

A CIVIL LEGAL FRAMEWORK TO DEAL WITH ADVERTISEMENTS IN INDIA

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ABSTRACT

In today's world no business can survive without advertisements. Every product needs differentiation from other products which is done by promoters and advertisers through their advertisements. The advertisers use different mediums for this purpose like television, radio, newspaper as it is not limited to print and broadcast media but we get these advertisements from digital space i.e. YouTube, Mobile Apps, Websites etc. with the internet revolution, the area of advertisement has become much more wider now. Advertisement is an important source to disseminate the information about the new products and services available to the consumers. It is also important that the information which is given should be true, trustworthy, useful and not offensive. In India, whenever any product is advertised companies are adding some unnecessary puffing, imaginative stories, and wrong data to impress customers. And there is no denying the fact that at times even the literate consumers are misled due to such misleading advertisements. This is an impediment in the way of consumer justice.

KEY WORDS: Constitutional, Legislations Etc

INTRODUCTION

Consumer justice can be inferred from the Preamble, Fundamental Rights and from the Directive Principles of State Policy as enshrined in our Constitution. The Constitution of India, as we all know is the supreme law of the land. The Constitution of India gives justice, to its entire citizen, social, economic and political'. The Fundamental Rights protect the rights of every person, it prohibits any kind of discrimination against the person on the basis of religion, race caste, sex etc. and also gives right to religion (freedom of conscience), employment, freedom of speech and expression. However, all these rights come with reasonable restrictions. The Directive Principles of State Policy are made for the welfare of the society as it is the duty of the state to use these Directive Principles as guidelines while making rules as they are not enforceable by any court of law.

When we perceive the Fundamental Rights and Directive Principles of State Policy the rights of consumers are also impliedly a part of the Constitutional framework. If through the advertisements consumers are made to believe that fairness'is an attribute of beauty, then it can be considered to be highly violative of articles 14 and 21 of the

Constitution. Hence, consumer justice cannot be ignored while interpreting Fundamental Rights and Constitutional Guarantees. Buying and selling are mostly governed by the Indian Contract Act, 1872 and the Sale of Goods Act, 1930. Prior to passing of the consumer protection laws, the Indian consumers had remedial actions either under the Indian Contract Act or under the Law of Torts. However, it is very difficult for the consumers to fix contractual liabilities on the sellers since, in most of the business agreements, the consumers have little say in view of the fact that important clauses in the agreements are standardized by the sellers. They fix the terms & conditions and customers only have to accept these conditions but now the new Act i.e. the Consumer Protection Act, 2019 has dealt with consumer protection in a more comprehensive form.

CONSTITUTIONAL ASPECT OF ADVERTISEMENTS IN INDIA

The Preamble is the soul of the Constitution of India. It is the guiding principle of law and justice, equality between people, liberty of thought and faith. The consumer protection is covered under justice of social, economic and political nature. The Constitution of India, 1950 is the base of every law enacted in India. The Constitution declares the rights and duties of people of India. It also defines the duties of the State under the Directive Principles of State Policy. Article 19(1)(a) of the Constitution of India guarantees to all the citizens right to freedom of speech and expression. The Constitutional foundation of advertisement freedom of speech is classified into commercial and non-commercial speech to determine the degree of judicial scrutiny over the speech. A simple commercial advertisement comes within the concept of freedom of speech and expression guaranteed under article 19(1) (a) of the Constitution of India. However, this right is not as absolute one and reasonable restrictions can be placed over it. A conflict may often arise between the freedom of speech and expression and the right to advertisement. Right to advertisement can be asserted by the producers and manufactures as freedom of expression. However, reasonable restrictions can be placed on their rights on the grounds of decency, morality and public order¹.

In *Hamdard Dawakhana (waf) V. Union of India* the validity of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was challenged. The Supreme Court decided that commercial advertisements do not fall within the concept of freedom of speech, for the object of such advertisements is not propagation of ideas, social, political, or economic, or furtherance of literature or human thought, but the commendation of the efficacy, value or importance of the advertised article.³⁶⁷ Though the advertisements prohibited by section 3 of the Drugs and Magic Remedies

¹ Omna Roy, "Short Essay on Advertisements" available at : <http://www.importantindia.com/15675/short-essay-on-advertisement/> (Visited on March 27, 2017)

(Objectionable Advertisements) Act, 1954368 cannot be speech within the meaning of freedom of speech and would not fall within article 19(1) (a).

As in *Tata Press Ltd V. Mahanagar Telephone Nigam Limited (MTNL) Mahanagar Television Nigam Limited* (hereinafter referred as MTNL) Mahanagar Television Nigam Limited filed a case against Tata Press Ltd. that Tata Press has no right to print and publish Tata Press Yellow Pages' containing advertisements given by traders, businessmen and professionals. The MTNL had the sole authority to maintain the telephone service and as a part of it to publish and distribute telephone directory. The Supreme Court of India held that these yellow pages were not part of the directory that advertisements were speech protected under article 19(1)(a) of the Constitution of India and monopoly could not be created in favour of MTNL.

