

# CONTEMPORARY ISSUES IN FALSE AND MISLEADING ADVERTISEMENTS IN INDIA: AS A LEGACY OF UNFAIR TRADE PRACTICE

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***A**bstract—The paper seeks to explore the domain of false & misleading advertisement from the perspective of an unfair trade practice through the lenses of Consumer law as well Competition law. The branches of law that ultimately seeks to achieve consumer interest and welfare through distinct lenses. Whereas Consumer law directly seeks to provide effective remedies to consumers on the other hand Competition law tries to regulate all those practices which being anti -competitive in nature ultimately injure the interest of Consumers. The author has also ventured to trace many unfair aspects advertisement such as puffery, celebrity endorsement, surrogate advertisement, and most importantly issue of false and misleading advertisement in drugs & medicine specially in COVID era. The interface between Competition law & Consumer law with regard to advertisement as unfair trade practice for the effective remedy to consumer concludes the paper.*

**Keywords:** Unfair Trade Practice, Consumer, Advertisements, Competition Law.

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Liberalization has given proliferous meaning to consumer rights with wider choices in terms of quality and availability of goods and services. The right to make free choice of goods is facilitated and influenced by the advertisements, therefore regulation of advertisements occupies a vital aspect of consumer welfare. Consumer protection law seeks to protect such rights and further to provide remedy in those cases where consumer is defrauded, and his rights breached. The consumer also has right to be protected against any form of unfair trade practices relied in advertisements which are brought under the goal of competition law regime.

Advertising generally is understood as a business tactic to attract the consumer towards the product, its uses, benefits and at times to draw a comparison with similar product and in the process establish its superiority. The consumer protection law defines advertisement as “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>1</sup> The definition is all pervasive and it has very precisely tried to include all possible means used to advertise in all possible forms. The definition itself is oblivious of any criteria by which distinction can be drawn between lawful and unlawful advertisements. Therefore, the lack of legislative foresight is manifest here where the definition itself would have been more purposeful if the it had included the aspects of unfairness and fairness. The false and misleading advertisement if perceived from the perspective of unfair business practice, it would permit better remedies not only to the consumers but to the producers as well against competitive disadvantage.

The course adopted by law is that misleading advertisement is made actionable under the consumer Protection law. The scope of misleading advertisement has been laid down to include such practices which falsely defines the product or service, creates a false guarantee in the mind of the consumers regarding its nature, substance quality and its quantity, or indicates such representation to amount to unfair trade practice and with conscious efforts tries to hide certain significant information.<sup>2</sup> The advertising practice in India though has undergone active surge but despite this though all the characteristics are indicated, active concealment is made of the information which will enable conscious choice of the products by the consumer. The use of such

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<sup>1</sup> Consumer Protection Act, 2019, § 2(1), No. 35, Acts of Parliament, 2019 (India).

<sup>2</sup> “Misleading advertisement in relation to any product or service, means an advertisement, which— (i) falsely describes such product or service; or (ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or (iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or (iv) deliberately conceals important information ...”, Consumer Protection Act, 2019, § 2(1), No. 35, Acts of Parliament, 2019 (India).

tactics causes consumer to be subjected to what is termed as unfair trade practices and should be brought under the notion of anti-competitive practice.

A consumer right is not a single right, albeit a bundle of rights. The right to free consent while entering a contract, the right to make an informed choice, right to information, right to be protected against unsafe goods and services and the right to be protected from unfair trade practices are all snatched from a consumer while issuing false and misleading advertisements in India. The very first case of this nature can be traced to *Carlill v. Carboloc Smoke Ball Co.*<sup>3</sup> In the instant case, the company was manufacturing drugs known as 'smoke balls' as a cure for influenza. An advertisement of the company in various newspapers claimed that anyone who used the drugs in the prescribed manner, and contracted influenza shall be rewarded with £100. The advertisement went to extensive lengths to assure the readers that the company sincerely intended to keep its promise by stating that certain sums were already deposited with a certain bank, thereby luring the readers into believing the tall claims made by the company. The advertisement was accompanied by data revealing that during the previous epidemic of influenza, no reported case was sighted of persons using the 'smoke ball'. It also claimed to be the cheapest remedy available for influenza. Reposing faith in the advertisement, Mrs. Louisa Elizabeth Carlill took the medicine in the prescribed dose for two months and despite that, she contracted influenza and claimed the reward money. The company ignored her claim, but later asked her to visit the office and get checked by her secretary, stating that the company had resorted to such a policy to protect itself from fraudulent claims. Although, the judgment in this case focused on whether a contract was binding in a unilateral fashion, one cannot help noticing a consumer dispute here relating to false and misleading advertisements. Ms. Carlill in this case was categorically deprived of her right to informed choice and was exposed to unfair trade practices, with a triumph over the company's claims.

