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Misleading Advertisements and Exploitation of Consumers: Is The Law Silent?

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I. INTRODUCTION

Advertising has become a modern *mantra* — tool of promoting business/markets. It is principle motivator of growth in consumer demands.³ In the modern era advertising has attained the status of an industry wherein several specialized agencies⁴ are engaged in developing newer kinds of advertisements on print and electronic media. Today the advertising industry is a big business world-wide. According to some estimates the amount spent on advertising world-wide is in excess of 6004 billion Dollars.⁵ The advertising companies are hired to design advertisements in such a way which not only promote their product but also show comparatively a better product in terms of cost, quality, quantity, potency, efficacy and effectiveness of the product. The unfortunate part is that it is without their being any scientific proof of the claims made in the advertisements. And, therefore, the innocent consumers often become prey to highly professionally designed advertisements which incur huge financial loss or suffer serious health hazards. Such advertisements deeply influence particularly the children/youth and other ill educated consumers of the country. The situation becomes all the more complex when these advertisements are promoted by celebrities who enjoy a very popular position in the minds of masses having no stakes in the matter.



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The main question examined in this paper is: what the misleading advertisements have done and what has been the role of law?

II. ADVERTISEMENTS AND THE PREVAILING SCENARIO

Any time we open a television channel, switch on radio, or take our mobile phone or turn a page of newspaper/magazine including some of the journals or periodicals, we notice the presence of large number of advertisements. The nature of messages conveyed through these advertisements may be different but the final aim in all cases is the enrichment of the advertisers. The consumers are bombarded with more than 1500 commercial messages a day.⁶ Some of the popular advertisements include:

Reduce up to 10 kg in a week, get fair and glowing skin in ten days, have a long and shining hair in two weeks, become a chic magnet in just one spray or save a drowning person by wearing a particular brand of undergarments or increase height in a week or take money back. No sector affecting consumers is left unaffected. The youth is exploited by advertisements like join 'X' coaching for 100% placement or the institute is fully recognized and affiliated to the concerned university/authorities which turns out to be false.


Advertisement in a global scenario play a very crucial role as they facilitate consumers to exercise their right to choose, to be informed about the quality, safety, etc of the product besides being a part of their freedom of speech and expression as guaranteed under Article 19(1)(a) of the Constitution of India. But if these advertisements are false, exaggerated or tend to mislead the consumers, they adversely affect the consumers' interest and welfare. It is a message that promotes a

product or a service or gives information to the public. Advertisements may take many forms; such as press advertisements in newspapers or magazines, television and radio advertisements or signs, hoardings, pamphlets, banners etc. Advertisements can also be transmitted directly by mail, fax, e-mail or text messages and are mostly made to encourage consumers to buy particular products or services. According to *Black's Law dictionary* advertising means, 'to advise, announce, apprise, command, give notice of, inform, make known, publish or to call a matter to public attention by any means whatsoever'. Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation

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because of enumeration, statements and representations made in a newspaper or other publication or on radio or television or contained in any notice, hand bill, sign, catalog, letter, or printed on or contained in any tag or label attached to or accompanying any merchandise.² According to *Law Lexicon* an advertisement is a notice given in a manner designed to attract public attention; information communicated to the publisher, or to an individual concerned by means of hand bills, or the newspaper. The meaning of the word is not however, confined to notice printed in the newspaper.⁸ Further, the Control of Misleading Advertisements Regulations, 1998 (UK) defines 'advertisement' as 'any form of representation which is made in connection with trade business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations.'⁹

It may be pointed out that while defining the term, 'misleading advertisement' often a distinction is not made between 'puffery', 'bait advertising', 'comparative advertising', 'false advertising', and 'deceptive advertising'. *Puffing* as defined in *Black's Law dictionary* means 'an expression of opinion by seller not made as a representation of fact'. Advertising which merely states in general terms that advertiser's product is superior is only "puffing"¹⁰ and is not an actionable action by the competitor.¹¹ A comparative advertising is that which specifically compares the advertised brand with other brands of the same products. A competitive advertising contains basically little information and is used only to allow a producer to maintain a share of the market for their product. Informative Advertising gives information about the sustainability and quality of products.¹² A bait and switch advertising has been defined in *Black's Law dictionary*¹³ as 'a deceptive sales practice, such tactic usually involves advertising a low priced product to lure customers to a store. It induces them to buy higher priced product. The bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers to buy the advertised merchandise. A deceptive advertising is defined in *Law Lexicon*¹⁴ as 'an advertisement which contains any assertion, representation or statement of facts which is untrue or misleading. Where the public are not cautious or watchful in their buying habits are likely to be misled. According to the Federal Trade Commission (USA) deception occurs when: (i) there is misrepresentation, omission, or

