

# **PROTECTION OF CONSUMERS WITH REFERENCE TO MISLEADING ADVERTISEMENT IN INDIA: A CRITICAL ANALYSIS**

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## **ABBREVIATION**

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1. ASCI - Advertising Standards Council of India
  2. CCC – Consumer Complaints Council
  3. DOCA – Department of Consumer Affairs
  4. DMR – Drugs and Magic Remedies
  5. FSSAI – Food Safety and Standard Authority of India
  6. GAMA – Grievances Against Misleading Advertisements
  7. JFTC – Japanese Free Trade Commission
  8. JARO – Japanese Advertising Review Organisation
  9. MIB–Ministry of Information Broadcasting
  10. MRTP - Monopolies and Restrictive Trade Practices

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## **CHAPTER-1**

### **INTRODUCTION**

“Trying to do business without advertising is like winking at a pretty girl through a pair of green goggles. You may know what you are doing, but no one else does.” -**Cyrus McCormick**

Advertising is a form of communication used to convey to the target audience of a business about its existing and upcoming products. Advertising is used to stimulate the public to use products and services by making an appeal that the product/ services are relevant and using them would give the customer a social, economical or psychological edge over those who don't use these products/ services. The communication can be made either through traditional; media or contemporary media. The traditional/ mass media includes newspapers, television, advertising in cinemas, magazines, jingles on the radio and the contemporary/ new media includes conveyance of the message through blogs, advertising on Web Series (over platforms like YouTube), E- mails and more recently the usage of platforms like WhatsApp Business etc.

Advertising is used to project a certain image of the company/ product in the minds of the customers.<sup>1</sup> Companies allocate a large portion of money towards advertising (both online and offline) during the preparation of their Annual Budget. Often, what happens is that the customer bears the brunt of exquisite advertisement budgets set by the company as the costs are directly passed down to the customer. We do not deny the resourcefulness of advertising. In a country of a billion plus people it is very hard to reach out to the various sections of the society without appropriate advertising. However, advertising gets redundant when the product is exaggerated and the brand hopes that the product would sell on the basis of lavish advertisement or ride on the **Star Power** of the celebrity who is advertising the product. This article provides an insight to the concept of 'misleading advertising', from a legal viewpoint and the laws around it and its impact on Indian consumers. It further discusses the existing and possible solutions to overcome it.

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<sup>1</sup>See Advertisement Laws of India –it's time for a uniform legislation available at <http://legalonline.blogspot.in/2011/04/advertisement-laws-of-india-its-time.html> Last accessed on August 29, 2017 4:08PM

**Misleading Advertisement** is an advertisement which is factually incorrect or in a manner deceptive while conveying the information about the product. Misleading Advertisement can also be done in respect of determining whether any advertisement is misleading through ingredients of the product or by tag lines of the product such as “boost is the secret of our energy”. So, this is something which is misleading of advertisement other than labelling and has a very ambiguous tone as it lacks facts. The problem of such an ad is that the consequences are felt only after the product is bought. Advertisements can be misleading if they contain false statements of fact, conceal or leave out important facts, include or imply a promise to do something without the intention of carrying it out, or create a false impression, even if everything stated may be literally true. They also affect a consumer's economic behaviour<sup>2</sup> and are likely to injure a competitor's product of the advertiser.

Misleading advertisements have a negative effect on society, directly or indirectly hampering every member of its ecosystem. It makes the consumers root for a fantasy whereas the reality is something totally different. There's a need here to discuss the negative impact in detail. Misleading advertisements can be classified into three main approaches; fraudulent, false, and misleading<sup>3</sup>. Fraudulence means that the advertiser distorts the facts and projects the product as something it is not. Falsity could mean the advertiser lying based on parameters such as price, quantity and availability. Misleading via any media focuses on a consumer's belief. Misleadingness requires the advertiser to observe the false belief of consumers in relation to exposure to the advertisement.<sup>4</sup> Misleading deals with the distortion of facts.

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<sup>2</sup>**Economics and Consumer Behavior** by Angus Deaton, John Muellbauer.

<sup>3</sup>[http://lex-warrier.in/opanda\\_terms\\_of\\_use/](http://lex-warrier.in/opanda_terms_of_use/). Last Accessed on august 29 2017 [11:20 PM]

<sup>4</sup> Id at 3

Most of the time we see the advertisements mislead viewers in such extent through which viewers get confused and sometimes a person may think that an advertisement, such as 10 rupees off or 20% extra, it would create monetary gains for him. However, in fact they are related to pricing strategies or may disseminate misguided information about the product contents. As a result, consumers end up purchasing items at a greater price or at a lesser quality than they had intended to. Misleading advertisements create intense confusions and play with the mind of consumers, depending on the consumer's reaction to those advertisements and how exactly the market is influenced. These types of advertisements cater to the wants and fancies of the customers not exactly the need and it is often remarked that the customer ends up regretting after buying the product as the product they had been advertised was highly exaggerated and the current product is only a shadow of what was advertised to them and thereby it serves no purpose.

Misleading advertisements mislead the society on the following ways:

- Distorting the public opinion
- Largely ignoring the consumer culture of the society
- Insulting the IQ of the masses
- Showing objectionable and immoral scenes
- Showing impossibly unusual and unattainable lifestyles
- Trying to achieve goals no matter how immoral the means
- Exaggerating and overstating
- Expressing unrealistic about the product
- Using professional concepts for more effects
- Faking license
- False warranties
- Using cinematic tricks and misleading images
- Discounts and gifts

Misleading advertisements largely impact the market supply and demand of the products due to which people are negatively affected. Public awareness is the way to go when dealing with these misleading advertisements.



After globalization, India is rapidly embracing consumerism. This means increasing purchasing power for the Indian consumers, with rapidly expanding consumer markets offering a growing variety of products and intense competition<sup>5</sup>. Advertisements are beneficial as it brings awareness for the consumers about the new products in the markets but there's a problem when misleading tactics are used. However, with all the advantages that this development brings to the Indian consumers, it also implies a number of challenges. One of the major weaknesses of the present system is perceived to lie in the lack of effective enforcement of rules protecting the collective consumer interest. There are few provisions which speak about misleading advertisements but there is neither a single comprehensive and special legislation nor any empowered regulatory authority exclusively on misleading advertisements.

The rapid growth of misleading advertisements has become increasingly dangerous, especially now that the purchasing power of the Indian customer is increasing rapidly. Misleading and Unfair advertisements are not just unethical but also, they distort competition and also consumer choice. Misleading and Unfair advertisements violate several basic rights of consumers, such as, the right to choose, the right to be informed, right to safety, protected against unsafe goods and services, as well as, unfair trade practices<sup>6</sup>. No doubt Advertisement Standard Council of India is self-regulatory body without any legal tooth to prevent misleading advertisements. But it is not sufficient to control misleading advertisements. Hence a check on misleading advertisement becomes imperative.

### **1.1 STATEMENT OF THE PROBLEM**

In the light of above introductory remarks, it is asserted that the existing self-regulatory mechanism is weak and inadequate to deal with the issues of misleading advertisement. For example there is one self-regulatory authority "Advertising Standards Council of India" (1985), has adopted a Code for Self-Regulation in Advertising. In which we can file a complaint through online or through call, but there are a lot of persons who is not even aware about that and not enough educated to know how to lodge complain online. And moreover Advertising Standards Council of India (ASCI) is not empowered regulatory authority. Even there is not

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<sup>5</sup><https://2012books.lardbucket.org/books/business-ethics/s16-03-we-buy-therefore-we-are-consum.html> Last visited [Date-30/08/2017] [Time - 6:17 PM]

<sup>6</sup>[Advertising and Public Relations Law](#) By Roy L. Moore; Ronald T. Farrar; Erik L. Collins Lawrence Erlbaum Associates, 1998

any single comprehensive and special legislation which exclusively deals the matter related to misleading advertisements. This brings further difficulties in regulating misleading advertisements in different sectors.

There are some statutory and regulatory bodies such as “Food Safety and Standards Act – 2006” and the problem with the Act, there is lack of sufficient legal infrastructure to curb menace of objectionable misleading advertisement in food sector. Because in recent years there has been a great increase in the number of objectionable advertisements published in the newspaper and magazines. If we talk about the “Consumer Protection Act – 1986” which do not provide remedy to those consumers who have not file a case in consumer forum and who are victim of misleading advertisement.

The Drugs and Magic Remedies (objectionable Advertisement) Act, 1954 was passed by Parliament with a view to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities. But more often than not the rules of the Act are being observed in breach. More and more people of varying age groups are being attracted towards these advertisements. Keeping in view, the apprehended side effects of these chemical derivatives, it is submitted that urgent steps must be taken to curb the ever-increasing menace of objectionable and misleading advertisements.

## **1.2 OBJECTIVE OF THE STUDY**

1. To analyse the existing legal framework governing misleading advertisement and to identify problem associated with it.
2. To examine the limitation of the existing self-regulatory mechanism.
3. To make a comparative analysis of regulations on misleading advertisements in other countries and to draw best practices which might be useful for India.

## **1.3 RESEARCH QUESTION**

Inadequate mechanism to deal with issue of misleading advertisement, there is not any single comprehensive and special legislation. This arises a difficulty in regulating subsidiary. So my research is mainly on two points -:



- Whether a certainty can be brought to determine the legislation impact or special regulations for the purpose of consumers' impact in misleading advertisement?
- Considering the multiple legislation which are in high impact to the consumers interest, whether all such legislation can have a comprehensive determination of consumer redressal control of misleading advertisement.

#### **1.4 SCOPE OF THE STUDY**

The scope of the research will be limited to misleading advertisement in food, drugs and cosmetic sectors. We only discuss the Indian context. However, reference is made to other countries as per the requirement of studies.

#### **1.5 RESEARCH METHODOLOGY**

The methodology adopted is doctrinal in nature. It involves systematic analysis, and critical evolution of legal principle/doctrinal/concept. After close scrutiny, the derivation of the concept from the legal principle or doctrine will be highlighted and various after careful consideration various proposals will be put forth. For the purpose of the study we will be using both primary as well as secondary resources.

The study of primary sources will include legislation relating to consumer protection such as the Consumer Protection Act – 1986, the “Cigarettes and other Tobacco Products (prohibition of Advertisement and Regulation of Trade and commerce, Production, Supply and Distribution) Act, 2003”, the “Food Safety and Standards Act – 2006”, the “Drugs and Cosmetics Act – 1940”, the “Telecom Regulatory Authority of India Act – 1997”. Further the Constitution of India, 1950 and the relevant laws relating to misleading advertisement in other countries will be relied upon.

Secondary sources material will include books, articles, data published by public and private authorities and organisations, websites etc.

#### **1.6 SCHEME OF CHAPTERIZATION**

The work presented in this thesis is based on empirical research, in my introductory chapter-I explains about the "What is misleading advertisement and what is false advertisement and also discuss about how deception in advertisement. Adverse effects to the society through these

false advertisements affect the society and how advertisement creates confusion in the mind of viewers. What are the tactics which been used by the companies to make advertisement good and how to make profit.

In chapter -2 which is Literature Review” in which I read 5 articles and made a summary of it, and try to explain the concept of “Misleading advertisement” and what other scholars think about it at global level. I also explain, what other authors face problem in India reagarding the problem of consumer affect through misleading advertisement, by any means such as Television, Templates, Newspaper, Internet, advertisement or through messages etc.

In chapter – 3, I am going to discuss the full wide concept of misleading advertisement, what advertisement is, and when advertisement will become deceptive advertisement. After that I am going to discuss the types of misleading advertisement and historical background of advertisement.

In chapter – 4, Regulatory mechanisms of misleading advertisement in India, I am going to discuss many of regulatory bodies such as Role of Advertising Standard Council of India (ASCI) 1985, Food Safety and Standards Act-2006, Consumer Protection Act – 1986, Food safety and standards Act, 2006, etc. and also going to discuss what is there work and objectives of these statutes, and where they fail to provide safety of customer/consumers from misleading advertisement.

In chapter – 5, Deception in advertisement and protection of consumers an Judicial Approach, In this chapter I am going to discuss many of landmark supreme court judgements and the principles laid down by the Apex Court of India (Supreme Court).

In chapter –6, Comparative analysis of India with other countries, regulation on misleading advertisement, under this chapter I am going to discuss in brief a comparison of Indian regulatory bodies with the other countries regulatory bodies such as: China, Japan, United Kingdom, United states. In this particular chapter I am trying to establish the equation, how Indian regulatory bodies protect consumers through misleading advertisement and why they fail to do so properly by comparing the laws with other countries how they control or manage to protect consumers through misleading advertisement.

Lastly in final chapter of this dissertation, I conclude my research and explain my findings during my research with the suggestions, how to solve the problem, which is facing by the consumers/customers through misleading advertisement by any means.



## **CHAPTER -2**

### **REVIEW OF LITERATURE**

The present research is an analytical study of the topic. For the same, the researcher referred many articles for a better understanding and analysis on the subject matter concerned. A summarized elicits of a few articles referred in relation to the topic are given below:

1. **Dr. Swati Sinha And Dr. Pradip Kumar das**  
**“FALSE AND MISLEADING ADVERTISEMENTS AND PROTECTION OF**  
**THE CONSUMERS: INDIAN SCENARIO”, International Journal of Law and**  
**Legal Jurisprudence Studies: ISSN: 2348-8212.**

In this above article, author has discussed distinction between Advertisement and misleading advertisement and also discuss the positive contribution on consumers thought process and at same time how advertisement has immense manipulative power and capacity to harm the consumer and capacity to harm the consumer and the public interest. So overall this article discuss the positive and negative impact of development of business of advertisement on consumers and also suggest to rethink the regulatory measures in this regard, and lastly highlighted the relevant social legal and economic aspect.

2. **Priyank singh, Vijay Thawani, Alok Saxena, “ORIGINAL ARTICLE:**  
**DECEPTIVE FOOD ADVERTISEMENTS IN INDIA”, Indian Journal of basic**  
**and applied medical Research; December 2013: Vol.-3, Issue-1, P.132-135**

In this article, the author has analyzed in detail, the responsibility of Food Safety and standard Authority of India (FSSAI) for protecting and promoting public health. Author tries to tell what should be the government roll In order to protect consumer Interest. And also discuss some cases which of violation of section-24 of Food safety and standards Act – 2006.

3. **C.Jeeva, “IMPACT OF MISLEADING ADVERTISEMENTS: ISSUES AND**  
**REMEDIES”, Bonfiring International Journal of Industrial Engineering and**  
**Management Science, Vol. 6, No.4, November 2016.**

In this Article, Author started with the introduction, what is misleading advertisement what all are communication through which advertisement can be done. Than further He discussed about

the objective of DMR act, which is to control the advertisement of drugs and to prohibit publishing of advertisements that promises magical cures. He also discuss about False claims and misleading Advertisement, specifically in the context of section 36A (1) of the MRTP Act. Further he talks about Legal Protection of Consumers from misleading advertisement. Lastly He conclude with the adverse effect on consumers from misleading advertisement and must be regulated by the legal provisions and institutional framework that regulate misleading advertisement in our country.

**4. Maria Antonietta Ruggiero, “MASTER THESIS: UNFAIR COMMERCIAL PRACTICES, CONSUMER AND INTERNAL MARKET PROTECTION: A COMPARATIVE STUDY”, Wageningen University and Research.**

This thesis mainly deals with the consumer protection against unfair commercial practice, including misleading advertisement. This research paper analyse, whether the legislation on unfair commercial practices transposed in the Italian and English legal frameworks present relevant and substantial differences in interpretation, in implementation, in compliance assurance and in sanctioning which create legal uncertainty and cross border problems and barriers that have a negative effect on the functioning of the internal market. Lastly this thesis elaborates that the differences between Member States indeed impede on the internal market, by using Italy and the United Kingdom (UK) as case study.

**5. Pushpa gurumaji, “MISLEADING ADVERTISEMENT AND CONSUMERS”, Centre for consumer studies (Indian Institute of Public Administration)**

In this article, Author tries to tell about the Advertisement and consumer culture in this paper, which becomes a part and parcel of our lives today. She critically examines the concept of misleading advertisement and what is the affect occurs from deceptive advertising. She also discuss about how consumers deception happen from misleading advertisement and what should be the strategies to get out from it. Further she discussed, what is self regulatory body and how does it work.

### **CHAPTER – 3**

#### **CONCEPT AND HISTORICAL EVOLUTION OF MISLEADING ADVERTISEMENT**

Advertisement is the effort companies take over various forms of media to introduce and educate the public about themselves or their product or both. Advertisement is done to reach out to the targeted market of a business in the hope that it would lead into conversion and thereby increase revenue.

**Misleading Advertisement** is an advertisement which is factually incorrect or in a manner deceptive while conveying the information about the product.

**Misleading Advertising include: -**

- Exaggeration of a product
- expressing unrealistic attributes of the product
- use of professional concepts for more effect
- fake license
- false warranties
- use of cinematic tricks and misleading images
- Discounts and gifts

Basically deceptive/misleading advertisement is an advertisement if in any way, advertisement deceives the persons to who is an addressed or whom it reaches, and after seeing that advertisement by any chance customer buys that product and effect on their economic behaviour, consider the injuries happens to the buyer due to the promotion of advertisement called as deceptive/misleading advertisement.

Deceptive advertising means the use of false or deceptive statements in advertising. An advertisement which distorts reality and thereby results in people buying products which they otherwise wouldn't have.



False advertising is illegal in most countries. Advertisers nonetheless keep finding ways to deceive consumers and watchdogs in ways that are legal, or technically illegal but unenforceable<sup>7</sup>.

### **3.1 WHEN DOES AN ADVERTISEMENT BECOME “MISLEADING” OR “DECEPTIVE”?**

An edible oil company implying that people suddenly get rid of heart problems or become fit after using its product is deceptive in nature. A water purifier company insisting that its product make water 100% safe by eliminating all bacteria it is misleading because the same product does not eliminate viruses. Thus, the water isn't safe for drinking.<sup>8</sup> When a mobile operator promises STD calls for free but doesn't mention that it only implies intra-network then it's false advertisement.

### **3.2 ESSENTIALS FOR AN ADVERTISEMENT TO BE DECEPTIVE<sup>9</sup>**

An advertisement is deceptive if: -

- (1) It contains a misrepresentation, omission or practice that is likely to mislead the consumer;
- (2) The consumer is “acting reasonably under the circumstances”; and
- (3) The misrepresentation, omission or practice is “material,” that is “likely to affect the consumer's conduct or decision with regard to a product or service.”

### **3.3 TWO CATEGORIES OF FALSE AND MISLEADING ADVERTISEMENTS**

False advertisement can be categorised into two groups:

- a) This consists of ads that violate consumers right to information and choice, have the probability of causing financial losses and also mental agony.

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<sup>7</sup> Refer free legal dictionary on <https://legal-dictionary.thefreedictionary.com/misleading+advertisement> excess on 5/jan/2018, time – 2:30pm

<sup>8</sup> See article written by mrs. smriti chand, on <http://www.yourarticlelibrary.com/advertising/essay-on-misleading-the-customers-thorough-advertisement/2041> excess on 6/jan/2018, time - 6:00 PM

<sup>9</sup> Ibid

- b) This consists of ads which falsely claim health benefit and cures. These have a more direct impact on their consumers which could result in loss of life or some sort of physical or mental damage.<sup>10</sup>

Although we have a number of laws to deal with such a situation not many are effective and the reasons for this are: -

- (a) Improper enforcement
- (b) Loopholes in the law.

What is saddening, is that these advertisements are growing day by day despite the number of laws increasing. Previously, one used to only find them in print media but today television, radio and social media have also fallen prey to these deceptive ads. This has resulted in these advertisements reaching a wider network of people who fall prey for them and in case of health supplements and such things end up bearing lifelong consequences.