CIVIL LEGISLATIONS REGULATING ADVERTISEMENTS IN INDIA

As advertisements occupy a very important place in the society, people significantly rely on advertisement for purchase of different goods, commodities and services. Thus, their legislative regulation becomes important. In this part of the chapter an effort has been made to study different civil legislations dealing with advertisements in India as follows:-

THE INDIAN CONTRACT ACT, 1872

The Indian Contract Act, 1872 deals with every kind of contract between parties who are major, of sound mind and have made it with free consent on the lawful subject with lawful manner and through lawful means. The false, misleading and fraudulent advertisements are not defined anywhere in the Indian Contract Act, 1872 but it protects against false statements and misrepresentation. Any statement made by the party with the intention to deceive other party and to take consent, that statement becomes false, misleading and fraudulent. The contract becomes voidable at the option of other party whose consent has been obtained by false or misleading statement.

CONTRACT AND ADVERTISING

A contract is an exchange of promises between two or more parties to do or to refrain from doing an act which is enforceable in a court of law. The contract law is based on the Latin phrase *pacta sunt servanda* (agreement must be kept). The breach of contract is recognized by the law and remedies can be provided. Sometimes written contracts are required, such as when buying a house. However, most contracts can be and are made orally, like buying a law textbook or purchasing coffee at a shop. Contract law can be classified, as is habitual in civil law system, as part of a general law of obligations (along with tort, unjust enrichment or restitution). An understanding of the law of contract is important to those engaged in all aspects of advertising. The law of contract will also apply to many aspects of customer relations and contractual obligations must be absolutely clear in coupons and literature which

offer goods and expect payment. That is why direct response order requires a signature, as occurs in undertakings to buy so many books or CDs from a club².

ADVERTISEMENT AND OFFER TO SELL

First we have to understand whether an advertisement is an offer or an invitation to offer. The offer' as defined under section 2(a) of the Indian Contract Act, 1872 is when a person signifies other his wiliness to do or to abstain from doing something such act or abstain is called offer. The invitation to offer is an offer inviting from other party to make an offer to form the basis of a contract.

One of the famous case on advertisement treated as general offer is Carlill V. Carbolic Smoke Ball Co. Ltd. A company claimed in an advertisement that regular use of its smoke ball'product would prevent influenza. It offered £100 to anyone who caught the disease after using the product and stated that £100 had been placed in a special bank account in case there were any claims. Mrs. Carlill bought the product, used it regularly but still got influenza. The company argued that the claim in the advertisement was a mere puff', which was not intended to be taken seriously. The Court held that reward was included in the advertisement which was reflects the seriousness of the offer. Thus, the advertisement was treated as an offer anyone who buys and uses that medicine would create a binding contract¹. It was also held that the advertisement in such type of cases amounted to general offers. She recovered the reward as she had accepted the offer by complying with the terms of the offer¹.³⁹⁶ Generally speaking, an advertisement on a hoarding, a newspaper display' or a television commercial will not be regarded as an offer. Thus, in Harris V. Nickerson the defendant had advertised that an auction of certain furniture was to take place on a certain day. The plaintiff travelled to the auction only to find that the items in which he was interested had, without notice, been withdrawn. He brought an action for breach of contract to recover his expenses in attending the advertised event. His claim was rejected by the Queen's Bench. The advertisement did not give rise to any contract that all the items mentioned would actually be put up for sale. It was concluded that the advertisement is nothing more than an invitation to treat. Therefore, the advertisement shown on any media is not an offer but an invitation to offer. The person who places the advertisement is not making an offer but inviting people to come and make an offer for purchase of any product and service advertised. Then the company and the seller accept the offer and it became an agreement. When this agreement is enforceable by law it becomes a contract.

THE CODE OF CIVIL PROCEDURE, 1908

² A. G. Krishnamurthy, Learnings of an Advertising Practitioner 17 (McGraw Hill Education, Noida, 1st edn., 2010).

The Code of Civil Procedure, 1908 is the procedural Code is civil matters. When any relief of civil nature is claimed a case is filed under section 9 of the Code of Civil Procedure, 1908 in a civil court. All the civil laws follow the procedure set out in the Code of Civil Procedure, 1908 while summoning under section 27 and examining witnesses, discovering and production of any documents as evidence, receiving of evidence on affidavit or issuing of commission for examination of any witness. Whenever any advertisement is offensive against any person, he can file a suit for compensation under section 19 of the Civil Procedure Code, 1908. The section said that where any wrong done to the person or to any movable property can file a suit where wrong was done or where defendant resides or carries business. If an advertisement is objectionable, a suit of temporary injunction can be filed and the procedure to be followed for injunction orders are based upon the balance of convince under order 39 of the Code of Civil Procedure, 1908 and permanent injunction under the Specific Relief Act, 1963. Under section 94 of the Code of Civil Procedure contains a provision relating to the temporary injunction or any interlocutory order to present the end of justice.