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a practice that is likely to mislead; (ii) the consumer is acting responsibly in given circumstances; and (iii) the practice is material and consumer injury is possible because consumers are likely to have chosen differently if there is no deception.¹⁵ And

finally, fallacious advertising has been defined in **Law Lexicon** to mean that, 'which persuade by any bewilder, but seldom reasoning is that of which the nature is so subtle, that its faults cannot easily be detected and exposed, and it may be unanswerable without being convincing.'¹⁶

In view of the above, an advertisement can be said to be misleading when such advertisement, in any way, either in its wording or presentation deceives or is likely to deceive the persons to whom it is addressed or whom it reaches; or by reason of its deceptive nature, is likely to affect their economic behavior or for those reasons, injures or likely to injure a competitor. However, not every advertisement necessarily fall in the category of misleading advertisement. It occurs when a claim about a product or service is materially false or misleading, in an attempt to persuade the consumer to buy it. The Apex Court in *KLM Royal Dutch Airlines v. Director General of Investigation and Registration*¹⁷ clarified the position. According to the Supreme Court it 'will depend upon the facts and circumstances of each case'. It has been further clarified by the Court that,

It is not possible to provide an exclusive list of statements which may constitute misleading representation nor there can be any strait jacket formula evolved thereof for the said purpose. However, the statements of the nature which are willfully made knowingly false, or made recklessly without belief in its truth, and made with the purpose to mislead or deceive will definitely constitute a false or misleading representation. In addition a failure to disclose a material fact when a duty to disclose that fact has arisen will also constitute a misleading representation.

In 1984, The Saachhar Committee further clarified the position, when the report states:

With regard the menace of advertisement affecting the consumer choice, the objection is not to the advertisement of the products, which it may be necessary to do in order to acquaint the public the articles. Whatever, however, insisted on, is that there is an obligation on the seller,



*namely, that if he advertises, he must speak the truth. This obligation also requires that the representation that is made to the consumers is must not only contain an element of truth but must also avoid half-truths so as to give deliberately different impression than is actual fact. Thus the advertisement may be misleading because things are omitted that should be said, or because advertisements are confusing or purposefully printed in such a way so as to mislead the consumers.'*¹⁸


The misleading nature of advertisements depends on a set of criteria, viz. the characteristics of the goods or services (availability, nature or composition, method of manufacture or provision, origin, etc.), the results to be expected from their use; the results of quality checks carried on; the price or the manner in which the price is calculated; the conditions governing the supply of the goods or services; and the nature, qualities and rights of the advertiser (identity and assets, qualifications, intellectual property rights, etc.).

It is little strange that the term "misleading advertisement" could not be defined in the Consumer protection Act, 1986 despite the fact that the Act has been amended thrice and is likely to be amended again. However, Section 2(r)¹⁹ of the Act provides a comprehensive definition of 'unfair trade practices' which includes misleading advertisements and further Section 14 enumerates the remedies that the Courts/forums can award. Thus in view of the above scenario of the misleading

advertisements it becomes necessary to study the existing legal framework for prevention and control of the menace and save the consumers from exploitation.

III. CONSTITUTIONAL CONTROLS


A Constitution is the fundamental law of a nation. It guarantees individuals collective rights and liberties; protects the principles of people's — consumers'—free choice. The Constitution of India guarantees the right to freedoms under Article 19(1) [20](#). Amongst these freedoms, the most

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auspicious and a pre-condition of liberties is the freedom of speech and expression enshrined under Article 19(1)(a). This right plays a very crucial role in formation of public opinion in socio-economic matters and includes the right to propagate, publish or advertise one's own views²¹ and serves several purposes which include to attain self fulfillment; assists in discovery of truth; strengthens the capacity of an individual in decision-making; and to provide a mechanism to establish a reasonable balance between stability and social change. This right has been given expansive interpretation so as to include number of other rights as well. Accordingly it includes the right to know²², the right to receive and disseminate information²³ and right to communicate effectively to a large population not only within but also outside the country.²⁴ This right to communicate includes commercial speech as a part of freedom of speech and expression guaranteed.²⁵ Under the right to freedom of speech and expression freedom of media is implicit which includes any communication meant for public at large through press, films, radio, television, cell-phones, and all other forms of communications.