### 3.4 TYPES OF MISREPRESENTATION

There are three types of misrepresentation<sup>11</sup>:

- Innocent misrepresentation
- Negligent misrepresentation
- Fraudulent misrepresentation

1. Innocent misrepresentation: Innocent representation is a representation which exists where a misrepresentation is made entirely without fault, i.e. where the representor can prove that he had reasonable grounds to believe that his statement was true.

2. Negligent misrepresentation: Negligent misrepresentation occurs when a statement is made carelessly or without reasonable grounds for believing in its truth. The test is an objective one as, if the representor's statement is proved to be false, he must prove that he reasonably believed in its truth. The court will look at what a reasonable man would have believed in the

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<sup>10</sup> Supra 1

<sup>11</sup> Chapter – 8, “Deceit and misrepresentation, page no. – 117 & 118, “Advertising law and regulation” 2<sup>nd</sup> edition, Authors - Crwon, Bray, Earle.

circumstances as to whether the statement was made innocently or negligently, there is no requirement to prove fraud.

3. Fraudulent misrepresentation: An action for fraudulent misrepresentation can be found in the law of Torts. The principles, laid down in *Derry vs. Peek*<sup>12</sup>, are that the tort is committed where a false representation has been made without belief in its truth, or recklessly as to its truth. It can be enough to prove that the representor merely suspected that his statement might not be true, or that he failed to make enquiries into its truth.

### 3.5 HISTORICAL EVOLUTION

Advertisements have been an age-old form of communication to the public about the goods or services. They help in promotion of the business of the producer using various media like newspapers, magazines, journals, hoardings, posters, radio, television, internet to name a few. Not only the advertisements help in dissemination of information about the products or services but they also help in convincing and thus attracting the customers to the unique quality, standards and benefits being offered therein thus enhancing the sales of the producer.

Advertising may be an audio or visual form of marketing communication or both that is sponsored, non-personal message by an individual/ legal entity to promote or sell a product, service or idea<sup>13</sup>. Sponsors of advertising are often businesses wishing to promote their products or services. Advertising should not be confused with public relations.<sup>14</sup> Advertisement can be made either through traditional; media or contemporary media. The traditional/ mass media includes newspapers, television, advertising in cinemas, magazines, jingles on the radio and the contemporary/ new media includes conveyance of the message through blogs, advertising on Web Series (over platforms like YouTube), E- mails and more recently the usage of platforms like WhatsApp Business etc.

The purpose of commercial ads is to generate increased consumption of their products or services through a phenomenon called "**branding**", which emphasises on associating a product name or image with certain pre-conceived notions in the minds of consumers. On the other hand, ads that are made with the intention to garner instant sale are known as direct-response

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<sup>12</sup>(1889) App Case 337

<sup>13</sup> William J. Stanton. Fundamentals of Marketing. McGraw-Hill (1984) page no. - 465

<sup>14</sup> Ibid page no. – 661 and 672

advertising. Entities other than commercial entities that advertise include political parties, various interest groups, organised religion, governmental and non-governmental agencies. Public service announcement may be also used by Non-Profit organisation. Occasionally, advertising is used to reassure employees or shareholders that a company is on track and successful.

Tobacco advertising of the 1920s laid the foundation for Modern Advertising and the campaigns of Edward Bernays led to what the advertising world today knows as “Madison Avenue” advertising.<sup>15</sup>

Annual advertisement spends amounted to US\$529.43 billion in 2015.<sup>16</sup> It was forecasted that addistribution for 2017 was 40.4% on TV, digital occupied 33.3%, newspapers got 9%, 6.9% was allocated to magazines, 5.8% on outdoor and 4.3% on radio.<sup>17</sup> It emerged that the largest ("big four") advertising-agency groups in the world are Interpublic, Omnicom, Publicis, and WPP.<sup>18</sup>

In Latin, *advertere* means "to turn towards"

## 19TH CENTURY

Thomas J. Barratt is referred to as "the father of modern advertising".<sup>19</sup> He worked at the Pears Soap company, Barratt is credited with creating an effective advertising campaign for the

<sup>15</sup> Donley T. Studlar (2002) *Tobacco Control: Comparative Politics in the United States and Canada* Archived May 9, 2016, at the Wayback Machine. p.55 quotation: "... froms. the early days advertising has been intimately intertwined with tobacco. The man who is sometimes considered the founder of modern advertising and Madison Avenue, Edward Bernays, created many of the major cigarette campaigns of the 1920s, including having women march down the street demanding the right to smoke."

Donald G. Gifford (2010) *Suing the Tobacco and Lead Pigment Industries* Archived May 10, 2016, at the Wayback Machine., p.15 quotation: "... during the early twentieth century, tobacco manufacturers virtually created the modern advertising and marketing industry as it is known today."

<sup>16</sup> "CARAT PREDICTS POSITIVE OUTLOOK IN 2016 WITH GLOBAL GROWTH OF +4.7%". Carat. September 22, 2015. Archived from the original on October 1, 2015. Retrieved September 30, 2015

<sup>17</sup> "Plummeting Newspaper Ad Revenue Sparks New Wave of Changes". Wall Street Journal. October 20, 2016. Archived from the original on March 11, 2017

<sup>18</sup> Parekh, Rupal (July 12, 2012). "Not the 'Big Four' Holding Firms in Adland Anymore – Now It's the Big Five | Agency News – Advertising Age". Adage.com. Archived from the original on February 15, 2015. Retrieved January 18, 2014

<sup>19</sup> Matt Haig, *Brand failures: the truth about the 100 biggest branding mistakes of all time*, Kogan Page Publishers, 2005, pp. 219, 266

company products, which involved the use of targeted slogans, images and phrases. One of his slogans which became hugely popular was, "Good morning. Have you used Pears' soap?"

Barratt introduced many of the ideas that are used to make an advertisement successful. Mr. Barratt believed in the existence of a strong and exclusive brand image for Pears and emphasized that the product be available through saturation campaigns. He was one of the first to recognize that the Customer is King and that tastes change with time and the Company should also change its approach with time.

In June 1836, French newspaper *La Presse*<sup>20</sup> became the first newspaper in history to include paid advertisements. The money earned through the paid advertisement was used to reduce the cost of newspaper to the public.

With the economy booming during the 19th century, advertising grew at a rapid pace. The success of this advertising format in the US, eventually led to the growth of mail-order advertising.

## 20TH CENTURY

Advertising increased manifold throughout the United States due to industrialization which expanded the supply of manufactured products. To make a profit from the supply the customers had to increase *drastically* which meant that the workers now had to become consumers. This led to the advent of mass marketing which was designed to influence the population's economic behaviour on a larger scale.<sup>21</sup> The advertisers of the 1910s and 1920s, in the U.S. targeted the human instincts as they believed that it could be targeted and harnessed. People could be "sublimated" into the desire to purchase commodities.<sup>22</sup> Edward Bernays, a nephew of Sigmund Freud, became the poster boy of this method and is sometimes called the founder of modern advertising and public relations.

Bernays felt that targeting unconscious desires of humans would act as a motivator to people and would end up in more sales than targeting the rationale side of humans. Idealism would win over practicality.

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<sup>20</sup> It is a French newspaper, which published first advertisement in the newspaper and it was paid advertisement.

<sup>21</sup> Ewen, *Captains of Consciousness* (1976), p. 34.

<sup>22</sup> *Ibid* page no. 33



The means developed in 20<sup>th</sup> Century for advertisement are still in use today. Some of these are: -

1. On the radio from the 1920s -: The 1920s saw the establishment of radio stations from retailers and manufacturers to increase the sales of radio and ancillary equipment. After a period of time a lot of people were listening to radio and businessman made sure that they monetised this opportunity by letting people know about products and businesses.
2. Commercial television in the '50s -: In the early 1950s, the Dumont Television Network couldn't find sponsors for their programs so they came up with the idea of selling television time to advertisers for money which could then be used to produce programs and cover expenses.
3. Cable television from the 1980s -: The late 1980s and early 1990s will be remembered for the advent of cable TV and specifically MTV. Pioneering the concept of the music video, MTV ushered in a new type of advertising: the consumer tunes in for the advertising message, rather than it being a by-product or afterthought. As cable and satellite television became increasingly prevalent, specialty channels emerged, including channels entirely devoted to advertising, such as QVC, Home Shopping Network, and ShopTV Canada.
4. On the Internet from the 1990s -: With the advent of the ad server, online advertising grew, contributing to the "dot-com" boom of the 1990s. Entire corporations operated solely on advertising revenue, offering everything from coupons to free Internet access. In the 21st century, some websites, like Google, changed online advertising scape by starting to personalize ads based on browsing history. This led to a more personalised and interactive form of advertising.
5. Celebrity endorsements -: Advertisements changed forever when celebrities allowed brands to associate their names beside theirs. In this way brands leveraged on the fame and popularity of the celebrity to sell their products. People began associating the products of the companies as the product made by celebrities and the sales boomed like never before. However, there was a flip side. The down fall of a celebrity essentially meant that the public would also stop using the brand the celebrity was associated to.





## **CHAPTER – 4**

### **REGULATORY MECHANISMS OF MISLEADING ADVERTISEMENT IN INDIA**

Self-Regulation refers to a mechanism which involves members involved within the activity (advertising) actually coming together and setting up guidelines/codes for the airing of advertisements. It also needs a mechanism to listen to complaints against different advertisements which do not actually follow the Code, as well as a form of censure for not following the Code. In India the self-regulatory mechanism that exists-is the Advertising Standards Council of India (ASCI)<sup>23</sup>. The Consumer Complaints Council (CCC) of ASCI forms the wing of the ASCI that looks at the infringement of the ASCI advertising Codes by different parties as a result of a complaint being filed to ASCI by a consumer. The recent National Advertising Monitoring System (NAMS) instituted by ASCI involves the tracking of a number of advertisements ~ in both the print and electronic media by ASCI, and also allows for suo-moto action by ASCI against advertising parties.

It is quite difficult to provide a specific area of advertisement which is generally litigated against misleading advertisement. The general direction that litigation against advertisements has followed has been when a particular unproven claim is made by a product about its efficacy. It has therefore been the Cosmetics industry which seems to have the maximum number of cases made against, from fairness creams to shampoos to soaps. However this is not to say that this is the only sector which produces misleading advertisements<sup>24</sup>. Misleading advertisements are also made about the efficacy of drugs or about the capability of doctors, insurance schemes, and so on. However the only legislation which provides for the actual protection of, and ensures the welfare of consumers from the effects of misleading advertisements is the Consumer Protection Act, 1986. The other type of misleading advertisements involves the passing off of a product as that of a more well-known Company or Party. However these are more often litigated by the Company whose identity is being used to mislead the public along with members of the public themselves. Unfair advertisement is a different type of advertisement that is prohibited in India. Unfair advertising could of course be misleading but that is not the only facet to unfair advertising. Unfair Advertising could also refer to comparative

<sup>23</sup> See page no. 307 of, prof. (Dr.) Ashok R. PATIL, Chair professor, Chair on consumer law and practice (Ministry of consumer affairs, government of India) National Law school of india university Bangalore

<sup>24</sup> Supra – 6, chapter – 2 and page no. - 11

advertisements which disparage the products of a competitor or the competitor himself. While comparative advertisements are acceptable, they should be in such a manner that they did not reduce the reputation of the competitor and his trademark. While the 'law does provide for a number of laws against advertisements (both regulatory and prohibitory in nature), the only legislation which actually keeps in mind the consumer and the compensation that a consumer needs in any comprehensive sense is COPRA, 1986<sup>25</sup>. While other legislations try to protect consumers from being misled by manufacturers of products or the providers of services, they do not really provide for compensating consumers. There are also laws in place which protect competitors from unfair methods of competition. However the fact that the Courts in the country are already overburdened and in pursuance of justice for all, the Courts are sorely inefficient with respect to timely awarding of compensation, or injunctions or any other order prayed for or disposing off the complaint in a timely fashion. As such, a regulatory mechanism that involves all the major players in the advertising field the advertisers themselves, the advertising agencies, the newspapers and television channels, market, research agencies etc., would be and is extremely effective. ASCI and the CCC have (according to information provided by them) been ~ receiving nearly 170 complaints per month till the NAMS initiative. With the NAMS initiative, they have increased the number of advertisements being monitored, with nearly 1500 TV commercials and 45000 print advertisements per month. 120 cases on average are taken up by the CCC suo-moto after the NAMS initiative started up.<sup>26</sup>

Despite not having any actual enforcement powers, the fact that so many parties of civil society are involved in ASCI, it means that CCC actually ends up having a very high success rate with respect to advertisements that were held to be either misleading or unfair being taken off the air or from newspaper or other print media circulation. The decisions of ASCI also take around 4 to 6 weeks for the decision to be passed from the time of the registration of the full complaint.

The ASCI Code, while not having legal enforceability, it has been made applicable legally to Television Advertisements, through the fact that it was made a part of the Cable TV Network Rules, 1994 through a Notification passed by the Indian Government. The amended Cable Television Network Rules, 1994 includes the provision that, "No advertisement which goes

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<sup>25</sup> Consumer protection act. Consumer Protection Act, 1986 is an Act of the Parliament of India enacted in 1986 to protect the interests of consumers in India.

<sup>26</sup> See on National Advertising Monitoring system website on <https://www.ascionline.org/index.php/nams.html> , excess on 9/jan/2018, time- 8:pm

against the Self-Regulation Codes of ASCI shall be aired on a cable service". Looking at the immense potential that self-regulation has, and the effectiveness that ASCI seems to have with regards to advertisements, it appears logical that the ASCI Codes be made a part of the legal enforcement structure and the legal structure which controls advertisements. This can be done in a number of ways

1. As done in the Cable Television Network Rules, 1994, the ASCI Code could be given legal recognition by making it a part of legislations which involve advertising and advertisements.
2. Another mechanism which could be used is that the decisions of the ASCI be given some legal status by allowing the moving of the Courts in order to ensure the enforcement of the decision made by ASCI as well as appeals against ASCI's decision. This would naturally first involve a detailed analysis of the ASCI Codes themselves prior to such legal status being provided. The constitution of the CCC would also need to be changed to provide for the involvement of certain individuals who are in consonance with some legal criterion that should be set out in the CCC's Constitution.

These are just a few of the possible mechanisms that could be used to include the ASCI Code and ASCI itself within a possible new mechanism to enforce advertising codes against misleading the consumers or other forms of unfair advertising.

#### **4.1 Expanding Role of Self Regulating Mechanism In India**

In India, there are mechanisms for regulating advertisement which are both in the nature of self regulation and regulation by statutory rules and regulations. However, to a large extent advertisement regulation in print and electronic media is in the realm of self regulation.

There are several self regulating bodies in print and electronic media which are concerned with regulating the content in media. These bodies include News Broadcasters Association (NBA), Indian Broadcasting Foundation (IBF), and Editors Guild of India which are primarily concerned with the content of print and electronic

media. On the other hand, Advertising Standards Council of India (ASCI) is the main self regulating body regulating advertisement in media.<sup>27</sup>

The ASCI is a self-regulatory organization for the advertising industry. ASCI seeks to ensure that advertisements conform to its Code for Self-Regulation, which requires advertisements to be legal, decent, honest and truthful and not hazardous or harmful while observing fairness in competition. The ASCI and its Consumer Complaints Council (CCC) deals with complaints received from consumers and Industry, against advertisements which are considered as False, Misleading, Indecent, Illegal, leading to Unsafe practices, or Unfair to competition, and consequently in contravention of the ASCI Code for Self-Regulation in Advertising.

One of fundamental principles enshrined in the ASCI code is to ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.

The ASCI code has provisions which require that advertisements must be truthful. It requires that all descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation and advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions.

The problem of misleading advertisements and the consequent unfair trade practices that arise is widespread across all sectors and media in India. ASCI has taken steps to curb this menace by way of upholding complaints against such advertisements and asking violators to either modify or pull off such ads.

However, since the role of the ASCI is only recommendatory and it lacks mechanism to enforce its advisory/orders, the menace of misleading advertising continues to grow, affecting consumers in an adverse way. In recent times, there have been developments which have led to increased recognition of the role of ASCI in regulating advertisement.

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<sup>27</sup><http://www.mondaq.com/india/x/490426/advertising+marketing+branding/CONTROLLING+MISLEADING+ADVERTISEMENT+EXPANDING+ROLE+OF+SELF+REGULATING+MECHANISM+IN+INDIA> excess on 9/jan/2018, time 9:00 pm

Earliest statutory recognition of ASCI came when ASCI code was recognized under **“The Cable Television Network Rules, 1994”** which states that 'No advertisement which violates the Code for self-regulation in advertising, as adopted by the Advertising Standard Council of India (ASCI), Mumbai, for public exhibition in India, from time to time, shall be carried in the cable service.' The aforesaid rule gave legislative sanction to the ASCI code in regulating TV commercials. However, this particular recognition of ASCI was limited to only advertisement on cable services.

Recently, in order to strengthen its mission towards self-regulation in advertising, Department of Consumer Affairs (DoCA), of the Ministry of Consumer Affairs has made ASCI "Executive Arm" for handling all complaints pertaining to misleading advertisements. The ASCI has been entrusted with the job to process the consumer complaints on the DoCA's web portal GAMA (Grievances Against Misleading Advertisements) across media like print, packaging, internet, outdoor, wall paintings, posters, bill boards, etc. Initially, six priority sectors viz. Agriculture and food, Health, Education, Housing, Financial services, E-commerce have been covered.<sup>28</sup>

DoCA has termed its partnering with ASCI as an important step in empowering self-regulatory bodies and demonstrating "More Governance – Less Government." It is believed that this partnership will go a long way in ensuring that all ads released in India are honest, decent, safe and fair.

Next official recognition to the role of ASCI came from the Department of Transport, Uttar Pradesh which requested the ASCI to enforce Responsible Advertising in Auto sector. The Department, strongly backing efforts of ASCI in promoting responsible advertising, requested ASCI to instruct the advertising agencies to adhere to the self-regulatory code and take action against automotive advertisements that depict violation of traffic rules.

Very recently, the National Apex Committee for Stem Cell Research and Therapy (NAC-SCRT) joined hands with ASCI to monitor advertisements that claim stem cell based therapies. ASCI in partnership with the Ministry of Health has taken steps to curb

<sup>28</sup><http://www.mondaq.com/india/x/648880/advertising+marketing+branding/Cracking+Of+Whip+On+Misleading+Advertisements> , excess on 9/jan/2018, time 9:10 PM



unlawful advertisements promoting medical practices not approved by regulatory authorities and made several advertisers to amend the web-site content.<sup>29</sup>

Earlier the work of ASCI was also recognized by various government bodies such as Ministry of Information Broadcasting (MIB), Medical Council of India (MCI), etc. In August 2014, MIB issued advisory to various TV channels against non-compliance of ASCI's code of self-regulation holding that such non-compliance is violation of the Rule 7(9) of the Advertising Code as contained under Cable Television Networks Rules, 1994.

In view of recent recognition of the role of ASCI by Governmental bodies and departments, ASCI has come to acquire a predominant role as advertising regulator, particularly in regulation of misleading advertisements in India. Now, the status of ASCI as an independent regulator of advertising is more or less akin to self regulating advertising bodies in other countries such as Advertising Standard Authority (ASA) in United Kingdom.

#### **4.3 Role of legislations to protect consumers from misleading advertisement and problem in that legislation**

##### **4.3.1. Drugs and Cosmetics Act, 1940**

Rule 106 of the Drugs and Cosmetics Rules, 1945 framed under the Drugs and Cosmetics Act refers to “Diseases which a drug may not purport to prevent or cure”-

- a) No drug may purport or claim to prevent or cure or may convey to the intending user thereof any idea that it may prevent or cure, one or more of the diseases or ailments specified in Schedule J
- b) No drug may purport or claim to procure or assist to procure or may convey to the intending user thereof any idea that it may procure or assist to procure, miscarriage in women.