It is seldom that a consumer report matters, considering the average time taken by courts, the expenses involved and the sense of non – vitality of the matter. Mechanisms for providing speedier remedies were established since the Consumer Protection Act, 1986. In most of the cases today, consumers are not aware of their rights, and if they are, as mentioned above, they are wary of protesting against the wrongdoers. Misrepresentation of facts as defined under the Indian Contract Act, 1872, is "an untrue statement of a material fact made by one party which affects the other party's decision in corresponding to a contract".<sup>4</sup> Additionally, there is intent to deceive and induce a person in buying their products or services based on false promises. Such fraudulent and deceptive practices need to be brought under the ambit of stricter laws coupled with effective implementation. False advertising has been rendered actionable

<sup>3</sup> *Carlill v. Carboloc Smoke Ball Co.*, (1893) 1 QB 256.

<sup>4</sup> Contract Act, 1872, § 18, No. 9, Acts of Parliament, 1872 (India).

as tort of injurious falsehood.<sup>5</sup> There has been practices which are allowed to be practiced while promoting a product and even an essential commodity which should be lensed through strictest construction of law.

## I. PUFFERY

Sometimes, the advertisements contain exaggerated statements, known as ‘puffs’. Puffs are exaggerated vague statements which are so preposterous in nature that no one can believe that another was misled by it. An example of this can be the tag line of Red Bull which reads as “*Red Bull gives you Wings*”. However, Red Bull cannot literally give you wings to fly. In 2013, a man called Benjamin Careathers, knowing that the slogan was being used metaphorically to describe the high content of energy that the drink would pump in, sued Red Bull in the United States. He contended before the court that any claims of boosting energy in the drinkers was false and baseless, as the product had less caffeine than a cup of coffee. The judge agreed with him that “such deceptive conduct and practices mean that [Red Bull’s] advertising and marketing is not just ‘puffery’, but it instead deceptive and fraudulent and it is therefore actionable”. In 2019, Red Bull settled the lawsuit for \$13 million.<sup>6</sup> These brands are playing mind games with its consumers, and unscrupulous consumers are often tricked by these brands. In India, puffery *per se* will not be actionable. To determine the action ability of a puff, the courts shall assess the degree of untruth in the advertisements, the circumstances in which it was made and the knowledge and experiences of the person to whom it was made.<sup>7</sup> Innocent consumers need to be protected against puffery which plays with minds, especially young minds. Red bull however, adhered to its belief that their slogan was true, but claimed to have settled the suit only to save it from distraction, believing that Benjamin was just one of their dissatisfied unhappy customers. So, Puffery has turned out to be a means by which unfair tactics are used promote the product and hardly finds the action.

## II. PHARMACEUTICAL ADVERTISING

A patient is not merely a consumer and when the stake involved is so high and precious as life of a person, the stringency of law demanded, becomes more vital. The law governing advertisements of medicine is another gray area of concern. Pharmaceutical advertising suffers from lack of any standard operating procedure and the pharma companies also are not required to appoint

<sup>5</sup> FLEMING J.G., *The Law of Torts*, 671 (10<sup>th</sup>ed. 2002); See also *Church & Dwight v. Siftco Canada*, (1994) CPR Lexis 2069.

<sup>6</sup> Reuters, “No Wings, But Maybe \$10: Red Bull Settles False Advertising Suit” (*NDTV.com* October 10, 2014) <<https://www.ndtv.com/world-news/no-wings-but-maybe-10-red-bull-settles-false-advertising-suit-677448>> accessed April 25, 2021.

<sup>7</sup> Sale of Goods, 1930, § 16, No. 3, Acts of Parliament, 1930 (India); See also Ramamoorthy K. et. al, *Pollock & Mulla The Sale Of Goods Act* (Butterworths 2002).

personnel to fix the liability.<sup>8</sup> The instances are no less in numbers and whenever the occasion of crisis arises the disaster is used to ripe maximum possible advantages out of it. The emergence of COVID-19 has brought to lights many such cases where increasing gravity of the pandemic has made graver the adoption of marketing tactics.

