⁵ This averment is manifestly false, and presumably based on an incorrect and narrow construction of the term benefit – perhaps as being restricted only to benefits of a pecuniary kind. One would think that the Supreme Court ought to be condoned for its error due to the absence of a precise definition of the term benefit, but such condonation ought not to be easily forthcoming. It is true, as noted earlier in this article,¹⁴⁶ that the term benefit lacks a precise definition – neither has it been defined in the 1986 Act itself, nor have courts, through the process of judicial interpretation, fashioned a definition for it; while the Supreme Court did hold, in Lucknow Development Authority, that the ultimate test, to determine whether an activity constituted service is whether such activity entailed the conferment of some benefit on the person(s) in respect of whom it was rendered, it neither defined the term benefit nor made any pronouncement as regards the nature of the benefit that needs to be conferred by the activity, for it to be classifiable as service; subsequent decisions

¹⁴⁴ *Buddhist Mission Dental College and Hospital (I) v. Bhupesh Khurana*, (2009) 4 SCC 484, ¶ 35.

¹⁴⁵ *Id.*, ¶13 (The Court observed: “No ‘benefit’ is conferred nor any ‘facility’ provided by the Board for any consideration.”).

¹⁴⁶ See Part III of the article.

too failed to step up and expound upon the nature of the benefit averred to. However, given the extraordinary amplitude of service and other expressions under the 1986 Act and its avowed objective and purpose, it is only right, as I had argued before, that a commensurate width be accorded to the definition of the concept of benefit; thus, the term benefit must necessarily be taken to mean benefits of all kinds – tangible, intangible, pecuniary and non-pecuniary, as well as conditional benefits.¹⁴⁷

This line of reasoning is inescapable. On the basis of this definition, it is amply evident that the activities of an institute, in respect of examinations, when performed surely and irrefutably result in the conferment of benefits upon students. For one, the certificate or exam transcript, as the case may be, evidences the marks secured by a person in the examination, which in turn determines, to a large extent the career prospects of a person, during the initial stages of his/her professional career. In a country like India, where a severe, almost crippling emphasis is placed on the marks secured in examinations,¹⁴⁸ where a marginal difference in test scores can make or break a person's career or at the very least, prospect for admissions in some of the more competitive colleges, even the most minor error in stating the marks secured by the person, can entail severe consequences. Educational institutes therefore, by performing activities relating to examinations, do confer upon students, the benefit of evaluating their competence, providing a credible certification in respect of the same for the utilisation of admissions officers of higher institutes, recruitment officers of companies etc. to determine the suitability of the applicant in their institute and company respectively. This benefit, for benefit it is, is no less of a benefit, due to the fact that it does not itself carry a monetary worth, in that its worth cannot be quantified in pecuniary terms. The Court's emphatic averment therefore, that in performing activities respecting examinations, educational institutes do not perform service, is demonstrably wrong; the contention to that effect therefore, stands adequately rebutted.

5. Argument of non-inclusion in the inclusionary part

It was held in N. Taneja that services in relation to education are not classifiable as services, as education was not expressly mentioned in the inclusionary part of the definition in §2(1)(o) of the 1986 Act. This view is manifestly false, as is evident from the interpretation in respect of the scope of the inclusionary part of the definition.¹⁴⁹

¹⁴⁷ For a more complete definition of the term 'benefit', see Part IX of this article.

¹⁴⁸ See The Times of India, Cutoffs in Bangalore Colleges climb steadily, June 29, 2013, available at <http://timesofindia.indiatimes.com/home/education/news/Cutoffs-in-Bangalore-colleges-climb-steadily/articleshow/20827791.cms> (Last visited on February 15, 2016).

¹⁴⁹ See *supra* text accompanying notes 28, 30.