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<sup>29</sup>[https://www.researchgate.net/publication/264752841\\_The\\_Indian\\_advertising\\_-\\_How\\_effective\\_is\\_the\\_regulatory\\_mechanism](https://www.researchgate.net/publication/264752841_The_Indian_advertising_-_How_effective_is_the_regulatory_mechanism), excess on 9/jan/2018, time 9:10 pm

Schedule J contains over 50 diseases, disorders and conditions such as AIDS, genetic disorders, baldness, cataract, diabetes, improvement in height of children and adults, improvement in vision, myocardial infarction, obesity, stones in gall bladder, varicose vein, etc.

#### **4.3.2. Drugs and Magic Remedies (Objectionable Advertisements) Act 1954**

According to this act it prohibits four kinds of advertisements pertaining to drugs and magical cures. Section 3 of the Act says that no person shall take any part in the publication of any advertisement promoting a drug or leading to the use of a drug for:

- a) The procurement of miscarriage in women or prevention of conception in women.
- b) The maintenance or improvement of the capacity of human being for sexual pleasure.
- c) Correction of menstrual disorders in women.

Section 3 further prohibits any advertisement promoting drugs for the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule and the schedule lists a number of diseases, disorders or conditions such as diabetes, cataract, cancer, fevers (in general), obesity, rheumatism, impotence, high or low blood pressure, female diseases, epilepsy, stature of persons, venereal diseases, glaucoma, sterility in women, dropsy, etc. Section 4 of the Act prohibits advertisements relating to a drug if the advertisement contains any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false claim about the drug or is otherwise false or misleading.

Section 5 of the Act prohibits advertisements of magic remedies for treatment of certain diseases and disorders. Violation of the law attracts imprisonment for six months or fine or both, for first conviction and for subsequent conviction, imprisonment for a year or fine or both.

Earlier, AIDS/HIV was not in the Schedule of the Act. But subsequently, the Union Ministry of Health included HIV/AIDS too in the schedule to the Rules. What prompted this move was the Kerala High Court's order in 2002, against the manufacture, sale and promotion of the Ayurveda drug Immuno QR as a sure cure for AIDS. In response to a public interest litigation, the Bombay High Court had also restrained Mr Majid from making "tall and unfounded claims" about the drug.<sup>30</sup>

### **Problem:**

The problem is that the law is quite outdated and is inadequate to deal effectively with the problem in its current form. One of the key problem is that the law does not prescribe a penalty, corrective advertisements and heavy financial penalties, instead it is contended with imprisonment or fine or both. The Act has a provision of imprisonment up to six months or fine or both for the first offence and up to one year or fine or both for the subsequent offence. However, the enforcement is ridiculously poor. We can still see a number of companies flouting the rules because no stringent punishment has been given.

### **4.3.3. The Monopolies And Restrictive Trade Practices Act, 1969**

Consumer-movements have forced the government to pass laws to regulate advertising and protect consumer interest. Legal restrictions and regulation are enforced by government to check deceptive and misleading advertisement. On 1st august 1984, the MRTP Act was amended and Unfair Trade Practices were covered within purview of the MRTP Act. The main object of incorporating such provision in the MRTP Act was to check deceptive and misleading advertisements in the public interests. In 1986, the government enacted the Consumer Protection Act in order to protect the interests of the consumers.

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<sup>30</sup> 1 Press Information Bureau press release, titled "Kerala High Court bans magic drug; court order to be severe deterrent for quacks", dated February 22, 2002

For preventing deceptive and misleading advertisement, the MRTP Act had declared deceptive advertising as an\* unfair trade practice. In case the advertiser was found indulging in issuing deceptive advertisements which had the potential to influence any reasonable man, he was directed to immediately withdraw such an advertisement, not to issue such advertisements in future, issue corrective advertisements, make necessary clarification and give damages to cheated consumers.

For instance, the New Udaya Pharmacy and Ayurvedic Laboratory prompted an ayurvedic proprietary medicine, “Kamilari” claiming to be a sure cure for jaundice, viral hepatitis and gall bladder stone. The advertisement said the medicine had absolutely no side effects. The advertisement concluded:

Kamiliri pills and syrup are effective even in critical stages of jaundice. If you have a bottle of kamilari in your house, then jaundice is common cold to you.

Following a complaint from a consumer saying that it had not helped him with his gall bladder stone, the Commission sent a notice of enquiry and asked the laboratory to prove the efficacy of the drug. On its failing to do so, the commission issued a “cease and desist” order, putting stop to the advertisement”.

In the year 2002, government abolished the MRTP Act. Now all the powers regarding unfair trade practices have been given to consumer courts, setup under the Consumer Protection Act.

#### **4.3.4. The Cable Television Network Regulation Act and Rules**

The Act mandates that all advertisements transmitted through the cable television network adhere to the Advertising Code formulated under it. Section 6, Chapter II of the Cable Television Networks (Regulation) Act, 1995 says that “No person shall transmit or re-transmit through a cable service, any advertisement, unless such advertisement is in conformity with the prescribed advertising code. The Advertising Code, drawn up under the Cable Television Network Rules, 1994, stipulates that all advertisements should conform to the

relevant laws of the country, the product or service advertised should not suffer from any defect or deficiency as mentioned in the Consumer Protection Act, 1986 and should not contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or supernatural or miraculous property or quality which is difficult of being proved.

An amendment to the Cable Television Network Rules, 1994, notified on August 2, 2006, incorporated the ASCI code. The amendment states that “No advertisement which violates the Code for Self-Regulation in Advertising, as adopted by the Advertising Standards Council of India (ASCI), Mumbai, for public exhibition in India, from time to time, shall be carried in the cable service”. Under the Act, any ‘Authorized Officer’, either the district magistrate or the sub divisional magistrate or the commissioner of police or any other officer notified by the central or the state government can take action against any violation of the Advertising Code.

For contravention, the Act provides seizure of the equipment being used by the cable operator for operating the cable TV network. Chapter IV of the Act, under ‘Offences and Penalties’, prescribes for first offence, imprisonment which may extend to two years or fine which may extend to ` 2000 or both. For every subsequent offence, it can go up to five years or ` 5000 or both. The Act says that “No court shall take cognizance of any offence punishable under this Act except upon a complaint in writing made by any authorized officer.” The Authorized officer can also prohibit transmission/re-transmission of any programme or channel if it is not in conformity with the Advertising Code. The Act also gives the central government the authority to regulate or prohibit transmission of such advertisements or programmes.

### **Problem:**

The problem with this law is the enforcing agency. Such an advertising code should be enforced by an independent regulator, like the broadcasting regulator. In Australia, for example, the Broadcasting Regulator looks at violations of



advertising codes on television. In any case, this law is hardly enforced because one sees any number of highly misleading advertisements on the television, blatantly promoting 'miracle' products- concoctions of questionable efficacy that bring down your weight without any effort and without any side effects, 'ayurvedic tablets' that enhance the sexual prowess of men, potions that cure you of a variety of diseases - Ironically all of them violate the Cable Television Network Regulation Act (or the Advertising Code) and yet, they continue to dominate the screen on certain channels. Even though the Advertising Code was formulated under the Rules in 1994, it was only in September 2005 that the union ministry of Information and Broadcasting issued an order for setting up of district and state level monitoring committees to enforce the Act. And then almost three years later (in February 2008), saying that the enforcement of the Act in many parts of the country was not satisfactory either due to lack of clear understanding of the role of the District Monitoring Committees or a suitable mechanism to enforce the provisions of the Act, it issued guidelines to define the role of the state and district monitoring committees to 'ensure effective functioning of the committees'. Besides specifying the constitution of the state level committees, the guidelines stipulated that a complaint cell headed by a nodal officer should be established at the district level and this should be given wide publicity so that the public may lodge complaints regarding the content. As for complaints pertaining to violation of programme and advertising codes against national channels, such complaints should be forwarded to the I&B ministry through the chief secretary of the state, the ministry said.

#### **4.3.5. Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003**

The law clearly prohibits advertisements/promotion of cigarettes and other tobacco products. It says: Section 5 - Prohibition of advertisement of cigarettes and other tobacco products-



- 1) No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.
- 2) No person, for any direct or indirect pecuniary benefit, shall-
  - a. display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or
  - b. sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or
  - c. distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or
  - d. erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco product.
- 3) No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of (a) cigarettes or any other tobacco product; or (b) any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person.

#### **4.3.6. Food Safety and Standards Act, 2006**

This relatively new law has a provision to deal with false and misleading advertisements pertaining to food. Here, the word advertisement includes advertisement and publicity through all media, including the electronic media. Even promotional material on labels, wrappers and invoice are brought under the definition of advertisement. Section 24 of the Act

(Restrictions of advertisement and prohibition as to unfair trade practices) says that:

(1) No advertisement shall be made of any food which is misleading or deceiving or contravenes the provisions of this Act, the rules and regulations made there under.

(2) No person shall engage himself in any unfair trade practice for purpose of promoting the sale, supply, use and consumption of articles of food or adopt any unfair or deceptive practice including the practice of making any statement, whether orally or in writing or by visible representation which –

- a) falsely represents that the foods are of a particular standard, quality, quantity or grade-composition;
- b) makes a false or misleading representation concerning the need for, or the usefulness;
- c) gives to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof: Provided that -:

Where a defense is raised to the effect that such guarantee is based on adequate or scientific justification, the burden of proof of such defence shall lie on the person raising such defense. Section 53 provides for penalty for misleading advertisements, extending to ` 10 lakhs.

### **Problem:**

Problem with the law: However, there is no provision here for corrective advertisement, which is very unfortunate. As I have repeatedly said earlier too, it is only corrective advertisements that can wipe out the message conveyed by false and misleading advertisements and for any law to effectively protect the interests of consumers, there should be a provision for directing issuance of corrective advertisements and that provision should be effectively enforced.

#### 4.4 Role of Advertising Standard Council of India (ASCI) 1985: An Analysis

##### 4.4.1 Advertising standards council of India

The ASCI Code aims to protect the legitimate interests of the consumers by regulating patently false, misleading, and objectionable advertisements broadcast on television, radio, and internet by advertisers, media, and advertising agencies<sup>31</sup>. The first and foremost code of ASCI for self regulation aims to “ensure the truthfulness and honesty of representation and claims made by advertisements and to safeguard against misleading advertisements”

During 1985 prominent members connected with all aspects of advertising came together and decided to accept global best practices in the field of ‘Self Regulation in Advertising’<sup>32</sup>. It was then the Advertising Standards Council of India (“ASCI”), a non statutory tribunal, was established that created a self regulatory mechanism of ensuring ethical advertising practices. Before the establishment of the ASCI the courts were responsible to adjudicate upon these matters. But then gradually, the ASCI Code received huge recognition from the advertising industry. The warnings issued by ASCI to the advertisers against the misleading advertisements were gradually being accepted by the advertisers and the advertisements were actually stopped being aired or were modified significantly to comply with the prescribed ASCI Code<sup>33</sup>. ASCI receives and processes complaints against advertisements, from a cross section of consumers, the general public and industry, in the interest of all those who rely on advertising as a commercial communication, and this covers individuals, practitioners in advertising, advertiser firms, media, advertisement agencies, and ancillary services connected with advertising. ASCI communicate with the advertiser when a complaint is upheld and it is noteworthy that in about 90%

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<sup>31</sup>Refer Regulating Advertising in India , Sunaina Kapoor and Neeraj Dubey PSA 2009 Page 2 Available at [www.psalegal.com/pdf/TMT-Bulletin-Issue-III11062009042225PM.pdf](http://www.psalegal.com/pdf/TMT-Bulletin-Issue-III11062009042225PM.pdf) Last accessed on January 12 ,2018 7:08 PM

<sup>32</sup>Anonymous, Chapter III History and profile of ASCI Pg. 51 Available at : [http://shodhganga.inflibnet.ac.in/bitstream/10603/3434/7/07\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/3434/7/07_chapter%203.pdf) Last accessed on January12,2018 5:29 PM

<sup>33</sup>Sunaina Kapoor and Neeraj Dubey PSA 2009 Page 2 Available at [www.psalegal.com/pdf/TMT-Bulletin-Issue-III11062009042225PM.pdf](http://www.psalegal.com/pdf/TMT-Bulletin-Issue-III11062009042225PM.pdf) Last accessed on January 13 ,2018 7:08 PM

the cases where the complaint is upheld, the ads are either modified or withdrawn<sup>34</sup>.

Apart from the self regulatory organization ASCI, The Reserve Bank of India, Medical Council of India, Insurance regulatory Development authority, Telecom regulatory authority of India and Securities Board exchange of India are also empowered to exercise control over the misleading advertisements in their respective domains.

#### **4.4.2 Impact On consumers**

The Advertisements have a large impact on consumer. They are made to propagate awareness and hence should not mislead the consumer. The advertisement should bring precisely the use and motive of the product but the manufacturers or traders should not look for their gain or profits. In India, due to severe sanctions on advertising certain products like alcohol, tobacco products, medicines and baby food has led to the emergence of a whole genre of misleading / surrogate advertising<sup>35</sup>. The influence of such advertisements on consumer choice is undeniable. And it's this fact that makes it imperative that advertisements be fair and truthful. Misleading and false advertisements are not just unethical; they distort competition and of course, consumer choice. False and misleading advertisements in fact violate several basic rights of consumers: the right to information, the right to choice, the right to be protected against unsafe goods and services as well as unfair trade practices<sup>36</sup>.

Advertising costs companies lots of money and even after proper planning and implementation, there are hidden money involved, which burns our pockets deep. When we usually buy a product, we don't just pay for the product. There are lots of expenses already included with it like packaging, the development, manufacturing, technological expense, machinery, etc. along with all these we

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<sup>34</sup> Supra note 38 at Page 63

<sup>35</sup>See V.G. Ranganath Restrictions on Advertisement in vision of Consumer Page 1 Available at :- [http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=ranganath\\_vadapalli](http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=ranganath_vadapalli) Last accessed on january 13,2018 2:35PM

<sup>36</sup> See Pushpa Girimaji note 10 pg.1

also pay for advertising expenses as well. Some organizations go over board to sell their products making manipulative claims to the customers but as per the law it is mandatory for them to submit statistical data in order to prove their claims. Recently, a complaint was filed in ASCI against Hindustan Unilever Ltd (Dove Hair Fall Rescue shampoo) The advertisement was aired on various channels claiming “No Hair Fall No Damage” Further, the word ‘Super’ in the advertisement represented – “No hair breakage and split ends( according to the sampling based on lab test) when regularly used Dove Shampoo”. It was contended in the complaint that this claim needs to be substantiated with independent technical data. The word ‘Super’ does not state the source of the study and nor does it state the date on which the said study was conducted. The word ‘Super’ speaks only of sampling based on lab test which is not adequate to make such a technical claim. The word ‘Super’ in the advertisement was blurred and illegible from a consumer point of view. It was held by the ASCI commission that the claim, “No Hair Fall No Damage”, was an absolute claim which was not mitigated by the word super. Claim was not substantiated and was tagged ‘misleading’. The advertisement was hence withdrawn<sup>37</sup>. Thus, being factually incorrect such a statement could have attracted the consumers to buy the product subsequently causing them wrongful losses.

The most recent **Nirmal Baba’s** case is an epitome in the context of the topic .In a recent petition filed in the Delhi High court it was alleged by the petitioner that Nirmal Baba has been advertising in different electronic and print media claiming to give ‘magical treatment’ while misleading the common man by claiming himself to a ‘representative of god’. It said that such advertisement in the media given by the Baba is contrary to the provisions of the Drug and Magic Remedies Objectionable Advertisement Act, 1954<sup>38</sup>.

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<sup>37</sup> See Campaign India dated Dec 22 2011 , ASCI’s Consumer Complaints Council upholds complaints against 17 ads Available at: <http://www.campaignindia.in/Article/285214,asci8217s-consumer-complaints-council-upholds-complaints-against-17-ads.aspx> Last accessed on January 13,2018 4:35 PM

<sup>38</sup> See Millennium Post dated Tuesday, 28 May 2013 Available at : <http://millenniumpost.in/NewsContent.aspx?NID=2078> Last accessed on January 14,2018 4:47PM

It is found, nowadays that many of the cosmetic companies make misleading claims regarding their products in order to promote their sales. There are certainly some claims that are more egregious than others. The advertisements by the coaching classes and educational institutes are also manipulative to a very large extent. Being attracted by such misleading claims, the gullible students pay a large amount of fees and realize it very late that they are left with nothing. On failure some students suffer from deep mental trauma and prefer to end their life. The Consumer Complaints Council (CCC), in June 2011 received a complaint against Career Launcher, a prominent institute for the Law entrance exams (CLAT and AILET). Career Launcher claimed to have “Top 20/20 AIR in CLAT and Top 20/20 AIR in NLU, Delhi” This implied that students who took CLAT and AILET and achieved All India Rank (1 to 20) were CL students. In this advertisement, claims were not supported and substantiated with reliable data or evidence. The CCC concluded that pending the validation of the data by independent auditors, the claims mentioned in the advertisement and cited in the complaint are misleading.

Children are in the most vulnerable age group which is affected by the misleading advertising. Actually, the children lack the perceptual defense possessed by the adults and cannot objectively evaluate advertisements; they are more susceptible to deception. Television advertising corrupts children by instilling values that are not acceptable to the society and helps in the development of conflicting relationship between the children and their parents. As soon as children see some great persuading advertisement, they run to their parents to purchase them the item. Whether it's useful to them or no, they get so attached with attractive imagination that they get adamant on buying them. Junk food items, which are heavily promoted, may lead to child obesity in children. They keep craving for such foods all the time, which are more fatty and sugary from health perspective<sup>39</sup>.

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<sup>39</sup>See Business Mantra, Effects of advertising on children Feb 18, 2010 Available at:- <http://www.businessmantra.net/effects-of-advertising-on-children.html> Last accessed on April 17 2013 4:47 PM



Advertising creates artificial needs. Advertisements motivate and persuade consumers to buy the things that are not needed even. Advertising should not persuade by playing with consumers emotions, anxieties, psychological needs & desires such as status, self esteem, attractiveness & others but should just provide information useful in making purchase decisions such as price, performance & other objective criteria. Persuasive advertising foster discontent among consumers & encourage them to purchase products & services to solve deeper problems. Misleading advertising surrounds consumers with the images of good life and convinces how the materialistic possessions lead to happiness in life.

#### **4.5 Consumer Protection Act to Consumers – 1986, Rescue**

While all these laws, meant to curb false and misleading advertisements are enforced by different enforcement agencies/ regulators, the Consumer Protection Act is the only law that gives the consumer, the right to seek redress against such advertisements, including compensation for any loss or injury caused as a result of such advertisements. The law provides for redress against unfair trade practices and a false or misleading advertisement becomes an unfair trade practice under the provisions of the law. Section 2 (1) (r) of the Consumer Protection Act gives a comprehensive definition of unfair trade practice (see annexure I for the definition at p.52) and Section 14 deals with the directions that the court can give to deal with such practices and this includes directions to the advertiser to discontinue such advertisements and not to repeat it. They can also award compensation for any loss or suffering caused on account of such unfair trade practice. They can also award punitive damages and costs of litigation. But most important, they can direct the advertiser to issue corrective advertisement. Section 14 h (c) of the Act, describing the powers of the court, says that the court can order “corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement”. In so far as misleading advertisements are concerned, this is the most important provision and can really prove to be a deterrent. Unfortunately, this provision is not being used to effectively curb misleading advertisements.