The recent fiasco of Patanjali to have claimed the first cure of Covid – 19 was a huge embarrassment for India. Baba Ramdev claimed that its ayurvedic medicine ‘CORONIL’ could cure coronavirus SARs – Cov 2. Within 48 hours it retracted its statement, it claimed that this was only an immunity booster to protect people from COVID 19. CORONIL, the name itself suggests it to be a remedy for the recent coronavirus. Deceptive names may also falsely induce members of the public into signing up for products they have no full information of. In case of false or misleading advertisements relating to drugs and medicines, a writ petition was filed against the constitutional validity of the enactment of the Drug and Magic Remedies (Objectionable Advertisements) Act, 1954.<sup>9</sup> Here with regards to advertisement it was also observed by the Apex Court that *“an advertisement, no doubt, is a form of speech, but its true character is to be determined by the object which it seeks to promote. It may amount to an expression of ideas and propagation of human thoughts and, thus, would fall within the scope of Article 19(1)(a). But a commercial advertisement having an element of trade and commerce, and it no longer falls within the concept of freedom of speech for its object is not to propagate any ideas social, political, or economic or to further literature or human thought.”*<sup>10</sup> The major substantive law regulating drugs in India though does not specifically regulates advertisement but has very limited sphere of operation and only penalises use of Government analysts report for advertising, that to with a minimal penalty of five thousand only.<sup>11</sup> Another law which seeks to regulate advertisement of medicine is Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954, the Act was revolutionary in the sense that it sought to address unethical and scrupulous practices being used to promote the benefits of the drugs and other related products. The advertisement as defined in the Act states *“advertisement’ includes any notice, circular, label, wrapper, or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke”*<sup>12</sup> so by any of these means if the drugs are said to mislead or makes false claim regarding the

<sup>8</sup> Group GL, “Pharmaceutical Advertising 2020: India: ICLG” (International Comparative Legal Guides International Business Reports) <[https://iclg.com/practice-areas/pharmaceutical-advertising-laws-and-regulations/india#:~:text=Advertising%20of%20medicines%20in%20India,1955%20\(%E2%80%9CDMRR%E2%80%9D\)](https://iclg.com/practice-areas/pharmaceutical-advertising-laws-and-regulations/india#:~:text=Advertising%20of%20medicines%20in%20India,1955%20(%E2%80%9CDMRR%E2%80%9D)>)> (Accessed on 25 April 2021).

<sup>9</sup> *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554: (1960) Cri LJ 735: (1960) 2 SCR 671.

<sup>10</sup> *See id.*

<sup>11</sup> Drugs & Cosmetic Act, 1940, § 29, No. 23, Acts of Parliament, 1940 (India).

<sup>12</sup> The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, § 2(a), No. 21, Acts of Parliament, 1954 (India).

qualities of the medicine the act is liable for action under the Act.<sup>13</sup> Though the magic Remedies Act seeks to specifically prohibit advertisements to deal with certain drugs for diseases such as sexual wellness and menstrual disorder among other but the daily newspapers are testimony that negate the very existence of such rules. Such advertisements are made punishable by the Act.<sup>14</sup> In the COVID period there is no dearth of such cases where from sanitizer to handwashes and laundry washes everything was claimed to deal with COVID virus. The products boasting and making exaggerated claim to boost immunity is no exception. The manufacturing companies have been able to derive the benefit out of the fear for COVID 19, and the law is finding itself unable to deal with the situation.

The ray of hope is shown to some extent by The Code for self-regulation of advertising Content in India as released by Advertising Standard Council of India. ASCI is devoted to the cause of ensuring ethical values and fairness in representations which is made to a consumer in India. The advertisements do not hurt ideals of public decency and above all competitive spirit is observed while promoting a product.<sup>15</sup> The code for self-regulation of Advertising (CSRA) is progressive enough to incorporate within its ambit and includes any such paid for communication which seeks to influence the opinion of the people for whom it is meant.<sup>16</sup> The Code for self-regulation in advertising has been recognized by the Ministry of Information and Broadcasting, Government of India by inserting Rule 7(9) in the Cable Television Networks Rules, 1994 framed under Cable Television Networks (Regulation) Act, 1995. This is meant to supplement the provision of law. The Code has Illustrated that advertisements for the products to deal with any physical incapacity such as height, bust development, baldness, obesity, infertility etc do not result in misleading the consumers and false claims against the accepted norms or medical practice is not promoted.<sup>17</sup>

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<sup>13</sup> “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...”. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, § 4, No. 21, Acts of Parliament, 1954 (India).