The mere fact that education is not explicitly mentioned in the definition does not cause education to cease to be a service; the inclusionary part is only illustrative and not exhaustive. The definition is wide, and brings within its purview services of any description, including those which are not specifically enumerated therein, as long as they have the requisite elements of a service. Even if ex hypothesi, services in relation to education do not fall within the ambit of the inclusionary part, they still fall within the main part of the definition, being activities, which confer benefit upon the persons in respect of whom they are rendered. This line of reasoning adopted by the Calcutta High Court in N. Taneja has thus been rightly rejected as being an invalid ground in support of the exclusion of services in relation to education from the purview of the definition, by subsequent decisions of Consumer Dispute Redressal Commissions and other High Courts. For example, in Gorav Kumar, the Kerala High Court held, rejecting as being erroneous such a line of reasoning:

“.....[T]he definition of “service” under §2(1)(o) brings within its ambit service of any description which is made available to potential users and embraces matters which are not specifically enumerated in the definition as well. In this view, the fact that education is not mentioned in the clause does not make it anything other than “service” if on facts it falls within the main definition.”

Likewise, it was held by the Haryana State Commission, in *A.P.J. School v. K.L. Galhotra*¹⁵⁰:

“Merely because education has been not in terms mentioned in the definition is no reason for holding that it is consequently excluded from its scope. Whenever education is imparted for consideration, it is obvious that there exists a quid pro quo for providing of the amenity of education on one hand and the monetary recompense, therefore on the other. On larger principle there does not seem any logical reason for excluding education from the ambit of the definition under the Act.”

Having thus established conclusively, the erroneousness of the four major arguments promulgated in respect of the exclusion of educational institutes and the activities rendered by them, I shall now proceed to address the remaining arguments, all of which are minor, in support of such exclusion.

¹⁵⁰ A.P.J. School v. K.L. Galhotra, (1992) 2 CPJ 807.

6. Miscellaneous arguments

The four major arguments aside, there are a few other minor arguments that had been propounded, in support of the exclusion of educational institutes and the educational activities performed by them from the purview of the 1986 Act. Four arguments have been advanced in this respect which are – first, that the participation of students in examinations being a volitional act, the activities appertaining to the examination, as performed by the institute are not classifiable as services, second, that neither educational activities, nor the educational institutes providing them were intended to fall within the pale of the 1986 Act by the legislature, third, that the 1993 Amendment to the 1986 Act having not included education within the inclusionary clause of the definition of service was further indication of the legislative intent to exclude education from the pale of the 1986 Act, and fourth, that the relationship of student-teacher, not entailing the transference of property between the student and the teacher, is not classifiable as a service. All four of these arguments shall be rebutted below:

In *Maharshi Dayanand University v. Ruchika Jain*,¹⁵¹ it was held that, participation in various examinations, conducted either by boards of examination or universities, was at the volition of the student participating in such examinations, the purpose of such participation by the student, being to evaluate his/her competency and knowledge in the fields, on which he/she is writing exams, and consequently obtaining certification declaring his competency therein, activities of such boards or universities, in respect of examinations cannot be regarded as services. This line of reasoning is absurd; it implies that the volitional element implicit in taking examinations precludes activities in respect of examinations from being classified as a service. Most services are hired or availed of voluntarily by persons desirous of having such services rendered in respect of either themselves or third persons; therefore if volition was a factor, the exercise of which, would preclude the classifiability of that performance as a service, then almost every service, being the product of the exercise of the volition of the person hiring the service, would not be a service within the meaning of the Act, which is both anomalous and counterproductive to the enactment of a definition with as wide an amplitude, as that of service, as defined in the 1986 Act.

In *University of Madras v. Union of India*,¹⁵² the Madras High Court held that no intent to include educational institutes and educational activities performed by them, within the purview of the 1986 Act was evincible

¹⁵¹ *Maharshi Dayanand University v. Ruchika Jain*, 2006 SCC OnLine NCDRC 43 : (2006) 3 CPJ 343 (NC).