#### 4.5.1 Proposed Consumer Protection Bill – 2018

A new Consumer Protection Bill was introduced in the Lok Sabha, seeking to set up an authority to safeguard consumer rights in view of current challenges posed by e-commerce, direct selling, tele-marketing and misleading advertisements. The Consumer Protection Bill, 2018 was introduced by Consumer Affairs Minister Ram Vilas Paswan in the Lower House and it seeks to replace the 31-year-old act that is Consumer protection act – 1986.

The government has called for strict punishment, including jail terms and hefty fines for misleading advertisements and food adulteration. The Bill has strong provisions to check adulteration and misleading ads and also provides for fine up to Rs 50 lakh and jail up to 5 years for manufacturers and service providers for false and misleading ads. Against adulteration, the Bill has provisions for fine up to Rs 10 lakh and life term imprisonment.

The consumer protection bill 2018 which seeks to replace the archaic Consumer Protection Act 1986, states that “Any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of the consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend up to 10 lakh rupees.” Further offences may lead to a jail term of 10 years and a fine of up to Rs 50 lakh.

“For celebrities involved in misleading advertisements, there will be penalties. There is no provision for a jail term,” said a senior official who did not wish to be quoted, without revealing in particular the nature of these penalties. Minister of consumer affairs, food and public distribution Ram Vilas Paswan in a series of tweets on Friday said that the new bill will ensure faster dispute redressal for consumers and will allow Central government to regulate e-commerce and direct selling among other important measures.

“This Bill provides for simplification of consumer disputes adjudication process for faster disposal of grievances through filing of complaints by a consumer from his place of residence, e-filing and video conferencing for hearing,” Paswan said. The bill also

provides for product liability action, which means a complaint filed by a person before consumer court for claiming compensation for the harm caused to him on account of a defective product or service.

With respect to misleading advertisement in this bill Definition of advertisement added in the section- 2(1)<sup>40</sup> of consumer protection bill – 2018.

Further in chapter – III of the Bill which talks about Central Protection Authority, Section – 10<sup>41</sup>, Section – 21<sup>42</sup> are the one which deals with misleading advertisement.

Further in chapter – VII of the Bill - 2018, deals with Offences and Penalties, in which section – 89<sup>43</sup>, deals with the punishment for false or misleading advertisement.

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<sup>40</sup>“advertisement” means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents.

<sup>41</sup> Establishment of Central Consumer Protection Authority, section 10 (1) says The Central Government shall, by notification, establish with effect from such date as it may specify in that notification, a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.

<sup>42</sup> Power of Central Authority to issue directions and penalties against false or misleading advertisements

<sup>43</sup> Any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence, be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

**CHAPTER – 5**  
**DECEPTION IN ADVERTISEMENT AND PROTECTION OF CONSUMERS – A**  
**JUDICIAL APPROACH**

**WHAT IS DECEPTIVE ADVERTISEMENT..??**

Deceptive advertising, also known as false advertising, refers to a manufacturer's use of confusing, misleading, or blatantly untrue statements when promoting a product. Advertising law will protect consumers from deceptive advertising through the enforcement of specific legislation. Advertising law and consumer law have basically the same function: to promote truth in labelling.

Truth in labeling means that all pertinent information that a consumer should reasonably be aware of should be printed on the label of the product. This will ensure that consumers are protected, and know exactly what they are buying. This limits the level of manipulation by manufacturers and advertisers.

There are several different methods for attempting to deceive consumers that are not permitted under advertising law. One way is through hidden fees or the use of surcharges. This means that a company will charge extra fees beyond the advertised price for a certain product or service. This is very common in mobile phone contracts and air travel.

Oftentimes, the company will try to protect themselves by disclosing the extra fees in the "fine print" of the contract. Most consumers will be unaware of these charges and overlook them when signing contracts. Advertising law mandates that the language of a contract must not be so confusing that it prevents a consumer from being aware of them. Oftentimes, especially in mobile phone contracts, activation fees will be included. Advertising law will permit these charges as long as they are disclosed to the consumer.<sup>44</sup>

Another method of deceptive advertising occurs when "going out of business sales" actually charge customers more for products that had already been marked down. According to consumer law, this is an unfair practice because it takes advantage of and misleads the customer. By advertising that the company is going out of business and "everything must go" this tells the customer that the prices will be marked down. However, this is not always the

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<sup>44</sup> Available at <https://consumer.laws.com/deceptive-advertising/deceptive-advertising-definition> last accessed on 23 February, 2018 [2:00 pm]

case. A customer may actually pay a higher price than normal during a going out of business sale.

Advertising law also recognizes the manipulation of standards as a deception under consumer law. This means that a company will begin to change something, such as a unit of measurement, to mean something different from how it is normally understood. This will allow companies to charge more for their services, but is a violation of rights according to consumer law.

An undefined term is also considered a violation under consumer law. This will occur when manufacturers are very vague in their terms. They may be using terms that are not legally accepted and basically have little meaning.

### **Learn to Recognize Deceptive Advertising**

Deceptive advertising is officially defined by the Federal Trade Commission (FTC) as "a representation, omission or practice that is likely to mislead the consumer" and "practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations<sup>45</sup>.

However, it's important to note that deceptive advertising does not represent the entire industry, and makes up a very small percentage of the ads you will encounter every day. But there are always people out there looking to dupe consumers and make money in any way that they can. Here are some examples of deceptive and unethical advertising practices and scams that you need to look out for.<sup>46</sup>

### **Hidden Fees**

In this example, the advertising is not fully disclosing the true cost of the item. You may see an ad for a computer or tablet that says "Only 19999 rupees" and you can't wait to go into the store and buy it, or order it online. However, suddenly you are hit with a whole bunch of

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<sup>45</sup> Available at <https://www.thebalance.com/deceptive-advertising-38512> , access on 25 February, 2018, 1:00AM

<sup>46</sup> *ibid*

charges that you were not expecting. In some cases, shipping fees will be extortionate, often costing more than the product itself. Or, you may have to pay handling fees that are excessive. Often, hidden fees can be spotted by the asterisk (\*) that accompanies the incredible deal.

Guaranteed, there will be a big difference between "Only 19999 rupees" and "Only 19999 rupees\*". That asterisk basically says "hey, this is not the final price, you will have to jump through major hoops or fork over a lot more cash." So, if you see an asterisk, read the small print carefully. Whether it's a small item, a car, or even a home, hidden fees are a deceptive way of luring you in.

### **Bait and Switch**

In short, bait and switch is just how it's described. The advertisement entices you with a product, but makes a significant switch when you go to purchase it.

For instance, suddenly the laptop you wanted is not in stock, but there is a different one that is lower spec and costs twice as much. The chances are, that original laptop was never in stock, or at least, not for the price advertised.

Another example would be advertising a car at the base price, but with all of the top-of-the-line features included in the ad. When you get to the dealership, you have to pay much more to get the car actually shown in the ad. Bait and Switch advertising is illegal and should be reported whenever you encounter it. Sometimes, an offer can feel like bait and switch but it's not.

### **Misleading Claims**

Misleading claims use tricky language to make the consumer believe they are getting one thing, when they are in fact getting less (or paying more).

A British TV show called *The Real Hustle* had a great example of this in action. The presenters, who know the ins and outs of so many con games, set up stalls to sell seemingly awesome products at cheap prices.

At no time do the hustlers break the law by making claims that are untrue, but the verbiage leads people to believe they are buying something way better than they're actually getting. One of the cruellest was advertising a DIY model plane for a price that seemed like a steal. Things



like "easy to assemble" and "it really flies" were on the box. But inside...it was just a blank sheet of paper, with a set of instructions on how to make a paper plane.<sup>47</sup>

In this situation,

Did they break the law? .....No

Did they deceive? .....Yes

### **Judicial Approach in India**

In Colgate-Palmolive (India) Limited vs. Anchor Health & Beauty Care Private Ltd,<sup>48</sup> the issue involved was whether a person can be enjoined from making any false, misleading or disparaging representations or from making any slanderous statements in showing, screening, exhibiting or telecasting commercial/advertisements with respect to products of any other person. Colgate-Palmolive approached the court aggrieved by the use of the words "ONLY" and "FIRST" in the advertisement of the Anchor Health. The objection regarding the advertisement was the claim by Anchor that their's was the "ONLY" toothpaste containing all the 3 ingredients, calcium, Fluoride, Triclosan. The Second objection was the use of the word "FIRST" all round protection toothpaste. The applicants contented that even their products contained all these products. The claims made by Anchor were contented to be misleading. The court after detailed analysis of various case laws and provisions came to the final conclusion that the reasons behind the use of the words "ONLY" and "FIRST" were not satisfactory. The advertisement usually gives out an impression that Anchor is the only toothpaste containing all the three ingredients. Similarly, the use of word "FIRST" is not in relation to the slogan "all round protection" as it is indented to project. The respondent has to bring out a scientific base for such claims and thus, the words "ONLY" and "FIRST" fall under the dragnets of Section 2(1) (r) of the Unfair Trade Practices contained in The Consumer Protection Act, 1986 and could create an impression in the minds of the consumer that Anchor is the best toothpaste in the market. In this light, Anchor was restrained from using the offending words in the advertisement.

In M/s. Cox & Kings (I) Pvt. Ltd. vs. Mr. Joseph A. Fernandez & Others,<sup>49</sup> the Respondents Mr. and Mrs. Fernandez had booked for a tour from Bangalore to Singapore-Malaysia and back

<sup>47</sup> Available at <https://www.thebalance.com/deceptive-advertising-38512> last accessed on 23 February, 2018 [6:00 pm].

<sup>48</sup> Madras High Court C.S. No. 451 of 2008

<sup>49</sup> N.C.D.R.C. Appeal No:- 366 OF 2005

with Cox & Kings. The advertisement displayed the duration of the tour as “Two nights /three days cruise”. But in the confirmation voucher given to the Respondents timings were mentioned as “Leave Singapore at 23.59 hours on 17.4.2002 and arrive at Singapore on 19.4.2002.” This actually meant that the trip is originally for two nights and one and a half days whereas it was advertised as 2 nights/3 days Cruise. Therefore, there was a shortage of one and a half days cruise service according to the Complainants. The Hon. District Court ordered Cox & Kings to pay Rs.50, 000 as compensation. The appeal by the tour operator was dismissed by the Karnataka State Commission which however reduced the compensation to Rs.25, 000/- with 25% interest p.a. The matter then reached to the apex consumer court. The court found that the state forum took a lenient view by reducing the amount to half and restored the order of the District Commission. In courts view, this practice by the Petitioner was not only a case of misrepresentation through misleading advertisement but also an unfair trade practice in the eyes of Consumer Protection Act.

In the case of Bhupesh Khurana vs Bu2ddha Parishad,<sup>50</sup> the Buddhist Mission Dental College advertised in National newspaper for admission in BDS Course. The said advertisement claimed that the college was affiliated to Magadh University, Bodh Gaya and was recognized by the Dental Council of India. The Complainants in good faith accepted the information of the Opposite Party as an authentic and correct and sought admission in the BDS course and paid a substantial amount as demanded by College for admission. Later on it was revealed by the students that the college was neither affiliated to none of the claimed organizations and as a result of which unable to hold the annual examinations. Moreover, there was no regular qualified teaching staff to teach the students and laboratory was ill equipped and there were no instruments and other articles of the laboratory. Fees are paid for services to be rendered by way of imparting education by the educational institutions. The Complainants had hired the services of the Respondent for consideration so they are consumers as defined in the Consumer Protection Act. The Supreme Court said that this case comes under the meaning of deficiency in Consumer Protection Act .Thus the court, in its judgment directed the College to refund the admission expenses paid by the injured parties at the time of admission with interest calculated at the rate of 12% p.a. from the date of receipt of the amount till date of payment and also to

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<sup>50</sup>C.A. no.1135 of 2001

pay Rs.20,000/- to each of the Complainants by way of compensation for the expenses defrayed on purchase of books, mess expense, hostel expenses for two years and for the loss of two valuable academic years<sup>51</sup>.

### **Consumer Protection**

Role of the consumers in reducing the instances of misleading advertising is most important. The consumers are expected not to remain gullible. Customers should take their time to compare product features and prices before making a decision to purchase it. Generally, there is more than one choice per product in the marketplace, and it's our duty to determine which one will work best for our respective purposes. They should not get tempted by the discounts and other deceptive offers. Whenever they come across an Advertisement which they consider misleading or offensive, they should write to The Advertising Standards Council of India. ASCI promises them that even a single complaint alleging that an advertisement is misleading or offensive is usually enough to require the Advertiser to correct the Advertisement. Further, the ministry of consumer affairs, with the sole objective of empowering consumers, has implemented a pioneering and intensive multimedia campaign, "JagoGrahakJago (Wake up Consumer)" to create consumer awareness in the country.

The problem of misleading ads continues to be serious in the country despite several legislations like the Food Safety and Standards Act, Consumer Protection Act and the Drugs and Cosmetic Act. Therefore, need for a single codified legislation empowered to regulate all types of misleading advertising is an important need of the hour. Concerned over the advertisements that are misleading, the government of India is mulling the idea to create an effective law to stop companies from giving such advertisements.<sup>52</sup>

Revival of the MRTP commission with the sole purpose of preventing false and misleading advertisements can prove to be another landmark step.<sup>53</sup>

Further, as clear from the precedents that courts and consumer tribunals have been playing an effective role in imparting justice to the aggrieved parties. The consumers are advised not to

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<sup>51</sup> See Pushpa Girimaji, *Misleading Advertising and consumers*, Indian Institute of public administration. Delhi 2006 Pg.18

<sup>52</sup> Jagran Post dated 15 Feb 2012 Laws against Misleading advertisements soon :KV Thomas <http://post.jagran.com/Laws-against-misleading-advertisements-soon-KV-Thomas-1329303970> Last accessed on February 23, 2018[8:45 PM].

<sup>53</sup> See Pushpa Girimaji, *Misleading Advertising and consumers*, Indian Institute of public administration. Delhi 2006 Pg.30.

remain quiet if they happen to come across any injustice and approach the court and tribunals for the redressal of their grievances.

## CASES

**1. Name of the Case:** Jagrut Nagrik and Ors. v. The Secretary, Ministry of Civil Aviation and Ors.

**Legislation:** Consumer Protection Act, 1986

**Citation:** Consumer Case No. 13 of 2008 decided on 14.08.2015, MANU/ CF/0587/2015

**Commission:** National Consumer Disputes Redressal Commission

**Facts:** The complainant, Jagrut Nagrik is a Public Trust, registered under the Bombay Public Trust and Societies Act and is stated to be working as a Voluntary Consumer Association, providing legal help to the consumers and undertaking activities for their awakening. According to the complainants, airlines have been advertising sale of tickets on throwaway prices, ranging from Rs. 0 to Rs. 999 while in fact, charging much more than the price advertised by them. The respondent airlines, according to the complainant, are thereby misrepresenting the passengers, through misleading advertisements, as regard the fare being charged by them. This is also the case of the complainants that the airlines are charging fuel surcharge, congestion charges and transaction fee, which is much higher than their actual cost in this regard. The aforesaid action of the airlines, according to the complainants amounts to unfair trade practice and deficiency in the services to the passengers.

**Issue:** Are the advertisements misleading in nature and have the airlines adopted unfair trade practice?

**Decision:** The advertisements disclosing only the minimum basic fare to the potential consumers is to say the least misleading, when viewed in the light of the fact that the other charges payable by a passenger, far exceed the said minimum basic fare. The obvious purpose behind issuing such misleading advertisements is to lure the customers to the website of the carrier by misrepresenting to them that they would be able to travel on payment of the fare advertised by the carrier whereas, in fact, they have to pay much more than the said minimum basic fare. Though, the whole of the fare including its break up into different components would be known to the passengers before he books a ticket on the website of the Carrier, the ulterior motive behind issue of such advertisements is duly served by that time, since having gone to the website of the carrier not all the potential consumers would retract without booking tickets.

Having taken the trouble of accessing the website of the concerned carrier, some of them are likely to book the tickets, despite the fact, that the total amount payable by them is much higher than the amount advertised by the carrier. Such advertisements also serve the purpose of increasing the number of persons visiting the website of the carrier since not all of them would visit if they are not allured by the promise of the travelling on fare which is much below the actual fare payable by the passengers. For the reasons stated hereinabove it was held that issue of advertisements such as those issued by several airlines whether in newspapers or otherwise, constitutes unfair trade practice as defined in Section 2(1)(r) of the Consumer Protection Act, 1986. Airlines like Deccan Aviation and Jet Airways which used such practices were directed to deposit Rs. 5,00,000/and Rs. 25,00,000/respectively as compensation in the Consumer Welfare Fund of Government of India.

**2.Name of the Case:** Jai Bhagwan v. Estate Officer, Chandigarh

**Legislation:** Consumer Protection Act, 1986

**Citation:** Revision Petition No. 111 of 2011

**Commission:** National Consumer Disputes Redressal Commission

**Keyword:** Unfair trade practices; Misleading notification; Deficiency of services; Land.

**Facts:** In this case the appellant, after two adverse orders from the District Forum and State Commission, filed a revision petition before the National Commission. The problem at hand is with regard to the nonallotment of an industrial plot for which he had paid the requisite fee of Rs. 1000/on the basis of oral assurances of the Opposite Party. The appellant's contentions were that there was a deficiency of service by way of unfair trade practices, and that refund was made only after 30 years when he ought to have been allotted the land, despite several representations to the OP.

**Issue:** The basic question to be addressed is as to whether or not the assurances of the OP that land would be allotted could be considered as an unfair trade practice and hence misleading on their part.

**Decision:** The National Commission dismissed the appeal and upheld the orders passed by the State Commission. It held the complaint to be frivolous and that the appellant 'was trying to rake up an old matter citing irrelevant cases, and was asking to be allotted land simply on the justification that he had spent Rs. 1000/30 years before. The limitation period could not be

breached simply because he had been refunded the amount 30 years later. Further, even if the complaint were accepted, the assurances made by the OP were merely oral with no documentary evidence adduced on the part of the appellant. Also, the representations made to the OP by the appellant did not convince the commission of his interests in being allotted the land. Thus, there was no unfair trade practice and hence, could not have been misleading.

**3. Name of the Case:** Jain Irrigation Systems Ltd. v. M.B. Malipatil & Anr.

**Legislation:** Consumer Protection Act, 1986

**Citation:** Revision Petition No. 932 of 2007

**Commission:** National Consumer Disputes Redressal Commission

**Keyword:** Unfair trade practices

**Facts:** This case deals with an advertisement by the appellant for issue culture plants of G-9 variety have a very high yield of bananas. The respondent had purchased and planted 4500 of the seedlings, with due care and nurturing strictly in accordance with instructions as laid down by the appellant. But later, most of the seedlings had failed and plant growth was stunted, with weak stems and dried up bunches. Despite several representations, there was no response from the appellant. Several experts from the Horticultural Dept. inspected the fields and the plants and it was reported that 65% of the plants had failed owing to defective and diseased seedlings. Thus a complaint on the grounds of unfair trade practices was filed to make good the loss. The appellant argued that the wrong method of irrigation was used instead of drip irrigation which leads to overflowing. Further, the banana seedlings had been planted alongside virus infected watermelons, on poor quality sandy soil which had low nutrient and water holding capacity.

**Issue:** The basic issue was as to whether or not there were unfair trade practices committed by the appellants with respect to sale of defective seedlings. The underlying issue is with reference to the misleading advertisement by the appellant as to the genuineness of the seedlings and the instructions that could have been possibly misconstrued by the respondent.