<sup>14</sup> See *id.* § 3.

<sup>15</sup> “The Advertising Standards Council of India (ASCI)” (*The Advertising Standards Council of India (ASCI) | Indian Broadcasting Foundation*) <<https://www.ibfindia.com/advertising-standards-council-india-asci>> (accessed on 22 April 2021).

<sup>16</sup> Ramamoorthy K. et. al, *Pollock & Mulla The Sale of Goods Act* (Butterworths 2002).

<sup>17</sup> Code for Self- Regulation of Advertising Content in India, (ASCI) 16, <[https://ascionline.org/images/pdf/code\\_book.pdf](https://ascionline.org/images/pdf/code_book.pdf)> (accessed on 24 April 2021).

### III. CELEBRITY ENDORSEMENTS

Celebrities play the gimmick with the mentality of the consumers who either identifies themselves with the celebrity by using the product prescribed or they consider sometimes as a status symbol and feel elated and equal to celebrity. This Indian mentality is targeted by the celebrity endorsements. The regulation of celebrity endorsement and their personal liability for the damage caused to the user of the product has been lagging in Indian legal jurisprudence. The CPA 2019 though made a logical departure from the existing liability of the endorser, to make the celebrity liable under the CPA 2019<sup>18</sup> but it has gone further to weaken the law affixing the liability of the endorser where if he is able to prove due verification, is exempted from liability.<sup>19</sup>

The endorser needs to verify the claims/statements made and are expected to perform due diligence under Clause 15 of the draft Central Consumer Protection Authority guidelines released in 2020. Sub clause (2) Clause 15 specifies that “Every endorser endorsing a product or service shall take due care to ensure that their endorsement does not convey any express or implied representations that would be false, misleading or deceptive if made by the trader or manufacturer or advertiser of the relevant product or service”. The clause further goes on to provide that wherein either legal opinion or advertising advice from self – regulatory agencies have been sought by the endorser; it shall be deemed to have carried out due diligence. However, such due diligence may not be assumed where the endorser is aware that the advertisement is false, deceptive, or misleading or is apparent. This provision shall bring the celebrities within the purview of liability under surrogate advertisements and perhaps will lead to lesser endorsement by celebrities, thereby diminishing their value of advertisements. However, there may still be indemnity bonds, unless punishments are made to be personal in nature. Clause 16 of the draft CCPA guidelines also requires endorser to be users of such products and such endorsements shall continue only until the endorser can also be considered as a consumer of that product. Thus a more stringent regulations for endorsements with due sanctions is the need of the hour.

### IV. SURROGATE ADVERTISEMENTS

Surrogate advertisements are intended to persuade the famous dialogue – *‘Men will be Men’, we believe needs no introduction*. So even unconnected persons to these products know what the advertisement is aiming it. The target audience is subtly reminded of Seagrams (alcohol brand), and one may also consider the possibility of purchasing it after viewing the advertisement by the target audience. Seagrams’ ‘Men will be men’ advertisement makes no

<sup>18</sup> Consumer Protection Act, 2019, § 21(1), No. 35, Acts of Parliament, 2019 (India).

<sup>19</sup> See *id.* § 21(5).

sense otherwise and the aim of such an advertisement is to only promote the brand name rather than the advertised product. Such advertisements are false and misleading and can be brought within the sphere of unfair trade practices. Surrogate advertisement is a serious concern in the light of the fact where Oral Cancer form 30% of all cancers in India<sup>20</sup> and there is no exaggeration in the fact that surrogate advertisement has considerable share of blame for this. The irony is that though the legislative initiative was taken in this regard with introduction of The Surrogate Advertisements (Prohibition) Bill, 2016 but due to unnamed factors the Bill could not see the light of the day. The Bill sought to define surrogate advertisement and prohibit the same. It defines ‘surrogate advertisement’ as “an advertisement which shows a substitute product in the guise of the real one which otherwise cannot be legally advertised through the print and electronic media.”<sup>21</sup> It is suggested that in the absence of such law unfair trade practice aspect of surrogate advertisement should render it liable for action.