¹⁵² *University of Madras v. Union of India*, 1994 SCC OnLine Mad 501 : (1995) 1 LW 385 : (1995) 2 MLJ 367, ¶ 41.

from the Parliamentary debates, in respect of the 1986 Act,¹⁵³ which sought to support this by averring to the speech of one of the members of the Parliament, wherein he stated the lack of necessity of having a representative of the education sector in the Consumer Disputes Redressal Commissions. However, the premise does not support the conclusion at the slightest. Even if the statement were to be authoritative (which it is not, as I shall demonstrate in the next paragraph), it still does not conclusively, or even moderately, sustain the conclusion that the legislature did not intend to include educational institutes and the educational activities performed by them within the purview of the 1986 Act. Moreover, the Court did not provide any further explanation, opting instead, to merely say that the fact of the Bill of the 1986 Act was grouped with the bills of seven other Bills, related to trade and commerce, was adequate to conclusively evidence the lack of intent on part of the legislature to include education within the purview of the 1986 Act. It is abundantly clear therefore that such a spurious line of reasoning has no merit.

Two other contentions were made in *University of Madras v. Union of India*,¹⁵⁴ which were, respectively, that the amendment to the 1986 Act, in 1993, not having incorporated into the inclusionary part of the definition of service, education, as an express entry therein, was conclusive evidence of the lack of intent of the legislature to include education within the purview of the 1986 Act, and secondly, that the inclusion of activities relating to education within the purview of the 1986 Act would be analogous to including religious activities within the purview thereof. Both of these arguments are spurious. The first argument is patently erroneous – as the amendment averred to, did not effectuate any substantive change in the definition, but merely, made explicit, what was already implicit therein. Thus, the mere omission to specifically include education in the text of the inclusionary part of the definition of service cannot be treated as an indicia of legislative intent to either not include, or otherwise exclude educational activities from the ambit thereof. The second averment, viz. that the inclusion of educational activities within the purview of the 1986 Act would be analogous to including within the purview thereof, activities in relation to religion, rests upon a false equivalence, between religious and educational activities, in as much as the benefits conferred by the two are fundamentally different. Benefits conferred by educational activities are capable of objective ascertainment and evaluation, and are certain; benefits, accruing from the performance of religious activities on the other hand are not capable of objective ascertainment, and are uncertain; their accrual is heavily dependent upon the religiosity and the bent of mind, of the person in respect of whom such activities are performed. Thus, activities in respect of examinations are classifiable as services for the purpose of the 1986 Act, while activities in

¹⁵³ *Id.*, ¶ 35 (“A perusal of the entire debate which followed shows that no Member of the Parliament, including the Minister had any idea of bringing educational institutions and Universities within the sweep of the Bill or the Act.”).

¹⁵⁴ *Id.*, ¶ 38.

respect of religion are not. Therefore, the second argument advanced by the Court also fails.

In N. Taneja, the Calcutta High Court held, among other reasons, that the relationship between a teacher and a student in an educational institute is not one of service provider and consumer, because the student in such a relationship could not be regarded as a buyer of economic goods and further that the teacher in such a relationship could not be regarded as selling anything as there was no transference of property as between the teacher and the student.¹⁵⁵ This argument suffers from two flaws, first, it assumes that educational activities are not services capable of marketisation, the fallacy of which has been demonstrated already,¹⁵⁶ and second, it proceeds on a straw man; no contention was advanced that the impartation of education constituted a transference of property, nor even was a contention advanced that education is goods; what was in fact contended was that education is a service – which by definition lacks a corporeal form, and it is this difference, which distinguishes between goods and services; the question of transference of property never even arose. The Court however, under the pretext of rebutting the argument that was in fact, advanced, rebutted an entirely different argument, which was never put forth before it to begin with, and thus committed the informal fallacy of straw man. This line of reasoning is thus liable to be dismissed.

Having thus rebutted all the arguments that have been propounded in support of the exclusion from the purview of the 1986 Act, educational institutes, and educational activities performed by them, I shall proceed to expound upon the practical implications likely to ensue consequent thereto.