**Decision:** The District Forum and the State Commission rejected the appellant's arguments and held it liable to compensate the respondent for the losses without an in-depth analysis of the report and findings of the experts. The National Commission observed that there was no evidence adduced to prove that the disease was caused primarily due to defective seedlings. There was enough proof to show that the seeds had failed due to poor agronomic practices like planting next to diseased watermelons, low fertility soil. As regards the misleading part of the



advertisement, the fora below had looked into the wording and stated conclusively that drip irrigation was only recommended and not mandatory, which could not have expected of the respondent and thus not a reason for stating that the losses were entirely the respondent's fault. But the National Commission also looked into all these factors as being contributory to the failure of the seedlings. Thus, there was no unfair trade practice and consequently no misleading advertisement, although this was not expressly mentioned.

**4. Name of the Case:** M2K Country Heights, New Delhi and another v. Rajesh Kumar S/o Zile Singh

**Legislation:** Consumer Protection Act, 1986

**Citation:** 2013 Indlaw NCDRC 347

**Commission:** National Consumer Disputes Redressal Commission

**Keyword:** Unfair trade practices; misleading advertisement; Housing projects

**Facts:** Lured by an advertisement by the petitioner Company, the complainant booked an apartment in the housing project as proposed in it, involving a payment of Rs. 3,00,000 /-. However, no information was provided to the latter with regard to the location and progress of the project. The complainant also claimed that the project was being undertaken without any license to construct or CLU. But the Company (OP/petitioner) contested these claims as being frivolous because they had already informed the complainant of the specifications, tentative dates and other necessary information, and that all construction had been commenced with due prior permission and approvals. The orders of the District Forum and the State Commission were not in favour of the petitioners and hence this revision petition before the National Commission.

**Issue:** The main question before the Commission was as to whether the impugned orders of the fora below were faulty and based on incorrect appreciation of facts. As relevant to the scope of this project, the issue to be addressed is with regard to whether or not there was deficiency in services provided by the petitioner, and impliedly leading to the conclusion that the advertisement of the petitioner was misleading.

**Decision:** The Commission dismissed this case and upheld the orders of the state commission. The petitioner was held to be deficient in services. The claims of the petitioner that requisite instalments needed to be paid by the respondent were rejected. The claims that necessary information had been supplied were not sufficient in this regard, because the complainant was

not even aware of the whereabouts of the project. Even so, the information supplied stated that the construction would be completed within 36 months from the date of commencement of construction as in the supplied information. However, five years had passed since the commencement date had elapsed. This by itself amounts to deficiency and a major deviation from the advertisement's declarations since five years was much beyond even considerable leeway.

**5. Name of the Case:** Jaswinder Singh, Pradeep Kumar Gupta v. Corporation Bank

**Legislation:** Consumer Protection Act, 1986

**Citation:** Revision Petition No. 4662 of 2012

**Commission:** National Consumer Disputes Redressal Commission

**Keyword:** Unfair trade practices; Misleading and fraudulent notification; Auction of mortgaged, properties

**Facts:** Both petitioners filed their respective petitions against the orders passed by the State Commission against their respective complaints. The respondent here, i.e., Corp. Bank, issued a notification, for the sale of mortgaged properties by auction. Both accordingly paid the requisite initial investment money, and succeeded their respective properties as the highest bidders. In order to remit the balance amount, the complainants approached other banks with the documents of the succeeded property for obtaining loans. However, they all turned down the loan requests on the grounds that the title deeds had several defects, which was also approved and verified by legal consultants. Further, even when the respondent was approached with the same documents for housing loans, the requests were denied without any sufficient reasons. Subsequently several representations were made to the bank for repayment of the initial investment money. But the bank responded that the money had been forfeited because the bid amount and the remaining money had not been paid within the prescribed number of days. This was rejected by the District Forum but upheld by the State Commission.

**Issue:** The basic issue to be addressed is as to whether or not there was deficiency of services on the part of the Bank for having auctioned property using defective title deeds, thereby rendering the notification of auction false and misleading by necessary implication.

**Decision:** The National Commission set aside the orders of the State Commission and allowed the petition. It looked into the 'as-is-where-is' principle of notifications such as these, wherein the seller is not responsible for the title deeds and the burden of looking into the merit of the same lay on those looking to purchase the property. However, there had been deliberate

concealment of the defects on the part of the bank, which had refused to provide the said documents to the complainants before the auction and thus they could not have decided about bidding before. This was held to be fraudulent and an unfair trade practice for publishing misleading notifications about defective property.

**6. Name of the Case:** Jayanthilal and Anr. v. Abhinav Gold International Marketing Pvt. Ltd.

**Legislation:** Consumer Protection Act, 1986

**Citation:** Consumer Complaint No. 237 of 2012

**Commission:** National Consumer Disputes Redressal Commission

**Keyword:** Misleading and fraudulent notification; Consumer; Investment, Trading, etc.

**Facts:** In this case, complaints were filed by two 'consumers' collectively on behalf of a number of alleged individual consumers, because the right and interest of present complainants and all other individual and numerous consumers were identical and co-extensively cumulative, by virtue of the nature of privity of contract. The OP, engaged in the business of trading, marketing, and agency dealings of gold, silver, etc., carried extensive marketing and investment programmes across several regions, and also publicized their activities on a mass scale, inviting customers to invest in large numbers with assurances of high returns. However, they later on started indulging in evasive tactics and avoidance. Plans and schemes were unilaterally modified or withdrawn, excuses were fabricated to cover up deficiencies and dishonest intention, and finally the Company abruptly wound up without due notice. Several criminal cases were also filed against the respondents for cheating and fraud. The present complaint was filed asking for remittance and repayment of the amount as assured and payable to the investors/consumers.

**Issue:** The overall question before the commission was with regard to whether the complainants were consumers as under the purview of the Consumer Protection Act, and whether they could thus file the complaint. With relevance to the scope of this project, the issue that is impliedly addressed is as to whether or not the publications of the OP were misleading and fraudulent.

**Decision:** The Commission outrightly dismissed the complaint stating that the complainants were not consumers as per the definition under the Consumer Protection Act, since they themselves accepted that they were investors with the sole purpose of earning profits. However, it is obvious that the advertisements on the part of the OP were misleading, dishonest and

fraudulent considering the implied nature of their actions, and the criminal cases filed against them.

**7. Name of the Case:** United Breweries Limited v. Mumbai Grahak Panchayat

**Legislation:** Consumer Protection Act, 1986,

**Citation:** 2006 Indlaw NCDRC 212

**Commission:** National Consumer Redressal Commission

**Keyword:** Misleading surrogate notifications; Unfair Trade Practices; Railways; Liquor.

**Facts:** The background of this case, is with respect to a complaint against the appellant (UB) as well as Western Railways for having adopted Unfair Trade Practices in prominently displaying/exhibiting false, misleading and surrogate Liquor Advertisements on the coaches of the Western Railway trains and to seek discontinuance of the same along with corrective advertising by the opposite parties to neutralise the effect of the said advertising and punitive damages. The advertisement made a claim that the products in contention (Bagpiper, London Pilsner and Derby Special) were India's No.1 and World's No.3. Further, it was observed that the first two products were in fact not 'soda' as had been claimed, but actually beer or whiskey. It also proclaimed, 'Ab cold drinks out' in an attempt to replace cold drinks with liquor, especially in young minds. This was considered to be highly objectionable, deplorable and patently illegal. When the railways were approached all representations were spurned stating that agreements had already been made. The Railways claimed that the advertisements had already been removed in consonance with the railway guidelines against the advertising of alcoholic substances. The matter was also taken up with the Advertising Standards Council of India, with respect to the misleading nature of the advertisements. The main contention of UB was that 'Soda' was not covered under any of the legislations prohibiting advertisement of liquor such as Sec. 24 of the Bombay Protection Act, the Cable Network Act, ASCI Code or the \_ Railway Guidelines for commercial advertising.

**Issue:** The main questions that were placed before the Commission were as to whether or not use of the term 'Soda' was misleading in nature. Whether the impugned advertisements created a sense of false belief regarding the said products.

**Decision:** ASCI held that the advertisement was misleading by ambiguity since the headline, "Ab cold drink out" and the claim of "Rs. 16 only Rs. 3 refundable deposit", was not supportive of the product mentioning 'pint glasses', and contravened Chapter 1.4 of Advertisement Code.

Similarly, the complaint against Bagpiper Soda was also upheld. The mention of the word "Soda" in an inconspicuous manner, while boldly stating the brand name "Bagpiper" with the baseline, "India's largest, World's No. 3", was misleading by its ambiguity and contravened Chapter 1.4 of the Advertisement Code. It was also held that the advertisements were surrogate advertisements for alcohol producing brands and contravened Chapter III. 6 of the Advertisement Code. The Commission on the other hand, upheld the order passed by the State Commission and dismissed the petition of the appellant. Firstly, with regard to the question of the use of the term 'Soda', it was observed that the products were not available in the markets as soda but only available as whiskey or beer. Thus liquor replaced other cold drinks and not soda. Secondly, the claims of being No. 1 or 3 etc., could not be substantiated which collectively made them misleading and illegal. More so these were surrogate advertisements, which could have disastrous impacts, not just on younger generations, but also on unintended target groups. Thus, the issuance of corrective advertisements was upheld for the purpose of obliterating to the maximum extent any potential damage involved, which was a significant cost per se.

**8. Name of the Case:** Cox and Kings v. Joseph A. Fernandez

**Legislation:** Consumer Protection Act, 1986

**Commission:** National Consumer Dispute Redressal Commission

**Citation:** RP No 366 of 2005

**Keyword:** Misleading Advertisement, Unfair Trade Practice.

**Facts:** In this case the respondent tourists had taken a Star Ship cruise relying on advertisement which said that the cruise would be for two nights and three days. However the actual cruise was much shorter thus the complainants spent one and a half day less cruising against what had been promised to them. Thus they sued the tour operator.

**Issue:** Whether this would be a case of false and misleading advertisement and thus fall under Section 2(1)(r) of the Consumer Protection Act, 1986?

**Decision:** The National Commission held that this was a pure case of false and misleading advertising and thus fell within the ambit of the Section 2(1)(r). The complainant has relied upon the advertisement and the actual cruise being much shorter than what had been promised was clear indication of an unfair trade practice and, thus under Section 14(1)(f) of the Act the Commission ordered the withdrawal of the misleading advertisement.

**9. Name of the Case:** Rupasi Multiplex vs. Mautusi Chaudhuri and Ors.

**Legislation:** Consumer Protection Act, 1986

**Commission:** National Consumer Dispute Redressal Commission

**Citation:** Revision Petition No. 3972 of 2014 decided on 10.08.2015, MANU/CF/073 1/2015

**Keyword:** Unfair Trade Practice

**Facts:** The respondents/complainants purchased tickets for watching a movie at a cinema hall owned by the petitioner, paying a sum of Rs. 330/for the purpose. They were not allowed to carry drinking water inside the cinema hall, though the ticket contained no prohibition on carrying water inside the cinema hall. This was mainly because of security reasons, since it is not possible for the management of the cinema hall to verify or check whether any restricted liquid had been mixed with the drinking water in the container/bottle. When the complainants raised the concern of getting drinking water inside, it was stated that water facility was available just near the entry gate of the hall in the lobby.

**Issue:** Does prohibition on carrying water amount to deficiency in service and unfair trade practice?

**Decision:** A cinema hall, which seeks to prohibit carrying of drinking water inside the cinema hall for security reasons, must necessarily provide free portable and pure drinking water through water coolers installed inside the cinema halls, before such a prohibition can be enforced. An appropriate water purifiers such as Aqua-guards, needs to be installed with the water coolers so that the water available to the cinema-goers free from the impurities. Disposable glasses in sufficient quantity need to be kept available near the water coolers. It has also to be ensured that the water supply is actually available through the water coolers before the movie starts as well as throughout the screening of the movie including interval. If for any reason, water supply is not available on a particular day, alternative arrangements for supply of free pure and portable drinking water to the cinema-goers needs to be made available by the owners of the cinema hall. The cinema hall is also required to ensure that the water coolers as well as water purifiers remain fully functional and are regularly serviced from time to time so that only purified water is dispensed through the coolers. If this is not done, the owner of the cinema hall would be liable to pay appropriate compensation for the deficiency in rendering services to the cinema-goers. Mere availability of the drinking water from the cafeteria would



not be sufficient to enforce prohibition of carrying drinking water inside the cinema halls and any such action can be considered as unfair trade practice.

**10. Name of the Case:** General Motors (India) Private Limited vs. Ashok Ramnik Lal Tolat

**Legislation:** Consumer Protection Act, 1986.

**Citation:** Civil Appeal Nos. 807 2-8073 of 2009, MANU/SC/O919/201z decided on 09.10.2014

**Court:** Supreme Court of India

**Keyword:** Unfair Trade Practice and Misleading Advertisement

**Facts:** The complainant had passion for driving and dreamt to visit Leh Ladakh, Jammu & Kashmir and Nepal by driving a motor car. By surfing the internet, he read advertisement given by the Appellant and relying upon the same, he visited the agents of the Appellant. He was assured that the vehicle offered for sale will realise his dream. The brochure also assured that the vehicle in question was the best that he could find. He was also shown visual presentation of the vehicle and was also given a copy of the VCD. Accordingly, he purchased the vehicle for Rs. 14 Lakhs and got accessories worth Rs. 1,91,295/fitted and also got the vehicle insured and registered. Thereafter he realised that the vehicle was not fit for "off-road, no road and dirt road" driving as represented and had defects. Accordingly, he approached the Appellant and its dealers who referred to the owner's manual printed by the Company. He found that the owner's manual was contrary to the assurance in the brochure, internet and the book given to him. He also realised that the vehicle was not SUV but a mere passenger car.

**Issue:** 1. Did the automobile company carry out unfair trade practice?

2. Can punitive damages be awarded in such circumstances when not pleaded for it?

**Decision:** The assurances and representations made to the consumer were misleading and it amounted to unfair trade practice. A refund of Rs. 12,50,000/(Rupees Twelve Lacs Fifty Thousand only) to the Petitioner towards price of the vehicle subject to the Petitioner returning the vehicle in question without accessories to the Respondents was directed. A sum of Rs. 50,000/(rupees fifty thousand) in favour of the complainant to meet his cost of litigation was also awarded. These directions were to be implemented within 6 weeks from the date of order. The award of Rs 25 lakhs by the National Commission by way of punitive damages is invalid and was struck down and such damages when not pleaded for cannot be granted.

**11. Name of the Case:** Ganga Immigration v. Reena Pandey

**Legislation:** Consumer Protection Act, 1986

**Commission:** National Consumer Dispute Redressal Commission

**Citation:** Revision Petition No. 1397 of 2014 and I.A. No. 1682 of 2014 decided on 01.04.2014  
MANU/CF/0341/2014

**Keyword:** Employment Sector

**Facts:** An advertisement was given for staff requirement. The job was in Malaysia and food, accommodation and travel were part of the job package and even an attractive salary was specified in the advertisement. The complainants took up the job based on this advertisement. But, the complainants were asked to pay money for the tickets and accommodation and were forced to work for cheap labour. Their passports were taken by the employers and they were treated like slaves. None of the facilities mentioned in the advertisement were provided.

**Issue:** Does the failure to comply with the assurances given by the recruiting company amount to unfair trade practice?

**Decision :** Petitioners have taken unfair advantage of the respondents by indulging in unfair trade practices to collect money from the unsuspecting respondents showing them dreams of much better job opportunities in Malaysia and having collected their money abandoned them to their own devices after taking their passports. They forced them to do labour work on very cheap salaries. Petitioners promised them to give all other facilities like accommodation, food, medical insurance etc. which they also denied them. The petitioners must have also similarly duped other individuals with their misleading advertisements and glib promises. It was held that the petitioners are guilty not only of unfair trade practice but also deficiency in service.

**12. Name of the Case:** Havells India Limited v. The Advertising Standards Council

**Legislation:** Consumer Protection Act, 1986; Trade Marks Act, 1999.

**Commission:** National Consumer Dispute Redressal Commission

**Citation:** CS (OS)3187/2015, IA Nos. 22366-22368/2015 High Court of Delhi, 2016 (155)DRJ435, MANU/DE/0297/2016 decided on 03-02-2016

**Keyword:** Durables & Appliances

**Facts:** The suit filed by the plaintiff was directed against the Advertising Standards Council of India (ASCI). The plaintiff company states that it is engaged in the business of manufacture and supply of Fast Moving Electrical Goods (FMEG). It is engaged, inter alia, in the production of electrical cables and wires. In respect of wires & cables, the plaintiff has adopted/used the tagline "Wires that don't catch fire". It has been running an advertising campaign for its wires

& cable products using the said tagline. The plaintiff states in paragraph 2 of the plaint that the suit relates to the illegal direction dated September 15, 2015 issued by the defendant, directing the plaintiff to withdraw or appropriately modify an advertisement of the plaintiffs advertisement campaign featuring its distinctive tagline and trade mark "Wires that don't catch fire", which tagline has been uninterruptedly and continuously used since the year 2007, inter alia, in numerous advertising campaigns issued on national scale on national television channels by the plaintiff, and which is the back bone of the plaintiff's promotion of its fire retardant wire & cable products. ASCI considered the tagline as misleading in nature.

**Issue:** Whether the advertisement by on cables were misleading and exaggerated without substantiated evidence. Is the advertisement misleading in nature?

**Decision:** ASCI's decision was on the premise that the advertisement of the defendant using the tagline "Wires that don't catch fire" is misleading and exaggerated. The defendant has not sought to raise any challenge to the claim of trade mark or copyright laid by the plaintiff either in "HAVELLS" or in the tagline in question. Thus, no cause of action has arisen in favour of the plaintiff to assert its claim for a declaration that its mark/ expression "Wires that don't catch fire" is a well-known trade mark. As rightly argued by learned counsel for the defendant, since the defendant has not questioned the plaintiffs claim for a trade mark in the said tagline, the plaintiff cannot seek the said relief in the present suit, as the assertion of the said right would not have any real opposition. The court was convinced in considering the advertisement to be misleading. ASCI decision was based on the conclusion that the advertisement was misleading. The decision never raised any challenge on its trademark or ' copyright. Hence the petitioner company does not have the grounds to challenge the decision. It was held that the said advertisement is misleading as concluded by ASCI and it is not a question of trademark that arises here. The ASCI decision was held to be valid.

**13. Name of the Case:** Consumer Education and Research Society, Suraksha Sankool and Ors. v. Taj Mahal Hotel and Ors.

**Legislation:** Consumer Protection Act, 1986.

**Citation:** Original Petition No.148 of 2003, MANU/CF/0936/2015 decided on 02.07.2015

**Keyword:** Telecom, Luxury services Commission: National Consumer Disputes Redressal Commission, New Delhi

**Facts:** The complainant no.2 stayed at Taj Hotel and made some telephonic calls from his room. Hotel charged a sum of Rs. 168 for the said telephonic calls. The complainant No. 2 on scrutiny of the bill and the call details found that Opposite party No. 1 had charged Rs. 8 per call instead of the usual applicable rates Rs. 1.20 per call for 3 minutes or less. He brought this to the opposite party's notice, and made a request for refund of the said amount after deducting the charges as per the legal norms.

**Issue:** Can overcharged telephonic calls be called as unfair trade practice?

**Decision:** There is no compulsion on the guest to use telephone instrument for making outside calls. It is the option of the guest whether to use the facility provided by the hotel in the room or to take pains and make his outside calls from a PCO installed in the lobby of the hotel, The excess charges are for the added facility provided to the guest for making outside call in the privacy of the room and, therefore, it cannot be termed as unfair trade practice or deficiency in service.

**14. Name of the Case:** Orbit Tours & Trade Fairs Pvt. Ltd. v. Vivian Rodrigues

**Legislation:** Consumer Protection Act, 1986.

**Citation:** Revision Petition No. 1551 of 2013 and LA. No. 2699 of 2013 (For Stay) MANU/CF/0652/2014 decided on 17.10.2014.