In *Kalabharati Advertising V. Hemant Vimalnath Narichania* it was held that the interlocutory and interim orders are necessary to deal with and protect rights of the parties in the interval between commencement of the proceedings and final adjudication. They enable the court to grant such relief or to pass such order as may be necessary, just or equitable. Hence, interim or interlocutory proceedings play a crucial role in the conduct of litigation between parties.

In *Havells India Limited & Anr. V. Amritanshu Khaitan & Ors.* The case was filled for the permanent injunction restricting disparaging and misleading advertisement against the defendant. In the present case, the milk content of Amul was compared with the fat content of Frozen Dessert which was obviously not the same feature in both the products i.e. it was not fat versus fat comparison but a comparison made on distinct and unfair parameters. Further, in this case it was not the case of the plaintiff that the charge put up was false. Secondly, the judgment was assisting the plaintiff. It was held that the advertisement must not be misleading and the features compared must not be misleading - in the present case they were misleading³.

THE SALE OF GOODS ACT, 1930

This Act came into existence on 1st of July 1930 for the sale and purchase of movable goods. The Sale of Goods Act, 1930 is not directly dealing with advertisements but it defines the position of every dealer, manufacturer and seller against the customer. Whenever anything is purchased on the basis of advertisement the product should be according to the terms and conditions provided in the advertisement and the good

³ Supra note 117 at 25.

purchased should be in tune with the conditions and warranties provided in the advertisements

CONDITION AND WARRANTY

Under section 12 of the Sale of Goods Act, 1930 the condition and warranty is a stipulation in any contract of sale. There are some implied conditions and warranties i.e. about the quality and quantity in connection of goods. The breach of condition gives the customer right to reject the goods and repudiate the contract. The breach of warranty does not give the customer any right to reject the goods but buyer only claim compensation. In the case of Mangilal V. Shantibai even after the goods have been delivered into actual possession of the buyer the performance of the sellers' duties may still be incomplete by reason of the breach of some of the conditions and warranties express or implied whether as to title, or quality or fitness to which he has bounded himself by the contract. Even if there is a breach of a condition, the purchaser by taking delivery may, under section 3 of the Sale of Goods Act, 1930 elect to treat it as breach of warranty which under section 59 entitles him to diminution or extinction of the price.

THE PRINCIPLE OF CAVEAT EMPTOR

The principle of Caveat Emptor¹ is still dominant in the Indian market place. This principle assumed that the buyers buy goods at his own risk and that once he buys them, the seller is not liable for the quality of the goods. This situation is unfair to the consumers especially in an age when packaged goods are progressively taking over the market in a number of commodities and a buyer is unable to check the quality of the things he buys in the presence of the seller. Above all customer is overwhelmed by advertisements that leave him confused.

In Bigge V. Prkinson it was held that when a buyer buys a specific article, the rule Caveat Emptor¹ applies, but where the buyer orders goods to be supplied and trusts on judgment of the seller to select the goods which can be applicable for the purpose for which they are intended, which is known to both the parties, though there is no express stipulation that things fit for the purpose, there is an implied warranty that they are fit for that purpose. There is no reason why such warranty should not be implied in the case of a sale of provisions⁴.

THE CONSUMER PROTECTION ACT, 2019

The Consumer Protection Act, 2019 replaced the old law i.e. the Consumer Protection Act, 1986.⁴³⁴ the new law the Consumer Protection Act, 2019 came into force on 20th July 2020 for the better protection of consumers. The consumer is a person who buys product for his own use and not for resale. It covers the products and services

⁴ Arun Chaudhuri, Indian Advertising Laughter & Tears 189 (Niyogi Offset Pvt. Ltd., New Delhi, 1stedn., 2014)

bought offline and online ("e-commerce" means buying or selling of goods or services including digital products over digital or electronic network) both. This new Act, has defined advertisement⁵ and misleading advertisement⁶ for the first time and is also trying to give effective relief for online and offline frauds. The Consumer Protection Councils, Central Consumer Protection Authority, Mediation are also introduced in this new Act.

