

# India: Need For Clarity As To What Constitutes 'Pre-Packaged Commodity'

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The Legal Metrology Act, 2009 (hereinafter referred to as the "2009 Act") was passed by the Indian Parliament in order to repeal and replace The Standards of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Enforcement) Act, 1985. The 2009 Act was brought into force w.e.f April 1, 2011 with the aim of protecting consumer interests while simultaneously keeping the industry free from unnecessary interference.

However, the 2009 Act has failed in this regard, as the definition of the word 'pre-packaged' which was a point of contention under The Standards of Weights and Measures Act, 1976, has continued to create confusion among manufacturers, retailers, wholesalers, etc. as no clarity exists on which commodities qualify as a pre-packaged commodity. Due to the confusion created, the matter has been argued before Indian Courts and the matter is currently pending before a three judge bench of the Supreme Court in **State of Maharashtra v. Subhash Arjundas Kataria (Civil Appeal No. 1117 of 2010)**.

## Definition of Pre-Packaged Commodities

*Section 2(l) of The Legal Metrology Act, 2009 defines the term as follows:*

***"Pre-packaged commodity" means a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity.***

## What Qualifies as Pre-Packaged Commodity

The question as to whether a particular commodity qualifies as a pre-packaged commodity or not has been discussed by various High Courts as well as the Supreme Court. The High Courts of Madras, Andhra Pradesh, Bombay and Kerala have considered matters on various commodities such as vacuum cleaners, wristwatches, refrigerators, sunglasses, radios, tape recorders and VCRs. The Madras, Andhra Pradesh and Bombay High Courts have held that commodities that are packaged only for the purpose of transporting and packaging is meant for the convenience of consumers are not a pre-packaged commodity.

The Supreme Court and the Kerala High Court, on the other hand, have taken an adverse position on the issue. The Madras High Court in **Phillips India Ltd. v. Union of India [(2002) 1 Mad L.W (Cri.) 211]** while discussing whether televisions, video and audio players or speakers can be classified as a 'packaged commodity' had observed that such products would not fall within the definition of pre-packaged commodity as the products were packed only for the convenience of the consumers for safe transportation and for protection during storage and handling.

The Andhra Pradesh High Court in **Eureka Forbes Ltd. v. Union of India [AIR 2003 AP 275]** had observed that a product cannot be deemed to be a packaged good and put within the purview of the Standards of Weights and Measures Act, 1976 simply by virtue of the fact that the manufacturer or seller prints certain data on the product or places them in a box for the purpose of storage and transportation.

The Bombay High Court in para 10 of its judgment in **Titan Industries Ltd. v. Union of India and Ors. [AIR 2006 Bom 336]** laid a twin test to determine whether a package is pre-packed. The Bombay High Court had observed that:

*"The test would be firstly whether by the very nature of the commodity it requires to be packed before it can be sold. Secondly, in the event a package is opened does it undergo any perceptible change or reduction in value? If these twin tests are met, then only can it be said that the package contains a pre-packed commodity. Merely because the commodity is packed for protection during conveyance or otherwise or in the fancy package, would not result in the package becoming a pre-packed commodity. The Rule, therefore, along with the explanation aims to include only those Pre-packed commodities which by the very nature are required to be packed before they are sold."*

The Bombay High Court had observed that watches are removed from their package and displayed so that the customers can see them and try them and they do not lose any value because the package is opened. The Bombay High Court, therefore, found that watches cannot be considered a pre-packaged commodity and as a result, the provisions of the Standards of Weights and Measures Act, 1976 will not apply on them.

The Supreme Court had a different interpretation altogether as in **Whirlpool of India Ltd. v. Union of India [(2007) 14 SCC 468]**, a three-judge bench of the Supreme Court held that refrigerator is covered under the term pre-packed commodity. In para 6, it was observed that:

*"Even if the package of the refrigerator is required to be opened for testing, even then the refrigerator would continue to be a "pre-packed commodity". There are various types of packages defined under the Rules and ultimately Rule 3 specifically suggests that the provisions of Chapter II would apply to the packages intended for "retail sale" and the expression "package" would be construed accordingly".*

The Supreme Court, therefore, found that refrigerators, were a pre-packaged commodity and it did not matter if a refrigerator's packaging is opened for display and testing. The refrigerator would continue to be a pre-packaged commodity and the provisions of the Standards of Weights and Measures Act, 1976 would be applicable.

The Kerala High Court also ruled on the lines of the judgment of the Supreme Court in Whirlpool as in **Union of India v. Godrej-GE Appliances Ltd. [2009 (235) ELT 435 (Ker.)]**, the Kerala High Court in para 19 observed that:

*"Interpretation of the provisions of the aforesaid Acts and Rules is to be made from the point of view of the consumer and keeping in mind the object sought to be achieved by the enactment of the Acts and the framing of the Rules under the Standards Act. Viewed in that angle, it is abundantly clear that the intention of the manufacturer packer or retailer is hardly relevant in construing the various provisions of the Acts and Rules".*

This interpretation of the Kerala High Court, therefore, is that the definition of pre-packaged commodities includes commodities that are packaged only for the purpose of storage and transportation too.