**Commission:** National Consumer Disputes Redressal Commission Keywords: Misleading brochure, Tours and Travel

**Facts:** Respondents/Complainants accepted the offer of the petitioner to participate in Orbit Tour Programme in China during the period from 25.4.2005 to 30.4.2005. The agreed consideration of 77,700/- (US \$ 1468) was paid at that time by the respondents to participate in the tour which was branded as "Canton Fair 2005" where about 7500 stalls of different displays were displayed with modern technology. The respondents were interested to know the latest technique of furniture and interior. Therefore, they participated in the said tour programme. Both parties have relied on the brochure of the said tour programme printed and published by the petitioner as an organizer, received from the original event manager in China namely, Canton Fair organizers. The said brochure was with certain terms and conditions. The respondents were not satisfied with the visit as the required display of furniture and interior was already concluded prior to their visit to the said fair. Further, the class accommodation as promised was not provided and also the air conditioning at the lodging arrangement went out

of order for more than 24 hours causing great inconvenience and discomfort to the respondents. Being dissatisfied with the tour, respondents on return to India sent notice for refund of the amount paid on account of said tour trade fair but the petitioner did not accept the same.

**Issue:** Was there misleading advertisement which amounted to Unfair Trade Practice?

**Decision:** Complainants wanted to see and learn new things, new materials, and new designs of international standards which they could not due to deficiency in services by Opposite Party (Appellant here). The tour organizers are not supposed to give false and misleading advertisement in order to lure the customers if they do so, it certainly amounts to unfair trade practice. The kind of accommodation as promise was also not provided. OP is therefore are liable for not providing service: as promised in the brochure. Tour organizers published brochures promising; the services, which they could not offer is not only deficiency in service but also unfair trade practice and therefore liable to refund the full amount charged for the tour to the Complainants which is sufficient to recompense with a cost of Rs 5000. Petitioner (opposite party) is directed to deposit the cost by way of demand draft in the name 'Consumer Legal Aid Account of this Commission, within four weeks from the date of judgment which otherwise will attract an interest of 9% per annum.

## **CHAPTER-6**

**COMPARATIVE ANALYSIS OF INDIA WITH OTHER COUNTRIES**  
**REGULATIONS ON MISLEADING ADVERTISEMENT**

**UNITED KINGDOM**

**1. INTRODUCTION**

The United Kingdom is marked by an overabundance of laws through which consumer protection is effected. Which include the Consumer protection Act of 1987, the Consumer Credit Act of 1974, the Sales of Goods Act of 1979, the Competition Act of 1998, the Enterprise Act of 2002, the Unfair Terms in Consumer Contract Regulations of 1999, etc.

Incorporated with these statutory enactments, there are large number of government agencies, departments as well as self-regulatory and citizens' lobby groups that facilitate the implementation of these laws and "regulations. Together they have the robust system, which smooth the way of government for consumer protection.

In respect of misleading advertisements, the general framework pertains to two separate regimes: the first being the Statutory Regulatory Regime which consists of the Regulations enacted to give effect to the EC directives 2006/29 and 2006/114 and the regulatory bodies primarily the OFT<sup>54</sup> and the Trading Standards Authority. The second regime is the self-regulatory regime which relates to the 'Advertising Codes created by advertising industry committees, which in turn are implemented by the Advertising Standards Authority.

**2. STATUTORY REGULATORY REGIME**

In United Kingdom with respect of Misleading Advertisements, under Statutory Regulatory Regime I am going to discuss two acts and their enforcement mechanism.

**2.1 CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS, 2008 ('CPRs')**

The CPRs have been enacted under the European Communities Act, 1972 and came into force on 26th May, 2008. They give effect to the Unfair Commercial Practices Directive (UCPD),<sup>55</sup>

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<sup>54</sup> Office of Fair Trading

<sup>55</sup> EC Directive 2005/29



which aims to harmonise the legislations preventing business practices that are unfair to consumers across the European Community Members States in support of the growth of the internal (European) market.<sup>56</sup>

Further, the CPRs apply to any act, omission and other conduct by the businesses, which have a direct connection to the promotion, sale or supply of a product, to a consumer. More importantly, they apply not only during or after a commercial transaction but also before any contract is entered into, which in relation to misleading advertisements gains significant importance as it then stresses on the likelihood of harm as opposed to actual harm caused.<sup>57</sup>

In terms of its general homework it contains a general prohibition of unfair commercial purpose as reflected under Regulation 3. The relevant portions are:

*“Regulation 3: [1] Unfair commercial practices are prohibited.*

*....*

*(3): A Commercial Practice is Unfair if: (a) it contravenes the requirements of professional diligence; and (b) it materially distorts or is likely to materially distorts the economic behaviour of the average consumer with regard to the product.*

*(4): A Commercial practice is unfair if: (a) it is a misleading action under the provisions of regulation 5; (b) it is a misleading omission under the provisions of regulation 6;*

*(c) ..... ”<sup>58</sup>*

Emerging from this general prohibition: under sub-regulation (4)(a) and (b), a specific reference has been made to regulation 5 and 6 dealing with 'misleading actions' and 'misleading omissions, respectively. These two regulations put together lay down the law in relation to misleading advertisements in a trader customer relationship. They aim to ensure that the

<sup>56</sup> Guidance on the UK Regulations (MAY 2008) Implementing the Unfair Commercial Practices Directive, Office of Fair Trading, 2008.

<sup>57</sup> Ibid

<sup>58</sup> Regulation 3, Consumer Protection from Unfair Trading Regulations, 2008

necessary information to make an informed decision is given to the consumers in a clear and timely fashion.<sup>59</sup>

A '**misleading action**' is said to occur when the average consumer is misled through the information a commercial practice contains, or its deceptive presentation that misleads or has the potential to cause a change in the decision of the consumer. Accordingly, the CPRs recognise three types of misleading actions. These include: (i) giving misleading information; (ii) creating confusion with competitor's products and (iii) failing to stick to firm commitments made in the code of conduct formulated by the office of Fair Trading.<sup>60</sup>

Similarly a 'misleading omission' refers to a situation where the traders leave out certain important information which otherwise is much relevant to enable a consumer to make an informed choice and in the absence of which the average consumer takes or is likely to take a different decision.<sup>61</sup> Three types of misleading omissions have been recognised which are: (i) deliberately leaving out or hiding information important in making a decision to buy the product;

(ii) giving information that is unclear, unintelligible and untimely and  
(iii) not revealing that the information given is really for commercial reasons.<sup>62</sup>

## **2.2 BUSINESS PROTECTION FROM MISLEADING REGULATIONS, 2008 ("BPRs")**

While CPRs regulate business-to-customer commercial practices, BPRs regulate business-to-business commercial practices. Accordingly, a business, which advertises its goods and services to other business or draws comparisons with a competitor's product/service in the advertisement to the consumers or 'businesses, then such business shall fall under the scope of applicability of the BPRs.

The BPRs came into force on 28th May 2008 and gave effect to the Misleading and Comparative Advertising Directive (MCAD).<sup>63</sup> Further, it has a two-fold function: first, prohibits businesses from advertising products in a manner that shall mislead traders and

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<sup>59</sup> Id at 37

<sup>60</sup> Regulation 5, Consumer Protection from Unfair Trading regulations, 2008

<sup>61</sup> Supra 37

<sup>62</sup> Regulation 6, Consumer Protection from Unfair Trading Regulations, 2008

<sup>63</sup> EC Directives 2006/114

second, sets out the conditions for permissible comparative advertising to consumers and business.<sup>64</sup>

As regard misleading advertisements the relevant provisions are as follows:

*"Regulation 3: (1) Advertising which is misleading is prohibited.*

*(2) Advertising is misleading which –*

*(a) In any way, including its presentation, deceive: or is likely to deceive the traders to whom it is addressed or whom it reaches; and by reason of its deceptive nature, is likely to affect their economic behaviour; or (b) for those reasons, injures or is likely to injure a competitor.*

*(3) In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning - (a) the characteristics of the product (as defined in paragraph (4)); (b) the price or manner in which the price is calculated; (c) the conditions on which the product is supplied or provided; and (d) the nature, attributes and rights of the advertiser (as defined in paragraph(5)).*

*(4)....<sup>65</sup>*

Further, in relation to misleading comparative advertising, the BPRs provides for, the following:

*"Regulation 1: Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met-*

*(a) it is not misleading under regulation 3;*

*(b) it is not a misleading action under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008(a) or a misleading omission under regulation*

<sup>64</sup> Business to Business Promotions and Comparative Advertisements - A Quick Guide to the Business protection from Misleading Marketing Regulations of 2008, Office of Fair Trading, 2009.

<sup>65</sup> Regulation 3, Business Protection from Misleading Marketing Regulations, 2008. Sub-regulation (4) and (5) go on to explain the meaning of "characteristics of the product" and "the nature, attributes and rights of the advertiser", respectively.

*6 of those Regulations;*

*(c)....<sup>66</sup>*

## **2.3 ENFORCEMENT MECHANISM UNDER THE CPRs AND BPRs**

### **2.3.1 Enforcing Authorities**

The principal authority to give effect to the CPRs and the BPRs is the Office of Fair Trading (OFT), which is a non-ministerial government department established under the Fair Trading Act, 1973. It plays a leading role in protecting and promoting the consumer interests all throughout the UK by regulating the businesses so as to ensure that they are fair and competitive. It thus, in other words, is the nodal agency administering consumer law in UK.<sup>67</sup>

A significant aspect however to be noted is that the OFT cannot act upon individual complaints. Part 8 of the Enterprise Act of 2002 specifically restricts the powers of the OFT to enforcing the legislation only in cases of systemic complaints i.e. a breach affecting the collective interests of consumers.<sup>68</sup> Yet in this regard, 'acting upon individual complaints' is to be understood in the sense of undertaking an individual investigation of an individual's complaint addressing his claims. While such investigation shall not be undertaken by the OFT, nevertheless, it can log the information given by even an individual, highlighting any non-compliance by a business with the consumer and competitive legislation. However, such information shall only be used as intelligence enabling the OFT to determine the areas where traders' activities are required to be monitored and investigated.<sup>69</sup>

Consequently, action is taken by the OFT against those in breach either on its own accord or in pursuance of a complaint made by the Local Trading Standards Authority or Super Complainants.<sup>70</sup>

Another, important regulatory authority directly enforcing the CPRs and BPRs is the Trading Standards Authority. Its branches are located across the United Kingdom thereby providing its

<sup>66</sup>Regulation 4, Business Protection from Misleading Marketing Regulations, 2008.

<sup>67</sup>Available at <<http://www.offt.gov.uk/about-the-offt/>>, (20<sup>th</sup> February, 2018).

<sup>68</sup>Part 8, The Enterprise Act, 2002. In light of this observation, in the case of misleading advertisements, the researcher opines that as long as an advertisement....

<sup>69</sup>Available at <<http://www.offt.gov.uk/about-the-offt/fasqs/>>, (20<sup>th</sup> February, 2018)

<sup>70</sup> ibid

service locally and thus, enabling easy access to consumers. Broadly, it performs three functions: first, takes legal actions against traders who have violated the law including criminal prosecution, applying for injunctions, issuing statutory notices, entering premises and seizing goods and documents, etc. Secondly, as a preventive control mechanism, it advises and educates the traders about the law and prohibited activities, and thirdly, it offers advice and help to consumers in relation to their consumer complaints or queries.

### **2.3.2 Tools for Enforcement**

Numerous tools of enforcement and sanctions are available to the regulatory authorities enforcing the CPRs and the BPRs. These include: (i) education, advice and guidance as a preventive control tool; (ii) resorting to established means i.e. alternate well-effective systems of regulation put in place in UK (for example the ASA)<sup>71</sup> (iii) implementing a code of conduct; (iv) civil enforcement as Community infringements under the Enterprise Act of 2002, and finally (v) criminal enforcement under the CPRs and BPRs.

## **3. THE ADVERTISING SELF-REGULATORY SYSTEM**

While television and radio broadcast advertising was regulated by legislation, the same was absent in the zone of non-broadcast advertising. However, in 1961, having realised the importance of consumer acceptability and trust in all mediums of advertising, the Advertising industry came together to form the Committee of Advertising Practice (CAP) and formulated its first advertising code of practice in relation to non-broadcast advertising<sup>72</sup>. Soon thereafter, the Advertising Standards Authority (ASA) was established as the independent adjudicator under the Advertising Code.<sup>73</sup>

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<sup>71</sup>The recognition of any resort to established means as an enforcement tool highlights the recognised potential of non-governmental alternate forums such as the ASA by the Government.

<sup>72</sup> Available at <http://www.asa.org.uk/About-ASA/Our-history.aspx>, (20th February , 2018).

<sup>73</sup> Available at <http://www.asa.org.uk/About-ASA/Our-history.aspx>, (20th February , 2018). Encouraging these initiatives and efforts taken by the Industry, the Melony Committee on Consumer Protection too, rejected the need of any statutory regulation as in the USA.

Post 2004 and with the success of ASA, today the UK advertising self-regulatory system is a mixture of self regulation for the non-broadcast advertising and co-regulation for broadcast advertising.<sup>74</sup>

### 3.1 THE ADVERTISING CODES

The industry is governed by 'Codes of Practice' that are written and maintained by two bodies: (I) the Committee of Advertising Practice (CAP) that is responsible for the non-broadcast code; and (II) the Broadcast Committee of Advertising Practice (BCAP) that is responsible for the broadcast code.<sup>75</sup>

The fundamental thread running through the provisions under the code is that it must be ensured that advertising does not mislead, harm or offend. Instead Ads must be socially responsible and must respect the principles laid down in relation to fair competition.<sup>76</sup>

Both the Codes encapsulate the legal requirements otherwise attached to the advertisers in the broadcast and non-broadcast media. However, additionally, special protections for children and other vulnerable people along with such provisions for special kinds of products like alcohol, health and beauty have also been included.

#### 3.1.1 The Non-Broadcast Code

This Code provides rules governing non-broadcast advertisements, sales promotions and direct marketing communications. It primarily focuses on the content of the marketing communication as opposed to the terms of business or products themselves.<sup>77</sup> Further, the Code is intended to supplement the law and fill the gaps otherwise existing therein and thus, provide an effective mode of resolving disputes over and above the existing civil and criminal litigation avenues.

Some of the relevant provisions in the Code are as follows:

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<sup>74</sup> Id at 53

<sup>75</sup> Available at <http://www.asa.org.uk/About-ASA/About-regulation.aspx>, (20th February , 2018).

<sup>76</sup> Supra - 56

<sup>77</sup> Introduction, The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing



Rule III (b) defines a “consumer” as “anyone who is likely to see a given marketing communication, whether in the course of business or not”.<sup>78</sup>

This definition clearly highlights that to be a consumer, consideration in the form of purchasing the product or service is not required at all. Instead what is required that you are “likely to see a given market communication”. This becomes of utmost importance especially in misleading advertisements cause it gives the locus standi also to those consumers who are generally being misled by the content of the advertising yet haven't purchased the product on their own. Consequently, when the ASA sits in judgment over a matter, it is required to take into account the impression created by the advertisements in terms of the likely effect on consumers as opposed to the advertiser's intentions. Further, as evident from the definition the Code deals with both trader-to-customer marketing relations as well as business-to-business marketing communication.

Rule 3 of the Code specifically deals with ‘Misleading Advertising’. Some of the relevant sub-rules are:<sup>79</sup>

*“Rule 3.1: Marketing communications must not materially mislead or likely to do so.”*

This rule provides a general prohibition on all misleading marketing communications.

*“Rule 3.2: Obvious exaggerations (“puffery”) and claims that the average consumer who sees the marketing communication is unlikely to take literally are allowed provided they do not materially mislead.”*

This rule marks the limit of acceptable puffery allowed.

*“Rule 3.3: Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.”*

This rule corresponds to the concept of ‘misleading omissions’ under the CPRs discussed above.

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<sup>78</sup> Ibid -Rule III (b)

<sup>79</sup>Rule 3, The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing.

"Rule 3.4: For marketing communications that quote prices for advertised products, material information [for the purposes of rule 3.3] includes the main characteristics of the product..."

This provision lays down the definition of 'material information' for advertised products. Based on the same, the misleading nature of an advertisement may be judged.

*"Rule 3.9: Marketing communications must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify."*

*"Rule 3.10: Qualifications must be presented clearly."*

Rule 3.9 and 3.10 go on to ensure that all claims on a product or in relation to a service are necessarily qualified.

*"Rule 3.7: Before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove claims that consumers are likely to regard as objective and that are capable of objective substantiation. The ASA may regard claims as misleading in the absence of adequate substantiation."*

*Rule 3.11: Marketing communications must not mislead consumers by exaggerating the capability or performance of a product.*

Rules 3.7 and 3.11 together are of significant importance. They mandate that all claims made must be substantiated with objective documentary evidence to prevent any form of exaggeration. As a result, in case an advertiser claims that his fairness cream guarantees a substantial change in the skin tone within 4 weeks then the same must necessarily be substantiated with authentic case studies and scientific analysis.

*"Rule 3.6: Subjective claims must not mislead the consumer; marketing communications must not imply that expressions of opinion are objective claims."*

*"Rule 3.45: Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine, unless it is*

*obviously fictitious, and hold contact details for the person who, or organisation that, gives it.”*

These two rules too are of much relevance. Advertisers often appoint famous celebrities as a brand ambassador for their products who then are often seen making baseless claims in confirmation of the veracity of the performance of the product. Such claims are often untested and in turn have a significant impact on the fan-following of the celebrity. Thus, to prevent any harm caused due to such tactics, this rule mandates that any such testimonies must ‘necessarily’ be genuine.

*“Rule 3.33: Marketing communications that include a comparison with an identifiable competitor must not mislead, or be likely to mislead, the consumer about either the advertised product or the competing product”*

Comparative Advertising has also been addressed in the rules corresponding to the provisions in the BPRs.

### **3.1.2 The Broadcast Code**

This Code has been made applicable to all advertisements and programme Sponsorship credits on the radio and television services licensed by Ofcom. Similar to the non-broadcast code, this Code too is designed to inform the broadcasters and advertisers as regards the standards in the content that is to be ensured.<sup>80</sup>

Further, once again similar to the Non-broadcast Code, misleading advertisements are dealt under Rule 3.<sup>81</sup> Given the fact that most of the provisions are similar in both Codes with minor variations, the same is not being reproduced to avoid repetition.

## **3.2 THE ADVERTISING STANDARDS AUTHORITY (ASA)**

ASA is UK’s independent self-regulator of advertising across all media. This independence must be understood in terms of being independent from both the Government and the Advertising Industry. Nearly two-thirds of the ASA Council are independent of the industry

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<sup>80</sup>The UK Code of Broadcast Advertising.

<sup>81</sup> Rule – 3, The UK Code of Broadcast Advertising.

while the remaining have some current or recent knowledge of the media or advertising sections.<sup>82</sup>

It administers the Advertising codes discussed above and in doing so has been recognized by the Courts of Law, the Government and the other statutory regulators like the OFT and Ofcom, as the body of first resort to deal with consumer complaints about advertising.<sup>83</sup>

Further, its aim is to ensure that all ads are "legal, decent, honest and truthful". In this regard it performs two essential functions: (i) undertakes preventive control measures and, (ii) redresses consumer complaints.