B. PRACTICAL IMPLICATIONS

Its logical and legal fallacy aside, the exclusion of educational institutes and educational activities rendered thereby from the ambit of the 1986 Act is perverse on two other grounds, viz. first, that it deprives aggrieved persons, of the remedy mechanism, the promulgation of which was to redress precisely those grievances, which have now been taken outside their ambit, which if examined to its logical end, evidences the potential to yield manifestly absurd results, and second, that it is flagrantly in contravention to the very purpose, for the securement and actualisation of which, the 1986 Act was promulgated in the first place, which is, to implement a protectionary framework to safeguard the interest of consumers as a class, from acts and omissions stemming from negligence, unscrupulous practices etc. of entities which cater to the needs and desires of consumers.

¹⁵⁵ N. Taneja v. Calcutta District Forum, 1991 SCC OnLine Cal 241 : AIR 1992 Cal 95, ¶¶ 5, 19.

¹⁵⁶ See Part VIII of the article.

The avowed objective of the 1986 Act is to provide cheap, speedy and efficacious remedies to the consumers, through the effectuation of an informal, extra-judicial hierarchy of quasi-courts, which follow a summary trial procedure, as against the protracted procedural requirements entailed by the Code of Civil Procedure, 1908 which are followed by the conventional courts of civil judicature. The Consumer Disputes Redressal Commissions have dispensed with the procedural formalities and stringencies entailed by proceedings in conventional courts of civil adjudicature, in order to dispose of complaints swiftly.

The overarching rationale of the exclusion of educational institutes and the rendition of educational activities from the purview of the 1986 Act is that claims in respect of the same ought to be instituted before and redressed by conventional courts instead. This is precisely the sort of remedy the Supreme Court eschewed, in respect of its ability to address consumer disputes, referring to it as either not moving, or moving ineffectively and inefficiently.

How does it make sense to force the consumer to resort to the highly protracted and tedious, not to mention, expensive conventional litigation, for matters such as the payment of fees or failure to correct mistakes, or failure, in respect of which the cost of litigation in conventional courts would far exceed that of the claim itself, in respect of which such litigation is commenced? What is the rationale in forcing the consumer to endure the rigors of litigious procedure for matters of a simplistic nature, which can be adequately resolved through the summary trial procedure that is adopted by the consumer forums, which were designed to redress those very complaints? To preclude these claims would be to effectively disincentivise consumers, with legitimate complaints from seeking redressal, which they would not attempt to seek, were they to be forced to resort to conventional courts to secure the same, which is already overburdened with the pendency of a catena of undecided cases.

This measure seems incredibly ill thought out and counterproductive and is an exemplification of the tendency of courts to, in respect of some matters, allow themselves to be blinded by their subjective ideologies and perspicacity, and render decisions consistent therewith even if such rendition shall result in *reductio ad absurdum*. The Court has focused more on the labels attached to the activities, or the bodies rendering them, be it the labels of 'statutory and non-statutory' or 'educational', as against the substantive implications of the stance it has so vehemently espoused. This is entirely against the spirit of consumer protection laws, and courts have effectively failed in their role as the protector of the rights of the citizens.

IX. RECOMMENDATIONS

From a perusal of the authorities discussed hereinabove, it seems abundantly clear, how detrimental the exclusion of education from the purview of the 1986 Act is; this detriment is not just owing to the patent legal fallaciousness of the arguments used to buttress such an exclusion, but also due to the plethora of adverse consequences that are bound to ensue as a result thereof. In light of these circumstances, I believe to be necessary the implementation of the following measures, which I have explicated in the form of recommendations, directed at both the legislature and the judiciary.

A. IN RESPECT OF THE LEGISLATURE

In lieu of the multifarious lacunae in the approach of the judiciary in this respect, and the anomaly that has ensued consequent therefrom, it is imperative for the legislature to step in, and remedy the situation. The easiest way to do this is to effectuate an amendment to the definition of service in §2(1)(o) of the 1986 Act in two respects –first, in respect of the main part of the definition, by adding the following words, “which confers or causes to be conferred upon such users, a benefit after the words “potential users,” and second, in respect of the inclusionary part of the definition, by expressly including “education” among the activities enumerated there under. The definition of service, therefore, ought to look like this:

“Service” means service of any description, which is made available to potential users, [which confers or causes to be conferred upon such users, a benefit] and [shall include]¹⁵⁷ the provision of facilities in connection with banking, financing, insurance, [education] transport, processing, supply of electrical or other energy, board 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.