Initially it was a controversial issue: is advertising a "commercial speech"? In *Hamdard Dawakhana v. Union of India*, the Supreme Court was of the view that, "an advertisement promoting drugs and commodities, the sale of which is not in public interest, could not be regarded as propagation of any idea or as such, could not claim the protection of freedom guaranteed under Article 19(1)(a).²⁶ The emphasis of the Court in this case was '*pro bono publico*' and only those advertisements made in public interest may be entitled to claim fundamental guarantee under Article 19(1)(a) of the Constitution. It was further clarified by the Court in this case that an advertisement is a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Art. 19(1)(a) only when it seeks to aid by bringing it to the notice of public. However, when it takes the form of commercial advertisement, it no longer falls within the concept of freedom of speech.²⁷

The above position of law was subsequently changed in *Express Newspaper (P) Ltd. v. Union of India*²⁸ wherein the Apex Court observed that, "we are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) merely because they are issued

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by businessmen. Advertising pays large portion of cost supplying the public with the newspaper". Thus the element of public interest was located in the public advertisements and it became a criterion for grant or refusal of constitutional protection. Now the legal position is settled by the Supreme Court in *Tata Press Ltd. v.*

MTNL,²⁹ wherein it has been unequivocally held that commercial speech is a part of freedom of speech and expression guaranteed under Article 19(1)(a). Thus it may be safely concluded that the constitutional guarantee includes the freedom of commercial speech, including the advertisement. This right may lead to promotion of numerous rights of consumers as given in the Consumer Protection Act, 1986, i.e. the right to protection against the goods and services hazardous to life and property; the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices; and the right to be assured of goods at competitive prices etc. However, this freedom is not absolute, it is subject to restrictions provided in Article 19(2).

The producer of goods and the service providers have also a right to carry on any trade or business. The question is whether misleading advertisement in the process of sale the goods or rendering services protected under Article 19(1)(g)? The Supreme Court had initially taken the stand that in the name of trade, socially harmful and reprehensible activities, *res extra commercium*, the fundamental right in Article 19(1)(g) is not available.³⁰ But in the *Fate Chand case*³¹, the constitutional Bench, speaking through Krishna Iyer, J., took the stand that every systematic profit-oriented activity, however semestral, suppressive or socially diabolic, cannot *ipso facto* exalt itself into a trade. Thus the traders or service providers involved in misleading advertisement for their products or services, will come under the umbrella of Article 19(1)(g). However, unlike Article 19(2), 19(6) provides a wider scope for restrictions - 'reasonable restrictions' 'in the interests of general public' which will include protection of public health and economic interest, and, therefore, in the light of the above case law the above mentioned advertisement could be constitutionally banned by the State by law under Article 19(6) and the judiciary will endorse such ban.

Apart from the above provision, the right of consumers to get a quality service and goods would also come under the right to life provided in Article 21. This will come under this article through the expanding dimension to this article in the *Maneka Gandhi case*³², wherein Article 21 was given the status of the residuary fundamental right clause. The consumers, in order to live better dignified and decent life, must tap this important



resource. Further in order to control such nefarious activities, the State, under the Directive Principles, for the common good³³, to avoid common detriment³⁴ and 'to raise the level of nutrition and standard of living and to improve public health'³⁵, can activate its control and, in specific, the the legal control. It is time that these Directives must be put in action or else the defrauded consumers will show their strength at the time of election.

IV. TORTUOUS LIABILITY

Generally every unjustified harm is a tort and as such actionable, unless there is a legal policy leaving certain harm unrecognized. This ever expensive branch of law, the law of torts, has given recognition to several newer types of Torts including the wrongs inflicted on the consumers.³⁶ A tort, or a civil wrong, is where a person causes injury or damage to another person in breach of one of the legal duties that such person owe it to other. The remedy is usually monetary compensation, so each person needs to take care so as not to cause damage or injury to another person, including the consumer. The tort of deceit is based upon the breach of duty which a person owes not to be misled by another by his false, reckless or fraudulent statement. Thus tort of deceit

may be defined as 'a false representation of facts made with the knowledge of its falsity or without belief in its truth, or reckless statement whether it be true or false, with intent to induce a person to act upon it, and person does act upon it and suffers damage'.³⁷ Thus an aggrieved consumer needs to prove that:

- The defendant (advertiser) made a false statement or representation;
 - He made it so without belief in its truth;
 - The representation or statement was with intent to induce others to act upon it;
 - The person believing it to be a true statement, did act upon it and;
 - In consequence he suffered damage.
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Looking to the above ingredients, it could be deduced that the cases of misleading, false or deceptive advertisements are those which mislead people, alter the reality or affect buying behavior.

The injurious falsehood, preferably called slander of the title,³⁸ is another tort that would lead to an action against misleading advertisements. It may be defined as 'a false or fallacious statement in writing, printing or by words or in any other form which is injurious to person's title to property or causes damage to such person'. The essentials of this tort include: (i) falsity; (ii) malice; (iii) disparagement of person's property or business; and (iv) special damages. In *Ratcliffe v. Evans*³⁹, the defendant falsely and maliciously published in a newspaper a statement that the plaintiff had ceased to carry on business as a result of which plaintiff's business declined. The Court, making the defendant liable for injurious falsehood, held that 'an action will lie for a false statement made maliciously calculated to cause material damage to the plaintiff's trade or business'. This tort may help in deciding the cases of false, deceptive, injurious, or misleading advertisements but not puffery advertisements. In the case of *De Beers Abrasive Products Ltd. v. International General Electric Co. New York Ltd.*⁴⁰, the defendant published pamphlets for advertising his product in which it was stated that his product "Debust MBS-70" had been found to be more effective and quantitative in the laboratory examination than that of plaintiff's "Debust" product as it can grind the concrete stones more easily and accurately. The plaintiff filed a suit against the defendant alleging that advertisement indirectly meant that plaintiff stone grinding machine was of an inferior quality. However the defendant pleaded that it was only 'puffery' which he had right to do in order to promote his product in the market. The Court, upholding the defendant's act, held that *it was mere puffery of his goods which was not actionable or did not amount to injurious falsehood.*⁴¹ Thus it may be safely concluded that besides the constitutional limitations on advertising, there are adequate number of the tortuous solutions to the menace of misleading advertisements.