### **3.2.1 Preventive Control Measures**

As regards the preventive measures, it actively monitors advertisements to ensure standards are being maintained. It conducts surveys or ads in sectors where the compliance record has been significantly low and also in 'other high profile areas like gambling or alcohol advertising. Further, it educates and train advertisers in collaboration with CAP and BCAP on the governing rules and advertising codes to prevent the problem of misleading ads appearing in the first place itself.<sup>84</sup>

### **3.2.2 Complaint Redressal Mechanism**

In relation to its complaint redressal mechanism, instead of approaching the statutory regulatory bodies first, the consumer may complain against a misleading advertisement to the ASA. Accordingly, when such complaint is made, in order to protect the interests of the complainant, unless otherwise required, the complaints are kept confidential from the advertiser. Thereafter, the Complaints team assesses the marketing communication and the nature of objection to determine how best to resolve the complaint.<sup>393</sup> In case of minor changes required, the same is first sought to be resolved informally with cooperation of the marketer. However, in complex cases a formal investigation maybe undertaken by the ASA. Subsequently, the ASA Council shall rule on the matter in accordance with the Advertising

<sup>82</sup> Available at <http://www.asa.org.uk/About-ASA/our-team/ASA-council.aspx> , (20 February, 2018)

<sup>83</sup> A guide for Advertisers and Agencies, Clearcast Limited, 2009 at 9.

<sup>84</sup> Available at <http://www.asa.org.uk/Regulation-Explained/control-of-ads.aspx> , (20 February, 2018)

Codes. In the event the complaint is upheld, the Advertiser shall be directed to either amend or withdraw the Ad.<sup>85</sup>

Further, an independent review procedure has also been set in place to provide an opportunity for the advertisers and complainants to request a review of the adjudication.<sup>86</sup>

### 3.2.3 Sanctions to Ensure Compliance

Given the fact that the ASA has no statutory backing and is merely a self-regulatory body constituted by the industry itself, enforcing compliance with its rulings may prove to be difficult task. However, to counter this, the ASA has adopted numerous sanctions to facilitate and enforce its actions. These include<sup>87</sup> (i) weekly publication of all the rulings of the-ASA Council, which undoubtedly may lead to bad publicity for the advertiser coupled with great media attention; (ii) removal of Royal Mail direct mail discounts; (iii) mandating pre-vetting of the posters of poster advertisers that break the rules on taste and decency; (iv) referral of those who fail to comply with the ASA Council rulings or who persistently break the rules, to the OFT (for misleading non-broadcast ads) or to the Ofcom (for TV and radio commercials). Amongst all the sanctions, this sanction surely gives the ultimate boost to the significant position held by ASA as a self-regulatory authority.

Other than the above, given the credibility and respect ASA has been bestowed with from within the industry as well as outside, the broadcasters and media owners too have grouped together in refusing to feature ads that do not comply with the advertising codes. Thus, too has acted as an essential external sanction to ASA's authority.

## 4. CONCLUSION – A COMPARISON WITH INDIA

Following are certain points of comparison identified by the researcher in relation to UK and India:

*Firstly*, in India there is no special designated law to deal with misleading advertisements as in the case of UK. Consequently, we are forced to bring claims before the self-regulatory body

<sup>85</sup> Available at <http://www.asa.org.uk/consumers/How-to-complain.aspx> , (20 February, 2018)

<sup>86</sup> Available at <http://www.asa.org.uk/consumers/Independent-review-process.aspx> , (20 February, 2018)

<sup>87</sup>Id at 65

it.e ASCI, established in India on the lines of ASA or file a civil suit or. undertake a criminal prosecution on grounds such as misrepresentation, fraud, cheating, etc. The efficacy of these mechanisms is undoubtedly undermined in relation to the misled consumers as in the case of ASCI, apart from lacking statutory backing, it has not yet reached the level of recognition and credibility as the ASA has from the courts of law, advertising industry and the Government, thereby undermining its capabilities in protecting the consumers. Further, as regards the filing a suit, the time and costs incurred in undergoing litigation has proven to be an unfortunate barrier for the consumers to process their claims.

Recourse potentially available to the consumers to process their claims of misleading advertisements is the Consumer Protection Act, 1986. However, this too falls short in providing an effective remedy on account of the absence of any provision specifically dealing with misleading advertisements as well as the definition of 'consumer' being hinged upon the need for consideration. In other words, the latter necessitates the purchase of the product or service to have a valid claim under the Act.

Secondly, the UK law as provided under the BPRS as well as through the definition -of 'consumer' under the Advertising Codes (CAP and BCAP Codes), also accounts for and tackles business-to-business misleading advertising over and above business-to-consumer advertising. This is clearly absent in India especially under the Consumer Protection Act where to have a claim it is necessary that the product or service bought be for a non-commercial purpose.

Thirdly, ASA has established itself as a robust self-regulatory body. It has been identified a super-complainant in the sense, capable of making a complaint to the OFT and Ofcom, thereby raising its credibility. Further, it has proved to be effective in terms of its independence from the advertising industry as well as the Government. However, in India, the position and performance of ASCI still hasn't reached appreciable standards. It is still highly influenced by the advertising industry as the persons sitting in judgment over matters come from the same industry leading to potential biased opinion. Moreover, as stated above, there has been no official recognition of the organisation from the Government.

Fourthly, as regards the Regulations and Rules in the statutory codes and the selfregulatory



codes, there are certain such rules and regulations which are absent in India though are much required in light of the enormous lack of consumer awareness coupled with illiteracy. Some of these include, the need to ensure substantiation of claims with objective documentary evidence, mandating that the testimonies advertised in relation to a product are genuine, and necessitating that need for advertising the qualifications and limitations to the claims and guarantees made in relation to the product.

### UNITED STATES

In the United States, consumer rights law encompasses a large body of laws enacted by the government to protect consumers by regulating many transactions and business practices, such as:

- Advertising,
- Sales and business practices,
- Product branding,
- Mail fraud,
- Banking and lending,
- Quality produce and meats,
- Housing (construction) material and other product standards,
- And various other as well.

These laws exist on both state and federal levels. Some states even choose to additionally regulate door-to-door sales, abusive collection practices and referral/promotional sales. The Federal Trade Commission ("FTC") is the overarching regulator in this regard although originally established in 1914 to curb unfair competition in markets, its scope was extended in 1938 to include oversight of consumer protection laws in the country as well.<sup>88</sup> Most states in the US have Departments of Consumer Affairs, devoted to regulating certain industries and protecting consumers who use the goods/ services originating from these industries.

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<sup>88</sup>The FTC is extremely active in its approach to consumer protection it has the competence to initiate federal litigation. In *FTC v. Cyberspace.com* [453 F. 3d. 1196 (9<sup>th</sup> Cir., 2006)], the FTC successfully defended its finding that the defendant, sending mails that appeared to be cheques for \$3.50 to the consumer, attached to an invoice, was deceptive since cashing the cheque had the effect of concluding an agreement to pay a monthly fee for internet access. It was held to be misleading to 'reasonable consumers'.

There are numerous federal acts that address various aspects of consumer protection in the USA. The Consumer Credit Protection Act ("CCPA"), for example (also known as the Truth in Lending Act), regulates the credit industry and includes within its ambit credit card companies, credit rating companies as well as loan sharks. The Fair Credit Reporting Act ("FCRA") regulates credit reporting agencies as well as their users. The Fair Debt Collection Practices Act was added as an amendment to the CCPA in 1978 to abolish intrusive and abusive collection practices, and give consumers a right to dispute inaccurate debt information. Further, the Fair Credit Billing Act was added to the CCPA in 1975 to regulate the previously uncovered area of billing practices in credit accounts. The Magnuson-Moss Act of 1973 regulates product warranty standards both implied and express. To address the growing problem of identity theft, the Congress enacted the Identity Theft and Assumption Deterrence Act in 1998. The Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act ("GLBA"), sought to enhance competition in the financial services industry (removing barriers that disallowed banking, insurance and securities companies from integrating).

At the state level, many have chosen to adopt the Uniform Deceptive Trade Practices Act ("UDTPA"). The deceptive trade practices prohibited under this act can be roughly grouped as:

- Conduct involving unfair or fraudulent business practices, and
- Untrue or misleading advertising.

The UDTPA provides for a private remedy, with attorney's fees, for consumers/parties/plaintiffs prevailing in a suit, where the opposite parties wilfully engaged in a conduct, knowing it to 'be deceptive'.<sup>89</sup> As stated earlier, state Consumer Welfare Departments (Departments of Consumer Affairs), along with voluntary organizations (which have a strong presence, especially in California where their effect is seen in the form of strict consumer protection laws), enforce the legal frameworks for consumer protection in the states.

## **1. FALSE AND MISLEADING ADVERTISEMENT**

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<sup>89</sup> Section – 3(b) of Uniform Deceptive Trade Practices Act (UDTPA).

In the United States, false or deceptive advertising is, quite basically, the use of false or misleading statements in advertising. Advertising is recognised as a potent tool of marketing, which has the potential to influence people to make commercial decisions or enter into transactions that they otherwise might have avoided. This is the basic premise underlying the legal necessity of regulating advertisements governments generally choose, as the underlying philosophy of regulatory laws, 'truth' and the 'right to know' i.e. all relevant information regarding the product.

False/misleading advertisement is punishable in some way or the other in most jurisdictions, but advertisers find hidden loopholes in the law and manage to get away with ad campaigns that, although technically illegal, are practically unenforceable. It is pertinent to examine some of these strategies in the USA, before we embark on a discussion of the law.

## **2. PRICING BASED METHODS**

### **Hidden Fees and Surcharges**

Service providers often levy fees and surcharges that are not disclosed to the customer in the advertised price. One of the most common means is for activation Of services such as mobile phones, but is also common in broadband, telephony, gym memberships, and air travel. In most cases, the fees are hidden in fine print, though in a few cases they are so confused and obfuscated by ambiguous terminology that they are essentially undisclosed. Hidden fees are frequently used in airline and air travel advertising. In the case of motor vehicles, hidden charges may include taxes, registration fees, freight, predelivery inspection (FBI), licenses, insurance or other costs associated with getting a vehicle on the road. Airlines and car manufacturers hire firms that disadvantage customers through:

- Unfair contract terms, notably with respect to consumer compensation.
- Use customer data for purposes other than they were obtained for.
- Apply unfair fees, charges and penalties on transactions.
- Place artificial restrictions on the time period during which customers can submit claims.

For delivered items in the US, the amount of shipping and handling ("S&H") fees are typically not disclosed (although the fact that there will be such charges is disclosed). The deceptive part is that they will often claim an item is 'free', when, in fact, the S&H charges enable them to make a tidy profit

### **“Going out of business” sales**

In many cases, liquidators which are hired to sell merchandise from a closing store will actually raise the prices on items that were already marked-down on clearance. For items already marked-down, this means the liquidator increases the price, then "discounts" it from there. Also common is for the sale prices at a retail chain's other stores to be lower than the liquidator's prices at the closing stores. Both of these were proven to be the case in November 2008, with the same liquidator (Hilco) committing both offenses: the markups at Linens 'n Things, and the higher prices on around one third of the items compared to other Circuit City stores remaining open. Additionally, liquidators refuse to accept returns, so if a customer does find he or she has been overcharged, there is no apparent recourse. This is used by most advertisers trying to prove the acceptability of their products.

### **Misuse of the word "free"**

The usual meaning of "free" is "devoid of cost or obligation". However, retailers often use the word for something which is merely included in the overall price. One common example is a "buy one, get one free" sale. The second item is not 'free' under the normal definition, since, to obtain it, the buyer is obliged to pay the full cost of the first item.

### **3. INDIA – US COMPARISON**

In the United States, maximizing consumer welfare and promoting a free and competitive economy has been the guiding objective and “the keystone of governmental attitude towards the business scene” for more than 100 years. Thus, in US, comparative advertising has been a well-recognised and acceptable form of advertising, and enjoys the additional protection of freedom of speech laws. The 1969 FTC Policy Statement on Comparative Advertising encouraged the use of comparisons that name the competitor or the competitive product

However, the negative consequences of false and confusing comparative claims led the FTC to require “clarity, and, if necessary, disclosure to avoid deception of the consumer.”

For example, in *Tommy Hilfiger Licensing Inc. vs. Nature Labs LLC* [2002], Nature Labs, a shop selling pet perfumery, used “Timmy Holedigger” as its trademark as well as the slogan “If you like Tommy Hilfiger, your pet will love Timmy Holedigger”. Tommy Hilfiger, one of the best recognized U.S. fashion labels, brought a lawsuit against Nature Labs for, among other things, trademark infringement, unfair competition, trademark dilution and commercial fraud. The court held that the use of a trademark similar to Tommy Hilfiger by the defendant is a fair parody, a type of “freedom of speech” protected under the First Amendment of the United States Constitution. Consumers were more likely to laugh at the humor in the parody than be confused about the origin of the products. Moreover, the comparison used by the respondent did not depreciate the claimant's products in any means. Therefore, the court dismissed all of the plaintiff's claims.

Indian law, although interpreted to allow comparative advertisement, does not address the issue in a direct or comprehensive manner in any legislation. Trade Marks Act and Monopolies and Restrictive Trade Practices Act have to be read together to understand the concept of comparative advertising. In view of the policy shift from curbing monopolies to promoting competition, the Union Cabinet on June 26, 2001 approved the repeal of the Monopolies and Restrictive Trade Practices Act. The Competition Act is its successor, and all cases pertaining to unfair trade practices referred to in clause (x) of sub-section (1) of section 36A of the MRTP Act, and pending before the Monopolies and Restrictive Trade Practices Commission have been transferred to the Competition Commission of India.

It must also be noted that several important terms related to the concept of comparative advertising such as “disparagement” and “honest practices” are not defined in any legislation, and the dictionary meaning or judicial interpretations have to be used in ascertaining the meaning of these terms. ‘Unfair trade practice’ has been defined u/s 36A of Monopolies and Restrictive Trade Practices, 1969 that stands repealed now. Under the Consumer Protection Act, 1986, protection has been provided against unfair trade practice but in the cases of ‘comparative advertising’ the parties are firms (whose products are endorsed by the

advertisements), which would not come in the ambit of 'consumers' to approach the consumer forum.

Absence of a single comprehensive legislation had created a lot of confusion in the advertising industry in India. In 1985, a self-regulatory mechanism of ensuring ethical advertising practices was established in the form of the Advertising Standards Council of India ("ASCI"), a non-statutory self-regulator. The Consumer Complaints Council ("CCC") of the ASCI entertained and disposed off complaints based on its Code of Advertising Practice ("ASCI Code"). Gradually, the ASCI Code received huge recognition ' from the advertising industry. In August 2006, the ASCI Code was made compulsory for TV advertisements by amending the Cable Television Networks (Amendment) Rules, 2006: "No advertisement which violates the Code for Self-Regulation in Advertising, as adopted by the ASCI, Mumbai for public exhibition in India, from time to time, shall be carried in the cable service."<sup>90</sup> This move has provided a binding effect on the ASCI ' Code. Rule 7 postulates that any advertisement which derides any race, caste and tends to incite people to crime, cause disorder or are indecent or vulgar. Further, section 6 of the Cable Television Networks (Regulation) Act, 1955 prohibits the transmission or retransmission of any advertisement through a cable service unless they are in conformity with the ASCI Code. The key objectives of ASCI code is to ensure that advertisements must

- Make truthful and honest representations and claims which is essential to prohibit misleading advertisements;
- Not be offensive to public decency or morality;
- Not promote products which are hazardous or harmful to society or to individuals, particularly minors; and
- Observe fairness in competition keeping in mind consumer's interests.

Under the ASCI Code, complaints against the advertisements can be made by any person who considers them to be false, misleading, offensive, or unfair. The complaints are evaluated by the independent CCC. The CCC decides on complaints from the general public including government officials, consumer groups, etc., complaints from one advertiser against another and even suo-moto complaints from the member of the ASCI Board, CCC, or the Secretariat.

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<sup>90</sup>Section 6 of the Cable Television Networks (Regulation) Act 1955



The CCC usually decides upon the complaints within a period of 4 to 6 weeks once the party concerned is afforded an opportunity of presenting its case.

As regards legislative lessons we can import from US law, the extended limitation period (4 years) under the UCL in California is one we can import, especially in View of the fact that the major consumer laws in both jurisdictions require actual injury to be shown in order to have a locus to sue.

## **JAPAN**

### **1. INTRODUCTION**

In the United States, President John F. Kennedy advocated the "Four rights of the consumers, namely, the right to be heard, the right to be informed, the right to safety, and the right to choose." Several ideas in Japan are heavily influenced by the happenings in Japan. Similarly, the idea of consumerism was imported to Japan, and the Basic Consumer Protection Law was enacted in 1968. These legislative movements had a considerable effect upon the advertising world. In response to the growing call for self regulation, a delegation was dispatched to the Better Business Bureau (BBB) in the US. Receiving the report from the delegation and learning from the system of the Advertising Standards Authority (ASA) in the UK, the Japan Advertising Federation, a comprehensive association in the Japanese advertising world, examined ways to establish a self-regulatory body. Thus began the Japanese Model on consumer protection in the context of unjustifiable premiums and misleading representations. In the paper, the said model is compared to Indian setup and argues that the merits of the Japanese model ought to be adopted here.

### **2. LEGISLATIVE SETUP**

The Japanese government, in 1962, passed the Act Against Unjustifiable Premiums, and Misleading Representations. The primary objective of this act is to prevent the "inducement of customers" which occurs due to unjustifiable premiums, or due to misleading representations that may have brought about transactions of a commodity, or a service.<sup>91</sup> Understandably, such

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<sup>91</sup>Sec. 1, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

transactions will form a large part of the consumer complaints received by the Japanese Government. Additionally, the act also aims at establishing special provisions for the “Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade.”

On a more general note, much like the Consumer Protection Act in India, this act also aims at protecting the interest of consumers, and aspires to secure fair competition.

## 2.1. “REPRESENTATION”

Here, “premium” refers to any form of economic benefit, transferred from one party to another, vis-a-vis the transaction of the commodity or service. Additionally, since the act aims at targeting cases of misleading caused by means of advertisements, the usage of the term “representation” is in the context of advertisements, and other forms of inducement used to support the object of the transaction. The term representation is very broadly defined, so as to incorporate within its ambit all forms of changing modes of publicity for the entrepreneurs. Section-2 says, “*The term representations as used in this Act shall mean advertisement or any other descriptions which an entrepreneur makes or uses as means of inducement of customers, with respect to the substance of the commodity or service, which he supplies or the terms of sale or any other matter concerning the transaction, and which are designated by the Fair Trade Commission as such.*”<sup>92</sup>

The Japanese Fair Trade Commission, by the provisions of this act, possesses the power to restrict the maximum value of these premiums, along with their total amount. In addition to this, the Commission has also been given the power to regulate the kind of premiums, their methods of offering, and any matters that concern them. The Commission can, otherwise altogether prohibit the offering of the premium itself.

## 2.2. “MISLEADING”

1 Misleading representations, being prohibited by the act, are also specifically defined, and are categorised into three types: 1. Misleading representations concerning substance

2. Misleading representations concerning terms of the transaction

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<sup>92</sup> Sec.2, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

### 3. Representations classified as misleading, by the Japanese Free Trade Commission

#### 3.3. HISTORY OF MISLEADING REPRESENTATIONS

Of these three categories, the first one deals with instances where there is a misrepresentation concerning the quality, character, or any other matter relating to the substance of the service or commodity being transferred. Misrepresentations of the second category involve instances where a monetary term, like the price of the service or commodity, is misinterpreted by the consumer to be more favourable than the price, of the same service or commodity, available with a different party. The third category involves any form of representation made, which has been declared by the Japanese Free Trade Commission (JFTC) as one that is "misleading".<sup>93</sup> This form of representation qualifies as one that is misleading, only after the issue of a notification by the JFTC for the same. As a part of this process, the JFTC is also required to hold a public hearing to garner the opinions and responses of relevant, and affect parties. This process is identical for restrictions, or prohibitions on premiums.<sup>94</sup>

In the event that an act is committed that is in violation of the restriction, or prohibition of premiums, or is in violation of the prohibition of misleading representations, the JFTC has the authority to order and enforce the involved parties' ceasing of the act in question. The JFTC can exercise this by serving a "cease and desist" order.<sup>95</sup> In addition to these restrictions, the governor of every prefecture is also given the power, in the event of any violation of the above-mentioned sort, to issue a "cease and desist" order.<sup>96</sup> These cease and desist orders continue to remain valid, even if they are issued after the violation has ceased to occur.