Furthermore, the term ‘benefit’ should be defined in a broad manner, for example

“benefit” means any good, helpful or favourable circumstance, effect, condition or result, which accrues or is capable of accrual, in respect of the user of services, including, but not restricted to pecuniary, non-pecuniary, conditional, and intangible benefits, but excluding benefits of a purely

¹⁵⁷ As opposed to ‘including’ to provide a more cogent structure.

spiritual kind, or of such kind, the evaluation of the manifestation of which, is or would be unduly hard or impossible."

This definition interpolates the substantive elements of some of the definitions averred to earlier in the essay. The definition of benefit is absolutely necessary to clarify the nature of the benefit, the conferment by an activity of which can sustain a conclusion as to the classifiability of that activity as a service, as defined in the Act, and preclude courts from holding there to be no benefit, which accrues to the persons, in respect of whom the service is rendered, on spurious lines of reasoning, as in of Bihar School Examination Board, when a benefit, objectively ascertainable does in fact accrue in respect of that person.

B. IN RESPECT OF THE JUDICIARY

Legislative amendment is often a protracted and time consuming process; thus, in the period that shall elapse, between the present and such time, when the legislature, if at all, promulgates any or all of the amendments recommended above, the judiciary must step in and to the extent possible, remedy the state of the law in this respect. To that end, I make the following recommendations in respect of the judiciary: first, that it must formulate, and not necessarily in the context solely of consumer protection law, but even in a more general fashion, a proper definition of educational activities; the three tier definition of educational activities propounded at the outset of this essay, in Part II hereof, is an ideal candidate, if I may humbly say so, and can be adopted verbatim. This would enable decisions rendered in respect of educational activities of one kind to be extrapolated as carrying precedential value, respecting other activities of the same class of educational activities thereby, eliminating one of the main problems stemming from the lack of a precise, well delineated definition; second, that the Supreme Court, constitute a bench of at least five judges, and consider the tenability of its stance, in light of the rebuttals provided herein, to the various arguments, which have thus far found judicial sanction. It is fervently hoped that the Supreme Court reverse the trend of excluding educational institutes and educational activities performed by them, from the purview of the 1986 Act, and instead hold as being within the purview thereof, educational activities of all three classes, viz. primary, secondary and tertiary.

X. CONCLUSION

Having thus exhaustively perused multifarious judicial decisions in respect of the classifiability of different kinds of educational activities performed by educational institutes as services, as defined in the 1986 Act, ascertained the current position in law, in respect of the amenability of educational institutes and their activities to the provisions of the 1986 Act, to the extent that

such ascertainment is capable, perused and analysed the three Supreme Court decisions excluding education from the ambit thereof, and evaluated the legality and logicality of the multifarious arguments in support of such exclusion, which have been accorded judicial sanction, rebutting them to the extent that they were erroneous and/or fallacious, the three inquiries posed in the introduction of the present essay, can be conclusively answered. In respect of the first inquiry, which is whether activities respecting education performed by educational institutes are classifiable as marketable services in the sense ascribed to the term, in a consumerist economy, the answer is in the affirmative. In respect of the second inquiry, i.e. whether therefore educational institutes performing educational activities can be christened as service providers, also the answer is in the affirmative. Likewise, in respect of the third inquiry, i.e. whether the student, in respect of whom the educational activities are performed, or his parents or sponsors as the case may be, can be regarded as consumers of such services, too, the answer is without a doubt, in the affirmative. I have thus, consistent with my endeavours, which were expressed at the outset of this essay, demonstrated in a dispositive manner, the fallaciousness of the current judicial stance and trend in respect of the matter of the amenability of the educational institutes and their activities to the provisions of the 1986 Act. It is hoped that the reader finds this essay to be an adequate, if not thorough exposition of the principles sought to be explicated hereby.