V. LEGAL CONTROL

Starting with the Consumer Protection Act, 1986, an umbrella legislation, ensures consumers' welfare and provides a better protection of their rights and interest. It is true that the Consumer Protection Act, being a benevolent piece of legislation, intended to protect the consumers from exploitation, and, therefore, its provisions should receive a liberal construction;



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technicalities should be eschewed and grievances of the consumers deserve to be redressed expeditiously. Section 2(r) of this Act defines "unfair trade practice" and includes misleading advertisements. Unfair trade practice means a trade practice... 'for the purpose of promoting sale'... 'adopts any unfair method or unfair or deceptive practice'. Various sub-clauses of this provision illustrate various practices which fall in this category⁴². The practice of making any statement whether orally or in writing or by visible representation which either falsely represents that the goods are of a particular standard, quality or grade or which falsely represents any rebuilt, renovated or reconditioned goods as new goods amounts to 'unfair trade practice'. Under Section 2(1)(r)(ii) of the Act, it is provided that 'unfair trade practice' includes the practice permitting the publication of any advertisement, whether in any newspaper or otherwise, for the sell and supply at a bargaining price, of goods and services that are not intended to be offered for sale or supply at bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

While interpreting the term 'unfair trade practice' it must be born in mind that object of Section 2(r) is to bring honesty and truth in the relationship of manufacturers of goods/provider of services and the consumers. When a problem arises as to whether a particular act can be condemned as an 'unfair trade practice' or not, the key to the solution would be to examine whether it contains a false and misleading statement and what is the effect of such a representation made by the manufacturer on the common man. Does it lead a reasonable person, in the position of a buyer, to a wrong conclusion? The issue cannot be resolved merely by examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly a statement, which may be inaccurate in the technical literal sense can convey the truth and sometime more effectively than a literally correct statement. It, is therefore, necessary to examine whether the representation, complained of, contains the information misleading the buyer, does a reasonable man on reading the advertisement form a belief different from what the truth is?

The above position will have to be viewed objectivity and in an impersonal manner. It is stated in *Halsbury's Law of England*,⁴³ that a representation will be deemed to be misleading if it is false in substance and in fact; and the test by which the representation is to be judged is to see whether



the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee. Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequately establish a misrepresentation. However where the entire representation is a faithful picture of transcript of the essential facts then no falsity can be established, even though there may have been any number of inaccuracies in unimportant details.⁴⁴ It is to be kept in mind that the advertisement of any product is the backbone for the higher sale of the products but at the same time in order to protect the innocent, illiterate and poor consumers, it is necessary to regulate advertisements in such a manner that it depicts the true and honest legal position and the control is with the sense of responsibility to the consumers and, therefore, misleading, false and

deceptive advertisements should be controlled.

As the Consumer Protection Act provides cheaper and speedy remedy⁴⁵ to the consumers through a three tier consumers' dispute redressal agencies,⁴⁶ could be of seminal importance in this endeavour. The consumer forums may provide remedies as given under Section 14⁴⁷ which include: (i) issuing interim orders stopping advertisements that are false, deceptive



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or misleading; (ii) to pass cease and desist order; (iii) award compensation for loss or suffering, including punitive damages or litigation cost to the affected party; and (iv) to direct advertiser to issue corrective advertisement. Yet, as a matter of abundant caution, it may be pointed out that the power exercised by the consumer forums for redressal of consumer complaints being quasi-judicial in nature, they are required to take into consideration all the relevant facts and the materials brought on record by both the parties. To support a finding of "unfair trade practice", there has to be some cogent material before the forum and any inferential finding is not sufficient to attract Section 2(r) of the Act.⁴⁸ Of course, the burden of proof, the nature of proof and adequacy thereof depends upon the facts and circumstances of each case.⁴⁹