In the financial year 2007 alone, the JFTC handled a total of 595 cases concerning consumer complaints, and misleading advertisements. 56 of these cases resulted in the issue of cease and desist orders. 19 of these cases ended effectively with not more than the mere issuance of awaking, and the remaining 520 cases were closed with the issuing of cautions.

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<sup>93</sup>Sec. 4, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

<sup>94</sup>Sec. 5, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

<sup>95</sup>Sec. 6, Act Against Unjustifiable Premiums and Misleading Representations, 1962

<sup>96</sup>Sec. 7, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

All 56 “cease and desist” orders that were issued, were concerning cases involving misleading representations. This placed the record for the highest number of cases concerning misleading representations.

It is interesting to note that, 35 of these cases were handled by applying the Premiums and Representations Act, which stipulated that any representation shown to the consumers can be construed as that which is misleading, unless data providing reasonable grounds for that specific method of representation can be submitted.

### **3. REGULATORY BODIES**

#### **3.1. STATUTORY ORGANS**

It is seen that Japan’s most prominent legislation concerning consumer dispute redressal, the Act against Unjustifiable Premiums and Misleading Representations, has set up organizations to efficiently execute the provisions of the Act.

The Act introduces the concept of Fair Competition Codes, which are agreements established between the JFTC, and entrepreneurs who wish to begin a venture in Japan. These agreements aim at prevention of unjust inducement of customers, and maintaining fair competition.<sup>97</sup>

Additionally, the Act provides for several penalties imposed on the parties to the transaction, specifying the type, and magnitude of the punishment, on a case-by-case basis. The Act accounts for the punishment of witnesses who make false statements or expert testimony, by relying on their Code of Criminal Procedure i.e., he or she shall be punished by penal servitude from not less than three months to not more than ten years. When this Witness confesses to their respective crime, the penalty may also be “remitted accordingly.

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<sup>97</sup>Sec. 12, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

That aside, the act also decrees a punishment by penal servitude of not more than one year, or a fine of not more than three million yen, for the following offences concerning , the Fair Competition Codes:

- a) Any relevant individual, who fails to appear, give a statement, or submit a report, or gives a false statement, or report, under the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade.
- b) An expert witness, or specialist, who commits the same offences as above, under the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade.
- c) Any person who obstructs, refuses, or evades the inspection of the Fair Competition Codes.

With respect to the above penalties, when a representative of a juridical person, or an agent, an employee, or any other person in the service of a juridical person or of an individual has, with regard to the business or property of the said juridical person or individual, committed any of the above violations, then the said juridical person or the said individual shall be held liable, and punished by such fine as provided for in the above provisions. This penalty shall be in addition to the punishment of the offender. The same case would apply in the case of a non-juridical organisation, where the representative, manager, agent, employee, or any other person in the service of a non-juridical organization has, with regard to the business or property of the said organization, committed any of the Specified violations, the non-juridical organization shall then be held liable accordingly, and punished by such fine as provided for in the above provisions. Again, this penalty will be in addition to the punishment given to the offender.

In these cases, concerning vicarious liability, the representative or manager shall represent the parent organization in related acts of procedure and the provisions of the Code of Criminal Procedure related to acts of procedure where the juridical person is the defendant or the suspect shall apply.<sup>98</sup>

Another system established by the Act, which has already been mentioned, is the special power given to the governors of the prefectures. A prefectural governor has been bestowed upon with

<sup>98</sup> Sec.18, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

the power to instruct individuals concerned, when, he finds an act that is in violation of the restrictions or prohibitions prescribed in the provisions of this Art, to cease and desist such violation. Alternatively, his instruction may be to take the necessary measures to avoid the resurgence of similar violations, and to take any other necessary measure in interest of the same. This may even include publishing matters concerning the implementation of such measures. This sort of instruction by the prefecture] governor may be issued even when the said violation has already ceased to occur.<sup>99</sup>

The powers granted to the governor do not end there. if the individual in question fails to comply with the instructions given by the governor, in cases like those mentioned above, the governor is permitted to request the JFTC to take necessary action to deal with this matter. The JFTC is then compelled to notify the governor of the measure: taken by it vis-a-vis the violation.<sup>100</sup>

In addition to providing instructions, the governor has the power to inspect records of individual parties, and examine their accounts, documents and other matters, without prejudice. This sort of examination and inspection is not to be construed as a criminal investigation.

## **JAPANESE ADVERTISING REVIEW ORGANISATION SELF-REGULATORY BODY**

The system, in Japan concerning Misleading Advertisements was effectively implemented in 1974. This was directly following several scandals concerning ' ~ deceptive labelling of food contents, and competition in the area of premiums of allegedly excessive value targeted towards customers. Recognising the absence of an ,efficient consumer complaint redressal system, and in consideration of the large number of complaints being received by Japanese government agencies, and other consumer support groups, the Japanese Government set up the Japanese Advertising Review Organisation (JARO). This organisation is a self-regulatory body, and handles complaints and inquiries. Its primary. The aim of this organisation is to ensure fair advertising and labeling practices and to improve these practices in terms of their

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<sup>99</sup> Sec.7, Act Against Unjustifiable Premiums and Misleading Representations, 1962.

<sup>100</sup> Sec.8, Act Against Unjustifiable Premiums and Misleading Representations, 1962.



quality so that the interest of the consumers may be protected, thereby contributing to the growth of the economy and the maintenance of the people's living standards. A broad list of its activities is as follows:

1. Reception and handling of inquiries concerning advertising and labeling
  - a) Handling of complaints and inquiries from consumers
  - b) Handling of inquiries from advertising companies, media, and other business enterprises
2. Examination and instruction as to advertising and labelling
  - a) Deliberations by the Final Review Panel and the Ad Review Committee; Issuance of opinions
3. Establishment of standards concerning advertising and labelling
  - a) Collection of case examples
4. Collaboration/cooperation with self-regulatory organizations of advertisers, media, advertising, etc.
  - a) Communication meetings with media in the regions
  - b) Liaison meetings with advertising bodies
  - c) Liaison meetings with fair trade councils
5. Liaison and alliance with consumer organizations and relevant administrative bodies
  - a) Liaison meetings with administrative bodies
  - b) Liaison meetings with the National Consumer Affairs Center of Japan (NCAC)
6. Education and public relations activities for firms and consumers
  - a) Issuance of reports (for members)

- b) Dispatch. of lecturers to lectures and workshops
  - c) Public relations on the website
  - d) Holding study courses concerning advertising
7. Media sponsored advertisements for IARO [Achieving approximately 90% consumer recognition)
  8. Collection and maintenance of data in the role of an information centre.
  9. Other matters necessary for the attainment of its purposes.

Considering the functioning of JARO, there are two main sections, each independent to preserve fairness. The first section is the advertising review section, which receives complaints and inquiries, concerning advertising and labelling. The Second section is the managing section, which manages the operations of the organization.

Complaints are filed, and received at the JARO office. Most complaints are made by telephone. The complaints are classified on the basis of reported cases, into two categories. The first category consists of complaints with an identifiable offender, and the second, with an identifiable advertisement or representation. Declarations of complaint are classified as complaints, and others pleas are categorized as inquiries. Cases that can be treated with information possessed by JARO will be dealt with. If the circumstances necessitate it, JARO will contact the concerned advertiser and will deliver to its client, the reply to the complaint/inquiry. If the client refuses to accept the reply and remains dissatisfied, or if JARO finds it necessary to examine a specific case in more detail, the case will then be sent to the Advertising Review Committee. if this fails as well, the case will then be sent to the Final Review Panel, which is a panel consisting of seven educated experts, for a final decision.

The decisions and opinions of JARO are then announced to the client and the advertiser; however, since JARO is not a governmental agency, it possesses no power to force the parties to abide by its decisions. This proves to be a major drawback.

### **3.3. OTHER ASPECTS OF SELF-REGULATION**

It is interesting to note that even within the statutory mechanism a provision exists enabling the entrepreneurs to manage their affairs themselves. For example, Section-12, provides that entrepreneurs or associations of them can, under the aegis of the FTC, can compile codes of conduct laying down the stipulations for how and how not to advertise or represent their commodities or services.

If the following four conditions are satisfied, the FTC will permit the code to be authorised and registered:

- That it is appropriate to prevent unjust inducement of customers and to maintain fair competition;
- That it is not likely unreasonably to impede the interests of consumers in general or the related entrepreneurs;
- That it is not unjustly discriminatory; and
- That it does not restrict unreasonably the participation in or withdrawal from the fair competition code.

#### **4. COMPARISON WITH INDIA MERITS TO ADOPT AND DEMERITS TO LEARN FROM**

Given that India is marked by a conspicuous absence *lexspecialis*, i.e. special law on misleading advertisement or representation, India has more to learn from Japan than reject on grounds on non-applicability or merit.

The Advertising Standards Council of India – ASCI,<sup>101</sup> is very similar in function and setup to the JARO of Japan. The only difference is the efficiency in implementation of the latter as opposed to the ASCI. This is very significant in light of the wide ambit of the scope of the IARO's work. The following can be seen as the common salient features of JARO and the ASCI.

- Private body of advertisers
- Handling of Complaints
- Public-interest Advertisements, alongside other organizations
- Protection of consumers -ultimate purpose

<sup>101</sup>The Advertising Standard Council of India, <http://www.ascionline.org/>

- Advertising Review Panel + Supreme Court Adjudicating bodies
- No binding value, however
- Weak enforcement

Thus, it can be seen that except for the enforcement bodies The Advertising Review Panel and Supreme Court, the essential features remain broadly the same between India and Japan. However, India must still lose hold of implementation related inefficiencies, leaving aside problems of corruption and work to ensure that the ASCI remains as powerful a force as the JARO is in Japan.

### **5. PROBLEMS IN THE JAPANESE MODEL, TO BE AVOIDED IN INDIA**

Although on a rough comparative basis, Japan emerges as possessing the better model, there are some aspects in the mechanism which ought not to be blindly imported into the Indian scenario, for several reasons. Certainly this does not include the special legislation, specifically dealing with 'Misleading Representation'. It is submitted that the eventual Indian legislation could be modelled around the 1962 Japanese law. Nevertheless, some fundamental differences and exceptions will have to be made.

The first and foremost reservation to be adopted in incorporating the Japanese model is to make the model consumer-heavy. As established earlier, the Japanese law was enacted in 1962, before the Basic Consumer Welfare law came about in 1968. Thus the 1962 Act's primary focus is on the competition law regime. Since the fundamental aim is not protection of consumers, some of the provisions are to be taken as reflecting the interests of the entrepreneurs. Hence, in India, a more consumer-intensive approach ought to be taken instead.

Similarly, it is necessary to back the legislation with consumer welfare measures. Although JARO fulfils this purpose, it is merely a private body, with no force or binding influence whatsoever. Thus in India, it would be appropriate for adoption of specific consumer-focused measures. In this context, it is significant that the 1962 Japanese Act provides no scope for a consumer complaint to be filed in furtherance of a misleading representation. This is possible only with the JARO, an unofficial processing organization.

Thus, ignoring the rights of consumers and not providing adequate remedies to redress the consumer complaints is a major failing of the Japanese Model. Since, for several years now, India has emphasized the ability of the consumer to raise disputes, this ought not to be rejected following the Japanese Model.

Flowing from the above, the involvement of the judiciary in the Japanese scenario is very restricted. Consequently, in Japan, no binding judicial case law exists, other than the others of the FTC or the prefectural governors. In India, however, it is of utmost importance that either the judiciary per se or the Consumer forum be given wide ambit of judicial decision-making power over these misleading advertisement cases. Otherwise, the system would collapse if left in the hands of a few privately managed entities.

## **6. CONCLUSION**

Through the course of the paper, several insights emerged. The most important of them being the fact that Japan, now has a 50 year old effective mechanism to address the problem of misleading advertisements, while India is still struggling to bring forth an applicable law. The crucial aspect of Japan is the intricacy with which the model is framed. It is indeed commendable for incorporating broad and evolving definitions of the terms misleading and representation, but it is more relevant for building the statutory and other bodies simultaneously. Aspects of regulation are dealt with delicately by both public and private organisations, without the problem of corruption and inefficiency. These bodies are the FTC, prefectural governors and the JARO.

India ought to import the goodness of this model i.e. provision of quick redressal of consumer complaints not only in terms of deficiency in service, but also dealing with the problem of false representation in India. Possessing an enormous consumer base, India soon ought to put in place a model which combines several public policies together, like in Japan. For example, collaborating the purposes of Competition law and consumer law and thus providing one consolidated legislation for prices and publicity.

Marketing is known to the area of four Ps. Two of the four, price and publicity, are dealt with together and efficiently so in Japan. Certainly, India has more to learn from Japan than criticise.

## **CHAPTER-7**

### **CONCLUSION AND SUGGESTION**

As already discussed in the earlier chapters, in India we have a number of laws to curb false and misleading advertisements and protect consumer interest, but still the consumers continue to be victims of false advertisements because of two reasons-:

- (a) The poor enforcement of the laws and
- (b) Lacunae or inadequacies in the existing laws.

The rupture of the Monopolies and Restrictive Trade Practices (MRTP) Commission was the right decision because through dissolution of MRTP Commission only, Competition Commission of India can be setup, and has also left a huge bare in so far as consumer protection, if we particularly talks about false and misleading advertisements is concerned.

More so because the government excluded unfair trade practices from the purview of the Competition Commission, on the ground that consumer courts could deal with unfair trade practices.

It is very true that the MRTP Act and the Consumer Protection Act has the same meaning of the definition of 'unfair trade practice', but the similarity ends there. For one, the consumer courts neither have the power nor the infrastructure to investigate suomotu into misleading advertisements nor take up such cases on their own, as was being done by the MRTP Commission. They also do not have an investigative wing like the office of the Director General (Investigation and Registration) that existed under the MRTP Act. The consumer courts can only adjudicate over complaints filed before them. So this void needs to be filled- either by bringing UTP too under the Competition Commission or by creating a separate Commission for unfair trade practices or creating the necessary infrastructure under the Consumer Protection Act to deal effectively (as is being done in North America, for example) with unfair trade practices. Section 14 h (c) of the Consumer Protection Act, describing the powers of the consumer court, says that the court can order "corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing whereas on one side advertisements are used for a campaigning against the ills in the society (eg. Cancer,



AIDS, smoking, malnutrition, degrading tourism industry etc.) the same are being used in the wrong way for misleading the consumers. As has already been mentioned about the plethora of laws that have been enacted to get rid of misleading advertisements and claims, but it cannot be left without stating that none of these legislations has been able to curb this disease and provide a perfect catholicon for its cure. The most important thing is have better laws in keeping relevance with the contemporary scenario, better enforcement of the legislations, self-regulation by industry, and independent regulator to regulate the misleading advertising. Consumers must create self awareness and exercise their rights against deceitful businessmen indulged in practices of creating surrogate and misleading claims of their products. They are expected to bring such cases to the notice of the enforcement agencies, which, in turn, should play the role of a watch-dog of public interest.

An ad that is misleading continues to move difficult and controversial. Naturally, advertisers and consumer advocates rarely agree on whether a particular ad is misleading. producer for identifying misleading advertising is presented, based solely on measured consumer beliefs. An advertisement is misleading if an exposed group holds more false belief than a comparison group. When ten allegedly misleading advertisement were tested, two were identified as inclemently misleading and four others were shown to be exploitive misleading. Thus a misleading advertisement has adverse m consumer welfare and must be regulated by the legal provisions and institutional framework that regulate misleading advertisements in our country. There by Consumer should berational in thinking to see be and the packaging of words am illustrations while viewin; and for a purchase goods or services. Maggie is a classic example where even tie presence an: words of eminent movie stars could not hide the deficiencies of the product that they had to review and correct the content.

### **What to do**

So at a cursory glance to the above discussion it can be said that false and misleading advertisement has posed a serious threat to the consumer in general and to the society at large. However, we should take the following precautionary measures in order to check and stop this evil practice:

1) Before purchasing any product asking by ourselves : Whether, why, when, where, how, how much, how often, how long, etc.,

- 2) Consumer Oriented advertisement will have to be truthful and ethical,
- 3) It should not mislead the consumer, 4) Make truthful honest representations and claims which is essential to prohibit misleading advertisements,
- 5) Not to be offensive to public decency or morality,
- 6) Not to promote products which are hazardous or harmful to the society or individuals, particularly minors and observe fairness in competition keeping in mind consumer's interests,
- 7) Primary demand, buying motives, hidden qualities, differential advantage and money in every marketing situation, must be analyzed carefully to determine the advertise ability of a product.

Advertising is an important thing for making communication strategy, in marketing mix. It is an external stimulus that arouses dormant needs. It results in "inner tension" among buyers and it is very easy to encourage corruption through that advertisement in entertainment business in a country like India, if not checked properly. If false advertisements are not properly checked and prevented these may endanger and mislead our right to choice and freedom of buying commodities. However, steps should be taken to make aware the common consumers by the government as well as NGOs. Law enforcing agencies should not be apathetic and insensitive to implement the existing legal provisions for the protection of consumers. Special care should be taken to protect the children, young communities and patients from the evil of false and misleading advertisements.

### **OVERALL SUGGESTIONS**

An over reaching and comprehensive framework to deal with the misleading, deceptive, fraudulent and all other forms of unfair advertisement is the need of the hour in pursuance of the same. Few of the recommendation are as follows -:

1. Keeping in mind the numerous provisions in misleading advertisements under different legislation which are not effective and not enforced hence a new and comprehensive legislation needs to be drafted to control misleading and unfair advertisement.
2. A regulatory authority under Consumer Protection Act, needs to be constituted for the purposes of implementing and enforcement of the provisions and it must also have members from all the ministry,

3. Complaints can be place before the above mentioned regulatory body by individuals or companies, suo moto cognitive action can be taken by this authority.
4. This authority will also coordinate and harmonise all initiatives towards consumer protection and welfare aimed; at redressal against misleading advertisement and other unfair trade practice.
5. This authority will-also coordinate with ASCI in particular to carry forward and its projects and its efforts to ensure "greater implementation.
6. This authority shall not limit itself to the provisions of the proposed legislations but shall also entertain complaints under advertisement provisions in other legislations.
7. Consideringthe geographical and linguistic diversity within the nation, this authority must be divided into zonal levels for case of actions and more efficient handling of complaints at the local levels.
8. This proposed regulatory authority shall be empowered with investigating to impose high penalties for non-compliance of the orders of the body.
9. It is essential that awareness should be spread to all stake holders including consumers, advertisers, advertising agencies etc on the negative effects of misleading advertisements. In furtherance of creating such awareness a module on consumer protection in general and misleading advertisements in particular must be included in the curricula of schools, colleges, and educational institutions.
10. To protect the consumer from misleading advertisement there should be a code of conduct for all advertisements for all sectors so that they cannot mislead the consumer by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.
11. Marketing communications must not materially mislead by omitting the identity of the marketer.
12. Regulatory bodies in specific sectors have to implement effectively & efficiently to control misleading ads and also authorities have to check and monitor over the misleading ads telecasted to attract the consumers.
13. Consumer Protection Regulatory Authority with investigating powers and suo moto powers

14. Existed Regulatory Authorities like Insurance Regulatory Development Authority, Telecom Regulatory Authority of India, Reserve Bank of India etc have to implement effectively.

15. Amendment to Consumer Protection Act to punish intermediaries like film actors, experts, print and electronic media who are endorsing such misleading advertisements.

16. Consumer Forum/Commission should exercise full powers given under Consumer Protection Act.



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