## V. THE ERSTWHILE PROVISION REGULATING FALSE AND MISLEADING ADVERTISEMENTS

Previously, a complainant of a false or misleading advertisement had to prove ‘unfair trade practice’ which required that he proves that the trade practice in question was used for boosting sales or supplies of the goods or services. This false representation was considered to be wrongful and mischievous.<sup>22</sup> In this regard reference may also be made to the observations made by Supreme Court in *Man Roland Druckmaschinen Ag v. Multicolour Offset Ltd.*,<sup>23</sup> “In the case of an unfair trade practice ... the object of inquiry is a statement which is a false representation of the kind specified in sub-clauses (i), (ii) or (iii) of clause (1) of Section 36-A<sup>24</sup> or is an advertisement of the kind spec-

<sup>20</sup> Ferlay J., Ervik M., Lam F., Colombet M., Mery L., Piñeros M., Znaor A., Soerjomataram I., Bray F. (2020). Global Cancer Observatory: Cancer Today. Lyon, France: International Agency for Research on Cancer. Available from: <<https://gco.iarc.fr/today>> (accessed on 24 April 2021).

<sup>21</sup> The Surrogate Advertisements (Prohibition) Bill, 2016, Bill No. 20 of 2016, § 2(d), (India).

<sup>22</sup> *KLM Royal Dutch Airlines v. Director General of Investigation and Registration*, (2009) 1 SCC 230; (2009) 1 SCC (Civ) 91 (238); See also *Lakhanpal National Ltd. v. MRTT Commission*, (1989) 3 SCC 251.

<sup>23</sup> (2004) 7 SCC 447(12).

<sup>24</sup> “Unfair trade practice” means “a trade practice which, for the purpose of promoting the sale, use or supply of any good or for the provision of any services, [adopts any unfair method or unfair or deceptive practice including any of the following practices], namely—

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—(i) falsely represents that the goods are of a particular standard, quality, 2[quantity,] grade, composition, style or mode; (ii) falsely represents that the services are of a particular standard, quality or grade; (iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods; (iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have; (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have; (vi) makes a false or



ified in sub-clauses (vii) or (viii) thereof. The statement or advertisement is the trade practice. The further requirement under the section is that the trade practice complained of must be for the purpose of promoting the sale, use or supply of goods or for promoting the provision of any service. The sale, use or supply need not, for the purposes of the section, actually have taken place although it may be relied upon by the complainant to establish the falsity of the representation.”<sup>25</sup> So the genesis of unfair trade practice is traced to The Monopolistic and Restrictive Trade Practices Act 1969 but the successor of the MRTP Act, i.e. Competition Act 2000 has not made a direct reference to it.

## VI. TRADEMARK DISPARAGING

The issue of false and misleading advertisement has an inalienable relation with Trademark. The unfair trade practice in Trademark, becomes actionable only when it has been proved that the impugned advertisements come under the ambit of ‘unfair trade practices. Many recent cases have emerged pertaining to trademark ‘disparaging’. Disparagement means making false, claims and representations of a product or service of a competitor. The “New International Websters Comprehensive Dictionary” defines disparage/disparagement to mean, “to speak of slightly, undervalue, to bring discredit or dishonour upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing, or comparison with that which is of less worth, and degradation. The Concise Oxford Dictionary defines disparage as under, to bring discredit on, slightly of and depreciate.” The Delhi High Court has on one occasion stated that “there is precise formula to determine disparagement, but the court need to be conscious that though disparagement may be clear direct and brazen they may also be subtle, clever, and covert.

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misleading representation concerning the need for, or the usefulness of, any goods or services; (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof: Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence; (viii) makes to the public a representation in a form that purports to be—(i) a warranty or guarantee of a product or of any goods or services; or (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out; (ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made; (x) gives false or misleading facts disparaging the goods, services or trade of another person.”, Monopolies and Restrictive Trade Practices Act, 1969, § 36-A, No. 54, Acts of Parliament, 1969 (India).

<sup>25</sup> *KLM Royal Dutch Airlines v. Director General of Investigation and Registration*, (2009) 1 SCC 230; (2009) 1 SCC (Civ) 91 (238).