In addition to the above legal controls, there are provisions under different laws, for example, the Indian Penal Code, 1860 which may help in preventing obscene, lascivious advertisements under Sections 292(1) and (2); 293 and 294⁵⁰. The Drugs and Magic Remedies (objectionable Advertisements) Act, 1954 prohibits advertisements claiming to cure certain medical condition. Thus the legislation bans advertisement promising magical cure of any ailments of disease. However the fact remain that a number of such advertisements both in prints and electronic media.⁵¹ Section 4 of the Act prohibits advertisements relating to a drug if it contains any matter which directly or indirectly gives a false impression regarding the true character of a drug or makes a false claim for the drug or is otherwise false and misleading.⁵² The Drugs and Cosmetic Act, 1940 (as amended in 2008) regulates the import, manufacture, distribution or sale of drugs and



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cosmetics and prescribes a fine of Rs. 500 for any person using report or extract of report of a test or analysis for advertising of a drug⁵³. Even the Indecent Representation of Women (Prohibition) Act, 1986 forbids depiction of women in an indecent or derogatory manner, whereas we find women are depicted in almost majority of advertisements, whether relevant, necessary and apt or not in a derogatory manner, raising sensual appeals. The Act provides that, "No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form."⁵⁴ Sex appeal is used explicitly in all kinds of advertisements to gain consumer's attention. Despite clear prohibition, women are used as decorative objects or as sexually provoking figures for advertisements wherein women are in fact not required. Such advertisements not only undermine the dignity and respect of women, a fundamental right under Article 21 but also are violative of existing legal provisions. The existing law must come out with stricter control in this regard. Cable Television Networks (Regulation) Act, 1995 provides that, "(N)o person shall transmit or re-transmit

through a cable service any advertisement unless such advertisement is in conformity with the prescribed advertisement code.⁵⁵ there are other enactments as well having bearing on the issue.⁵⁶

VI. JUDICIAL APPROACH

The Indian judiciary, a custodian of people's welfare, has constantly and continuously engaged in ensuring welfare of consumers through dispensation of justice to them. The Supreme Court while explaining the nature of misleading advertisement in *Lakhanpal National Ltd v. M.R.T.P. Commission*⁵⁷ held that erroneous description of manufacturing company in the advertisement does not attract Section 36-A of the M.R.T.P. Act.⁵⁸ Here the appellant had challenged the orders of the National Commission forbidding them from issuing an advertisement stating that Novino batteries were manufactured in collaboration with National Panasonic which according to the Commission was false and misleading. However, it was found that the Appellant Company was manufacturing Novino batteries in collaboration with M/S Mitsushila Electric Industrial Co. Ltd whose products were popularised in the name of National and Panasonic. It was noted that as there was no other company with the name of "National" and "Panasonic", accordingly, the Court was of the view that there was no scope for any



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confusion on that score. The orders of the Commission were set aside with a word of caution to the appellant company that it would be more proper for the appellant Company to give full facts by referring to Mitsushita Ltd. by its correct name and further stating that its products are known by the names "National" and "Panasonic".

The Courts have often drawn distinction between comparative, disparaging, competitive, puffing advertisements and the misleading advertisements. In *Dabur India Ltd. v. Emami Ltd.*⁵⁹, it was held that even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of a product in its generic sense, even in those circumstances, disparagement is possible. However it has been an accepted principle that a case of disparagement arises only if the product in question is identifiable which would be drawn from the facts and circumstances.⁶⁰ In the case of *Hindustan Lever Ltd. v. Colgate Palmolive (I) Ltd.*⁶¹ the Hindustan Lever advertised its toothpaste 'New Pepsodent' as "102% better than the leading toothpaste. In the television advertisement, samples of saliva were taken from two boys, one who had brushed with new pepsodent while another had brushed with "a leading toothpaste". The saliva of "the leading toothpaste" showed larger number of germs, while in the second case these were no germs. They were asked the name of the toothpaste with which they had brushed. One boy said Pepsodent, the response of the second boy was mut. However his lip movement were indicative of saying "Colgate". According to the Commission, the word toothpaste has become synonymous with Colgate over the years and a reference to "leading brand" was to Colgate. Thus it became a case of comparative advertising which led to disparagement of Colgate's product.

A. Education Sector

Misleading advertisements have deeply affected the education sector wherein the young consumers, the students, are victimised. In *Buddhist Mission Dental College and Hospital (1) v. Bhupesh Khurana*⁶², the advertisement specifically highlighted that the appellant college is a premier dental college of Bihar established and managed by the Vishwa Buddha Parishad under Article 30 of the Constitution of India. It was also

mentioned that the said institution, i.e. "The Buddhist Mission Dental College and Hospital" was under the Magadh University, Bodh Gaya Patna and was also recognised by the Dental Council of India, New Delhi. At the time of admission Rs One Lakh was taken in cash from each student



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for which no receipt was given to them. It was later on found that the college was neither affiliated to Magadh University nor it was recognised by the Dental Council of India besides being most ill-equipped both in terms of faculty and infrastructure. Aggrieved by such deficiency in service, the respondents preferred their claim before the National Commission. The Commission held that there was insufficiency of service on part of the appellant institute and directed the appellant to refund the admission expenses along with interest @ of 12% p.a. and a compensation of Rs. 20,000 along with the petition cost of Rs. 10,000. This order was challenged before the Supreme Court by the appellants. The apex Court not only upheld the orders of the National Commission but also issued the following directions:

- (i) The respondents (complainants) would be entitled to the compensation as directed by the National Consumer Disputes Redressal Commission. In case the amount has been deposited, the respondents would be entitled to withdraw the same.
- (ii) We further direct the appellant institute to additionally pay compensation of Rs. One lakh to each of the respondents (complainants).
- (iii) We also direct the appellant institute to pay cost of litigation which is quantified at Rs. One lakh to each of the respondents (complainants).