The definition of pre-packaged commodity was once again discussed by the Supreme Court in **State of Maharashtra and Ors. v. Subhash Arjundas Kataria [2012 3 AWC 2765 SC]**. The respondent had originally filed a suit in the Bombay High Court claiming that sunglasses cannot be classified as pre-packaged commodities. The Bombay High Court had upheld his contention and ruled in favour of the respondent. The State government was aggrieved by the order and filed the present suit in the Supreme Court. The Supreme Court in para 9 observed that:

*"it is clear that the expression "pre-packed commodity" would be applicable to commodities which are packed and the commodity packaged has a pre-determined value and that value cannot be altered without the package sold being opened at the time of sale or the product undergoes a modification on being opened. We are also of the view that the Explanation I to Rule 2(l) of the Rules is not attracted because the package is not opened for the purpose of testing as in the case of electric bulbs. We fully agree that the sun glasses are tested by the buyer for his suitability, and therefore, sun glasses, whether it be a frame or glass is not a pre-packed commodity within the definition of the expression "pre-packed" under Rule 2(l) of the Rules, hence, the High Court is fully justified in quashing the notice and allowing the writ petition filed by the Respondent".*

But keeping in mind the decision of the three judge bench, the Supreme Court held that the issues with regards to the definition of pre-packaged commodity should be dealt with by a larger bench and directed that the matters be placed before the Chief Justice of India for listing before a higher bench.

## **Conclusion**

It can be argued that the Court should decide what qualifies as a packaged commodity by the nature of the goods because if the legislation had planned to include every packed commodity it would have done so. It would be relevant to point out that at this time the law with regards to packaged commodities is far from established. In view of the judgments passed by various High Courts and the Hon'ble Supreme Court, there is an ambiguity in the definition of 'pre-packaged commodity' and the applicability of Legal Metrology Rules and the said issue is still under consideration before a three-judge bench of the Hon'ble Supreme Court in the Civil Appeal No. 1117/2010 titled as State of Maharashtra & Ors. Vs. Subhash Arjundas Kataria.

The invention of Credit Derivate Instruments (CDI) has created a mechanism by which Banks and other credit-giving institutions are able to mitigate the risks associated with the loans they give to their customers. There has been talk of bringing this innovation to Nigeria via the use of Insurance Companies. That is, to have the Insurance Companies provide insurance to lenders against the default risk of borrowers; especially the small and medium scale business borrowers. The premise for this idea being a belief that once the credit risk is removed, the lenders would be more willing to advance loans to businesses. Thus spurring increased economic activities and ultimately, economic growth.

Essentially, a CDI allows for the transfer of credit risk without the necessity of transferring the underlying asset (i.e. bank loan). There are many ways by which this can be done. However, the instrument most commonly used is the Credit Default Swap (CDS). Under this arrangement, the lender and the insurance company enter into a contract whereby the lender pays a regular premium to the insurance company to provide cover against the default risk of the borrower. So that, where the borrower defaults, the insurance company would pay to the lender an agreed amount of money to compensate the lender for the default.

Guarantees (personal and corporate) also produce the same type of effect as the CDI; it transfers the credit risk to the guarantor who would then be saddled with the obligation of seeking the repayment of the loan from the borrower. The difference between the two being that CDIs can, potentially, be easier to obtain than a guarantee; there being no need for a link between the insurance company and the borrower. Also, the insurance company gets paid to provide the cover whereas the guarantor is usually not paid to provide the guarantee (except in cases of Bank Guarantees).

Another benefit of a CDI Scheme, less talked about but no less important, is that to be derived by investors. The CDI allows an investor to make money on the default risk of a company's debt obligation without having to actually buy the underlying debt security. This is due to the fact that the instrument is tradeable, much like shares or bonds. For example, if an investor thinks that a company is likely to default on its debt obligation, he or she would buy protection using a CDS and pay the required

premium. If the company then defaults, the investor can make money in two ways; first, by selling the premium he or she bought to another party, a debt-holder, at a higher rate thereby profiting off the spread between what he paid to the insurance company and what the debt-holder would pay him or her. Alternatively, he or she may purchase the debt security which has deteriorated and then get the par value from the insurance company. Insurance companies are also not left out from the benefits as they can earn additional income from underwriting CDS contracts.

Although the CDI has been criticized by many due to its ability to engender systemic risk; especially the more exotic types. The flipside of being able to transfer credit risk is that a major default by a company in one sector may have the potential of affecting unrelated institutions in other sectors of the economy. Thus making it harder to contain a financial crisis.

However, in light of its potential to engender increased lending to the real sector and also create more investment opportunities for investors, the introduction of a CDI scheme is laudable.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*