Thus, judicial scrutiny needs to be confined to statement of the trader and how he tends to belittles, discredits and distracts from reputation of another's product."<sup>26</sup>

It is essential to protect freedom of speech and expression. But trademark disparaging is an unfair trade practice and thereby, an exception to such practices. Commercial speech needs regulation and balance. A disparagement may be punished if it falls within the definition of unfair trade practice. There is a thin yet wide line of difference between puffery and disparaging. As stated by the apex court "Between these two kinds of statements there is obviously still an extremely wide field; and it appears ... that, to draw the line, one must apply this test, namely, whether a reasonable man would take the claim being made as being a serious claim or not. A possible alternative test is to ask whether the defendant has pointed to a specific allegation of some defect or demerit in the plaintiff's goods."<sup>27</sup> Upon passing of either of the tests, disparaging occurs. The settled law on disparagement appears to be that "a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad to puff and promote his goods. It, therefore, appears that if an action lies for defamation an injunction may be granted."<sup>28</sup> If the goods are disparaged with a malicious intent or with an intent to injure not by way of fair-trade rivalry, the practice would be actionable.<sup>29</sup>

The decision of the Calcutta High Court in *Reckitt & Colman of India Ltd. v. M.P. Ramchandran*<sup>30</sup> has shifted and settled the law in this respect and all other subsequent cases have followed the path. The Five principles were enunciated in the said decision which are as follows: —

- i. "A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.
- ii. He can also say that his goods are better than his competitors', even though such statement is untrue.

<sup>26</sup> *Reckitt Benckiser India Ltd. v. Cavinkare (P) Ltd.*, 2007 SCC OnLine Del 736: ILR (2007) 2 Del 368.

<sup>27</sup> *Colgate-Palmolive (India) Ltd. v. Anchor Health & Beauty Care (P) Ltd.*, 2008 SCC OnLine Mad 627: (2008) 4 LW 628: (2008) 4 CTC 675: (2008) 7 Mad LJ 1119; (2009) 40 PTC 653.

<sup>28</sup> *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.*, 1996 SCC OnLine Del 349: (1996) 16 PTC 393.

<sup>29</sup> *Chloride Industries Ltd. v. The Standard Batteries Ltd.*, Suit No. 271 of 1993 decided on September 13, 1994

<sup>30</sup> 1998 SCC OnLine Cal 422: (1999)19 PTC 741.

- iii. For the purpose of saying that his goods are the best in the world, or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
- iv. He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible.
- v. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining the repetition of such defamation."

The recent controversy between Dettol and Lifebuoy has also attracted wide criticism. False and misleading advertisements have gone on to disregard the pressing circumstances of the Covid – 19 pandemics, while creating chaos and confusion. The very sinister plan unfolded in an impugned advertisement of Dettol, manufactured by Reckitt Benckiser (India) Pvt. Ltd. featuring a soap bar resembling Lifebuoy, manufactured by Hindustan Unilever Ltd. which depicted that alleged soap bar resembling Lifebuoy could not kill coronavirus as opposed to Dettol, that too during the onset of the pandemic crisis in India in March 2020. Hindustan Unilever Ltd. contended that Dettol intended to create panic in the minds of the consumers, instead of creating awareness. For a party to defend a suit of trademark disparaging, the contentions are two; firstly, the defence of freedom of speech and expression and; secondly, Section 30(1) of the Trademarks Act, 1999 which allows the use of a trade name as long as it complies with honest practices in the industry or commercial matters; while such use of trade name does not harm the reputation of the brand or does not take undue advantage of the same or does not show the rival product in a bad light. Dettol's advertisement was distasteful and harmed the consumers in desperate times, which should be punishable and termed as an unfair trade practice. The Trademarks Act, 1999 thereby allows healthy competition and comparative advertising, but looks down upon disparaging, which is tortuous. Comparative advertising is protected under the freedom of speech and expression facet.<sup>31</sup> In cases like *Dabur case*<sup>32</sup> and *Colgate case*,<sup>33</sup> the courts applied the ordinary man test, which tests the response of an ordinary man to the advertisements allegedly engaging in disparaging. Comparative advertisements are lucid and not damaging to society, as the best interests of an ordinary man are protected there. Other defences available are proving that the claim made by the advertisement is true, or merely an opinion or, conditional or absolute

<sup>31</sup> *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

<sup>32</sup> *Dabur India Ltd. v. Colortek Meghalaya (P) Ltd.*, 2010 SC Online Del 391.