COMPARATIVE ANALYSIS OF THE CONSUMER PROTECTION ACT, 1986 WITH THE CONSUMER PROTECTION ACT, 2019

The new Act, replaced the Act, 1986 for the better protection of the rights of customers & for speedy remedial mechanism. The pecuniary jurisdiction of the courts are also extended (District Commission up to one crore rupees, State Commission extended from one crore to ten crores, National Commission exceeds ten crores). Earlier it was for the District forum (up to 20 lac), State Commission (from 20 lacs to 1 crore) and National Level (above 1crore); The new Act, 2019 deals with both online and offline purchases and advertisements whereas under the previous Act of 1986 there was no regulation dealing with e-commerce: under the Act, 2019 the complainant can file his or her complaint where the complainant resides or personally work for gain. This helps to file a complaint against online fraudulent offers and advertisements from anywhere. In the Act of 1986 there was no provision of protection authority and mediation as in the New Act, 2019 under chapter III the Central Consumer Protection Authority and the Mediation under section 80 for the settlement through mediation between parties and for the speedy remedy. Hence, there is no denying the fact that the new law is very consumer friendly and has incorporated signifying provisions to deal with both online and offline purchases⁵.

THE CONSUMER PROTECTION ACT, 2019 AND ADVERTISEMENTS

The Consumer Protection Act, 2019 defines advertisement⁶ 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 documents⁷ and misleading advertisement⁸ under section 2(28) which covers false description, false guarantee about the nature, substance, quality or quantity of such product and services, or conceal any important information. The Act of 2019 provides a better protection to the interests of the consumers by establishing the Consumer Council and other authority for the speedy settlement of the consumer disputes and matters connected therewith. Under section 10 of the Act, 2019 as the Central Consumer Protection Authority (CCPA) is to be formed as a regulatory authority relating to violation of the

⁵ Ruchi Gupta, Advertising Principles and Practice 212 (S. Chand & Company Pvt. Ltd., New Delhi, 1stedn., 2012).

rights of consumers, unfair trade practices and false or misleading advertisements. Under the Act, the Central Authority can issue directions to traders, endorser, advertiser or publisher to discontinue or modify any false and misleading advertisement and it may also impose penalty which may extend to ten lakh rupees. Section 89 of the Act gives punishment for false and misleading advertisements which may extend to two years and fine may extend to ten lakh rupees. In *Tesol India V. Govind Singh Patwal & Ors.* the advertisement was published by the petitioner in the newspaper the Times of India' in 2007 in the name of Learn to Earn' and gave an assurance of a overseas job placement after completing the foundation course. They also showed that they were the part of the Global Tesol College, Canada. The complainant paid proper fees and completed the foundation course. But, the petitioner refused to provide job and issued only the certificate of the course. The National Consumer Dispute Redressal Commission (NCDRC) said that after reading advertisement it was clear that the advertisement allured the complainant to join the institute with 100% job Guarantee. It was shown that advertisement was not only misleading but also totally false in nature⁶.

CONCLUSION

As discussed, advertisements help in shaping the consumer behavior to a great extent. People rely on advertisements not only for the fulfillment of their daily needs but for other aspects of their lives as well. An advertisement can open up new vistas of growth and progress, on the contrary a false and misleading advertisement may cause irreparable damage also. There is no particular law which deals with different kinds of fraudulent advertisement but different Acts have been enacted from time to time with certain provisions which can be applied in case of false and misleading advertisements. The Constitution of India, 1950 provides the right to speech, safety and equality in justice, social, economic and political. Thus, it is constructed that advertisements are also a form of speech and expression. Under article 19 of the Constitution of India, the commercial advertisement comes under the concept of freedom of speech. The Directive Principles of State Policy covers economic justice which is made for the welfare of the State. Under article 38 the State can issue directions for the welfare of the people. Article 39 declares that State should make policies for the adequate means of livelihood of its people. And in article 43 State ensures the decent standard of life and enjoyment. The Civil legislations also protect contracting parties under the Indian Contract Act, 1872, the Sale of Goods Act, 1930 etc. The Consumer Protection Act, 2019 elaborately deals with misleading advertisements. This recent legislative endeavor to promote consumer protections

⁶ Anita Sarkar & Anand Halve, Adakatha: The story of Indian Advertising 41-45 (Pictor Publishing Pvt. Ltd., Mumbai, 2011).

strives towards speedy remedy of consumer disputes and their amicable settlement. In India, there are some professional laws which are prohibited from personal advertisement for instance the Advocates, Chartered Accountants, Company Secretaries and Doctors cannot give personal advertisements. The advertisements of gaming and gambling are prohibited in India. The Prize Competitions Act, 1955 and the Lotteries (Regulation) Act, 1998 are made to regulate the advertisements relating to lotteries and gambling etc. As discussed in this chapter, India lacks a uniform and comprehensive law to deal with advertisements in its diverse forms and manifestations. Furthermore, it is also important to note that the general public lacks awareness on the advertisement laws in the country which needs to be done, to prevent and penalize false and misleading advertisements. Even though the Consumer Protection Act, 2019 has comprehensively dealt with the various facets of false and misleading advertisements. Still it is felt that the general consumers may not be aware about the mechanism of social advertisements consumer awareness needs to be created.

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