The mushroom growth of coaching institutions for various entrance examinations and other competitive tests also resort to giving false/misleading advertisements, inviting candidates for admission to these institutes. Irony of the situation is that such institutes are not regulated by any law or rules or regulations. Such institutes lure the parents to admit their wards to these institutes by giving full page advertisements in the newspapers claiming success of their coaching programmes. It is the common knowledge that more than one coaching schools claim the same rankers in the IIT or such other entrance examinations as their own students. It clearly amounts to unfair trade practice. These coaching schools provide mostly printed material for a particular entrance examination. However, so far as the classroom teaching is concerned, much is left to the desire of the concerned institute. On the basis of misleading advertisements these coaching schools attract and enrol more students than they can cater to. As a result of this number of students per class reached high. The student-teacher ratio was also too low. As result of this, no personal attention is given to every student.



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In *FIIT Jee Ltd. v. Minathi Rath*,⁶³ a student who had enrolled in the two year regular classroom program and paid full fee, i.e. 61,202/- in advance, found that she was not benefited from the teaching pattern and thus decided to withdraw her candidature after completion of one year of program. She approached the appellants

for refund of the half of fee paid in advance i.e. sum of Rs. 30,500. Being unsuccessful, she to approached the District Forum which allowed the claims of the complainants. The order of the District Forum was challenged before the State Consumer Disputes Redressal Commission. The State Commission found merit and substance in the complaints and held that there was insufficiency of services on the part of the appellant and that the petitioners were legitimately entitled to the claims made in the petition. The orders of the State Commission were challenged before the National Commission which upheld the orders of the State Commission and directed: the Petitioners/Institutes to refund the fees (excluding the service tax) for the unutilized period i.e. the second year to all the respondents with interest @ 6% per annum and Rs. 5,000 as compensation towards mental agony and Rs. 3,000 as litigation cost in each case. However, the State Commission's *obiter dictum* as well as damages of Rs. 25,000 imposed on the Petitioners/Institutes were set aside. It may be pointed out that there has been a controversy as to whether the education is a "service" within the scope of Section 2(d)(ii) of the Consumer Protection Act, 1986 which was also further clarified by the National Commission. However, the question remains: should such scrupulous role player be left to go out of court room with such a liberal treatment?

B. Cruise Services

In *Cox and Kings (I) (P) Ltd v. Joseph A. Fernandes*,⁶⁴ the respondents—original complainants before the District Commission alleged that they had booked for a tour from Bangalore to Singapore-Malaysia and back with the petitioners company who had advertised a cruise trip as for "2 nights/3 days" which in fact was provided only for "two nights and one and a half days" which was short by one and a half day cruise service. The complaint was upheld by the District Forum which directed the tour operator to pay a compensation of Rs. 50,000/- which was reduced by the Karnataka State Commission to Rs. 25,000/- with 25% interest p.a. Against these orders of the State Commission, a revision petition was filed before the National Commission. The National Commission observed that "there is a deliberate



misleading thought in issuing the advertisement that the cruise is for two nights/three days. Actually what has happened was that the cruise was only for one and a half days." It further observed that the "State Commission has taken a lenient view in reducing the compensation". The National Commission upheld the orders of the State Commission and directed the petitioners to pay Rs. 5,000/- as cost of litigation. It further directed the petitioner to withdraw the misleading advertisement in view of Section 14(1)(f) and to give corrective advertisement under Section 14(1)(hc) of the Act. A consumer friendly approach of the Commission is praise worthy wherein it not only awarded payment of litigation cost and gave an addition time limit for payment, i.e. within four weeks or else would pay 9% interest p.a.

C. Banking Sector

An advertisement was given by the State Bank of Patiala for auctioning of a house whose possession was still with the mortgagor and not with the bank. It was stated in the advertisement that the possession of the property was with the bank. This was considered to be misleading advertisement by the District Forum⁶⁵ and it directed the bank to refund the sum paid by complainant, i.e. Rs. 3,05,000/- with 12% p.a. interest and Rs. 5,000/- as cost. This orders of the District Forum were upheld by the State Commission and further by the National Commission.