<sup>33</sup> *Colgate Palmolive Co. v. Hindustan Unilever Ltd.*, 2014 SCC OnLine Del 4986: (2014) PTC 57 Del 47 (DB).

privilege vests with the defendant. The Advertising Standards Council of India has set up a self – regulating code for advertising in 1985. Chapter 4(1) of the code permits comparative advertising in public interest, clearly stating that such advertisements should not be false and misleading. Advertisements should also not discredit the rival products.<sup>34</sup> Ethics play an important role in advertising. A malicious intent can destroy a brand, it could be the brand of the disparager or the victim brand. Such practices also derail the society, and it is imminent that stricter curbs and more objective tests be determined to curb disparaging.

### ***Regulating advertisement in India***

Digitalisation has certainly changed the dimension in which consumer opinion gets affected by the false and misleading advertisements. There is no denial to the fact that consumer has become empowered like never before, but the vulnerability of consumer has also become more exposed than ever. Considering the impact of advertisements on buyer’s psychology huge investments is flowing in making the advertisement but the regulation of such advertisements on legal and ethical grounds has hardly been emphasised in India. The advertisements are considered as part of freedom of speech and more broadly commercial speech therefore the right owe their genesis to the constitution. But the constitutional rights also do not exist in absolute terms therefore reasonability of restrictions cannot be ruled out. Commercial speech has been defined<sup>35</sup> as “that whose dominant theme is simply to propose a commercial transaction.” The object of advertising has been enumerated as “identification and description of article sold apprising of quality and space.” It was further observed by the J Mckenna that the only object of the advertisement is to draw attention towards the article sold and nothing more than that.<sup>36</sup>

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<sup>34</sup> “Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided: (a) It is clear what aspects of the advertiser’s product are being compared with what aspects of the competitor’s product. (b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case. (c) The comparisons are factual, accurate and capable of substantiation. (d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared. (e) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication. 4.2. Advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the goodwill attached to the trademark or symbol of another firm or its product or the goodwill acquired by its advertising campaign.”, Code for Self- Regulation of Advertising Content in India, (ASCI) Ch. IV, § 4(1) <[https://ascionline.org/images/pdf/code\\_book.pdf](https://ascionline.org/images/pdf/code_book.pdf)> (accessed on 24 April 2021).

<sup>35</sup> *Bolger v. Young’s Drug Products Corpn.*, 1983 SCC OnLine US SC 150: 77 LEd 2d 469: 463 US 60 (1983).

<sup>36</sup> *John W. Rast v. Van Deman & Lewis Co.*, 1916 SCC OnLine US 66: 60 LEd 679: 240 US 342 (1916).

In the beginning, advertising did not form the part of legal provision, before SC verdict of *Hamdard Dawakhana v. Union of India*.<sup>37</sup> It was held here that Though advertisement is one of the forms of speech it was not the essential of free speech. The rationale given for the same is that while promoting trade and commerce the goal guiding their act is economic gain.

The paradigm shift was observed in *Tata Press v. Mahanagar Telephone Nigam Ltd*<sup>38</sup> wherein “advertising was observed to be beneficial to consumers as it facilitated the free dissemination of information, leading to greater public awareness in a free market economy. Further, it was held to be the ‘life blood’ of the free media due to the substantial contributions it gave to print and electronic media organizations”. Considering the same, the Court reversed the position as adopted in *Hamdard Davakhana*,<sup>39</sup> and held “advertising to be constitutive of ‘commercial speech’, and therefore brought it within the ambit of constitutional protection conferred by Art. 19(1)(a)”.

## **VII. INTERFACE OF CONSUMER LAW & COMPETITION LAW OVER FALSE & MISLEADING ADVERTISEMENTS AS UNFAIR TRADE PRACTICE**

Initially the MRTP Act used to take care of the unfair trade practices followed in advertising the products. The Consumer Protection Act 1986 though took further the legacy but the Competition Act 2000 directly failed to recognise unfairness in advertisements as an aspect of fair competition in the market.

Human species is so nurtured that it is always in constant effort towards achieving higher goals of life and simultaneously never be contended with the achievements. This desire to obtain next level of satisfaction is the incentive behind advertisements which renders them detached from ethical business practices. Though there is fine line of distinction between what is termed as fair and what is unfair in business transactions and seldom the consumer realises as to what he has been subjected to. The antitrust laws though do not specifically cover misleading advertisements unless it is creating an appreciable adverse effect on competition. But it is interesting to note here that where the consumer law may fail, its aim being to save consumer not competition, but competition law may provide the rescue against unfair and false claims made in advertisement if the same is found to be unfair trade practice at the same time injuring competition in the market. The aspect of interface is found where the consumer may tend to lose if claims made in advertisement are not

<sup>37</sup> AIR 1960 SC 554: (1960) Cri LJ 735: (1960) 2 SCR 671.

<sup>38</sup> *Tata Press v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

<sup>39</sup> *Reckitt & Colman of India Ltd. v. M.P. Ramchandran*, 1998 SCC OnLine Cal 422: (1999) 19 PTC 741.

substantiated at the same time the producer may also be subjected to competitive loss at the cost of his opponent in the market. the Competition regime has well defined criteria to label an act as causing appreciable adverse effect on competition and thereby causing abuse of dominance<sup>40</sup> but here the factors fail to incorporate misleading and false advertising tactics. Though it is understandable that both the set of laws Competition Law & Consumer Protection Act 2019 seeks to cater to the different objective, but it cannot be denied that they do overlap and this interface can serve towards fulfilling the objective of both the laws more effectively and efficiently. The scope of unfair trade practices under the enactment of CPA 2019 is wide enough to bring action under the periphery of CPA against unfair trade practices followed in advertisement but the damage to the fair competition in the market is still unattended. The convergence and wider spectrum of competition law that incorporates aspects of misleading advertisement as an ingredient of anticompetitive practice will provide an edge to the competition regulator to better protect competition in market so that the ideals of fairness in business endures and triumphs.

Though, the Advertising Standards Council of India (ASCI) performs functions to ensure that comparative advertisement do follow competition ethics and such advertisements are allowed only subject to certain conditions that “it is clear what aspects of the advertiser’s product are being compared with what aspects of the competitor’s product. (b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or to suggest that a better bargain is offered than is truly the case. (c) The comparisons are factual, accurate and capable of substantiation. (d) There is no likelihood of the consumer being misled because of the comparison, whether about the product advertised or that with which it is compared. (e) The advertisement does not unfairly denigrate, attack, or discredit other products, advertisers or advertisements, directly or by implication.”<sup>41</sup>

Thus, ASCI has given due consideration to fairness & competition and allocates it as its objective that advertisement are true and make actual representation, do not harm public notions, stand against products harmful to society and more importantly fair in competition. The limited success of ASCI is because, the Code is Code for self- regulation and has limited application because non-members are not bound by it and further issue lies with its enforcement because there is no mechanism to enforce the Code. It is noteworthy to mention here that European Union has been able to make a remarkable progress in this regard which allows comparison between products in advertising considering the aspect of competition and public awareness.<sup>42</sup> The directive recognises

<sup>40</sup> The Competition Act, 2002, § 19, No. 12, Acts of Parliament, 2002 (India).

<sup>41</sup> Code for Self- Regulation of Advertising Content in India, (ASCI) Ch. IV, <[https://ascionline.org/images/pdf/code\\_book.pdf](https://ascionline.org/images/pdf/code_book.pdf)> (accessed on 25 April 2021).

<sup>42</sup> Directive 2006/114/EC of the European Parliament and of the Council, December 12, 2006, Concerning Misleading and Comparative Advertising, OJ L 376, 27-12-2006, pp. 21–27.

the economic interests of both consumers and traders. It has been indicated in the regulation that comparative advertising does encourages competition between suppliers of goods and services for the benefit of consumer.<sup>43</sup> In addition to it the Directive also seeks to overcome the enforcement issue by enabling its member countries to empower the courts with necessary administrative and civil power.<sup>44</sup>

The legislative will need the strength in this regard to come out with the proclamation that seeks to enforce consumer remedy as well as establishes competition with equal force. One such rules can be that incorporates and takes care of the impact created by false and misleading advertisement is restricted for the consumers and extends to traders as well. Thus, misleading advertisement's aspect of unfairness needs specific consideration in the enforcement mechanism.

The scheme of the law becomes very important because of the misleading and false claims made in the promotion of essential and pharmaceutical goods for which as well no detailed guidelines are available for ensuring fairness and ethics in advertisements. The regulation of pharmaceutical advertisement is crucial because such aspects has been diluted in India.

The significance of promotion techniques which operates irrespective of the category of goods for which it is used and the misery and the gain it can cause in the consumer's life renders the legislative initiative indispensable. Forensuring the survival of consumer rights and competitive essence, comprehensive renovation of the existing legal framework is essential.

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<sup>43</sup> *Id.* Art. 6.

<sup>44</sup> *Id.* Art 8.