VII. CONCLUSIONS

The scrutiny of prevailing scenario of misleading advertisements paints a very gloomy picture resulting in continuous consumers' exploitation. Needless to say that the allurements offered by these misleading advertisements not only affect the poor or less educated consumers but even the mature, educated and well informed consumers. These advertisements create inroads in developing consumer welfare regime. It has been found that there are adequate constitutional safeguards but they have to be activated in this regard. They do not remain simply the non-enforceable Directive Principles but enforceable fundamental rights. The tortuous solutions to the problem have yet to be proved to be effective. On the other hand, the general law on consumers' welfare reflect a half-hearted approach as it has yet to include the misleading advertisements within the ambit of its scope. It would be apt to give it a specific place under the Consumer Protection Act, 1986 so as to distinguish them from other synonymous terms explained above in this paper. They appear to be in a moribund state and only decorative provisions. Even the provisions under the Indian Penal Code could be used against the errant advertisers. There is a need to revisit the provisions



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of other laws which have direct or indirect relation to the menace under scrutiny and revamp those laws with adequate safeguards and strong penal provisions for making these laws more effective. There is a need to have a separate regulating agency instead of having piecemeal regulators. The violators/defaulters must be dealt with sternly and the government must blacklist them.

So what comes out? The misleading advertisements have yet to attend serious attention of the role players and stake holders and the result is that such advertisements have flooded the market, keeping the consumers a silent spectator in the entire game. Therefore, the need of the time is to have a specific comprehensive law to control such game.

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³ See, *Financial Express*, New Delhi, 2, 29 November, 2011 Mrs. Ambika Soni, I & B Minister GOI.

⁴ The first advertising agency was opened in 1843 by Volney Palmer in Philadelphia, Pennsylvania.

⁵ See Mansvelt Juliana, Paul Robbins (et.), *Green Consumerism (A to Z Guide)*, Sace reference, New Delhi, P. 4.

⁶ Kolter and Armstrong, *Principles of Marketing*, Pearson Education 2004, cited in Sheetal Kapoor, *Advertising and the Consumer — The Ethical Concerns*, 128, 2012.

⁷ *Freeman v. Greenbrir Homes. Inc.*, 715 SW 2d, 394 (Tex App 1986),

⁸ *Com v. Hooper*, 5 Pics.Mass. 42 cited in *Black's Law dictionary*, 6th Edn, P. 54.

⁹ See interpretation clause of *The Control of Misleading Advertisements Regulations, 1998* (UK).

¹⁰ See 6th Edn., P. 1233; also see, *Gulf Oil Corpn. v. Federal Trade Commission*, 150 F2d 106, 109 (5th Cir 1945).

¹¹ *Smith-Victo Corpn. v. Sylvania Electric Products Inc.*, 242 F Supp 302, 308 (DC 1965).

¹² See, *Black's Law dictionary*, 6th Edn, 54.

¹³ See 6th Edn, P. 142.

¹⁴ See 2nd Edn., 489 (2000).

¹⁵ See, Kapoor Sheetal, *advertising and Consumer — The Ethical Concerns, Consumer Protection in India*, 129.

¹⁶ See 2nd Edn. 703, 2000.

¹⁷ (2009) 1 SCC 230 : AIR 2009 SC 938.

¹⁸ Paranjape N.V. *Law of Torts and Consumer Protection Law in India*, 2, 2010. It was as a result of the *Report of Sachhar Committee*, 1985 that the concept of unfair trade practices was brought in the MRTP Act, 1969 and the Companies Act, 1956 as amended in 1988. (See also Hong Kong guidelines 1980 on misleading advertisement cited in Barowalia J.N., *Commentary on The Consumer Protection Act*, (Third Edition) 525, 2008.

¹⁹ For detail see Section 2(r) of the Consumer Protection Act, 1986.

²⁰ Article 19 guarantees six freedoms and they are: (i) freedom of speech and expression;(ii) to assemble peaceably and without arms; (iii) to form associations or unions; (iv) to move freely throughout the territory of India; (v) to reside and settle in any part of the territory of India; and (vi) to practice any profession, or to carry on any occupation, trade or business.

²¹ *LIC v. Manubhai D. Shah*, (1992) 3 SCC 637 : AIR 1993 SC 171.

²² *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 : AIR 1982 SC 149.

²³ *Supra* note 10.

²⁴ *Ministry of Information and Broadcasting v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 : AIR 1995 SC 1236.

²⁵ *Tata Press Ltd. v. MTNL*, (1995) 5 SCC 139 : AIR 1995 SC 2438.

²⁶ *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

²⁷ *Ibid.*

²⁸ 1959 SCR 12. See also *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305.

²⁹ (1995) 5 SCC 139 : AIR 1995 SC 2438.

³⁰ *State of Bombay v. R.M.D. Chamarbaugwala*, AIR 1957 SC 699. See also *Cooverjee B. Bharucha v. Excise Commr.*, 1954 SCR 873; *Nashirwar v. State of M.P.*, (1975) 1 SCC 29 : (1975) 2 SCR 861; and *State of U.P. v. Kartar Singh*, (1964) 6 SCR 679.

³¹ *Fatechand Himmatlal v. State of Maharashtra.*, (1977) 2 SCC 670 : AIR 1977 SC 1825.

³² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

³³ Art. 39(b).

³⁴ Art. 39(c).

³⁵ Art. 47.

³⁶ Rajiv Kumar Khare, *Law of Torts, Medical Negligence and Consumer Protection*, 12, *Consumer Education Monograph Series*, 1, 2010.

³⁷ Dr. N.V. Paranjape, *Law of Torts and Consumer protection Law in India*, 324, 2010; See also, *Palse v. Freeman*, (1789) 3 TR 51. The case marks a beginning of modern law of deceit.

³⁸ Salmond prefers to call it as slander of title. See also, Dr. N.V. Paranjape, *Law of Torts and Consumer protection Law in India*, 2010.

³⁹ (1892) 2 QB 524.

⁴⁰ (1975) 2 All ER 599.

⁴¹ *Ibid.*

⁴² See, Section 2(r)(1)(i) to (x) and Sub-clause 2 of the Section 2(r) of the Consumer Protection Act, 1986.

⁴³ 4th Edn. paras 1044 and 1045.

⁴⁴ Barowalia J.N., *Commentary on The Consumer Protection Act* (Third Edition), 523-24, 2008; See also; *KLM Royal Dutch Airlines v. DG Investigation and Registration*, (2009) 1 SCC 230, para 14-15 and *Man Ronald Druckimachinen Ag v. Multicolour Offset Ltd.*, (2004) 7 SCC 447.

⁴⁵ See, the Object and Reasons clause of the Consumer Protection Act.

⁴⁶ *Ibid.*

⁴⁷ Section 14 of the Consumer Protection Act reads as under:

Finding of the District Forum.—(1) If, after the proceeding conducted under Section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:—

- (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) To pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit;

- (e) to remove the defects in goods or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat it;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;
- (ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
- (hb) to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

Provided that the minimum amount of sum so payable shall not be less than five per cent. of the value of such defective goods sold or service provided, as the case may be, to such consumers:

Provided further that the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed;

(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

(i) To provide for adequate costs to parties.

Clause 2 ***** clause *****

⁴⁸ See Section 2(r) of the Consumer Protection Act, 1986.

⁴⁹ *Ludhiana Improvement Trust v. Shakti Coop. House Building Society Ltd.*, (2009) 12 SCC 369.

⁵⁰ See Indian Penal Code, 1860.

⁵¹ See Section 3 of the Drugs and Magic Remedies (objectionable Advertisements) Act, 1954.

⁵² Section 4 of the Act reads that, "Prohibition of misleading advertisements relating to drugs-Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement relating to a drug if the advertisement contains any matter which-

(a) directly or indirectly gives a false impression regarding the true character of the drug; or

(b) makes a false claim for the drug; or

(c) is otherwise false or misleading in any material particular.

See also *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

⁵³ See Section 29 of the Drugs and Cosmetic Act, 1940 (as amended in 2008).

⁵⁴ See Section 3 of the Indecent Representation of Women (Prohibition) Act, 1986.

⁵⁵ See Section 6 of the Cable Television Networks (Regulation) Act, 1995.

⁵⁶ The Emblems and Names (Prevention of Improper Use) Act, 1950; and The Trade and Merchandise Marks Act, 1958 etc.

⁵⁷ (1989) 3 SCC 251 : AIR 1989 SC 1692.

⁵⁸ Section 36-A of the M.R.T.P. Act, 1969 (now repealed) dealt with unfair trade practice.

⁵⁹ (2004) 112 DLT 73; see also *Dabur India Ltd. v. Colgate Palmolive India Ltd.*, (2004) 115 DLT 667.

⁶⁰ *Reckitt and Coleman India Ltd. v. Jyothi Laboratories Ltd.*, 1999 CTJ 107 (MRTPC)

⁶¹ (1998) 1 SCC 720 : AIR 1998 SC 526.

⁶² (2009) 4 SCC 484.

⁶³ (2012) 1 CPJ 194 (NC). Rejecting the contention of the petitioners that these cases do not fall within the ambit and scope of the Consumer Protection Act, 1986, the National Commission clarified that the complaints were made on specified grounds of deficiency in service before the District Forum and secondly, the respondents are consumers as per Section 2(d)(ii) of the Consumer Protection Act, 1986 and the petitioner institute is very much a provider of these services.

⁶⁴ (2006) 1 CPJ 129 (NC).

⁶⁵ See, *State Bank of Patiyala v. Birbal Ram*, 2008) 4 CPJ 114 (NC).

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