

Comparative Advertising in India: Need to Strengthen Regulations

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Executive Summary

With the liberalization and globalization of the Indian economy, firms have been aggressively and vigorously promoting their products and services. In a comparative environment, every representation of a product or service is about what 'others are not.' These practices raise questions about truthfulness and fairness of representation of products and services. This paper explores regulations on comparative advertising of products and services in the context of globalization and liberalization in India.

The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, was amended in 1984 to introduce a chapter on unfair trade practices. One of the provisions constitutes any representation which 'gives false or misleading facts disparaging the goods, services or trade of another person' to be an unfair trade practice. The MRTP Commission and the Supreme Court have given shape to the provision.

Most comparative advertisements refer to rival products as 'ordinary,' instead of specifically mentioning names of products. Aggrieved firms have claimed that 'ordinary' refers to all products other than the advertised one. The MRTP Commission, however, has maintained that the wording in the law 'goods of another person' implies disparagement of an identifiable product of a specific manufacturer.

Further, only if the disparagement is based on 'false and misleading facts' that the advertisement becomes an unfair trade practice. Establishing facts often requires detailed scientific and technical assessment of the products. Our courts are not equipped to deal with this. As courts can take a long time to settle a dispute, what has become crucial is whether a court would award intermediate injunction or not. This is restraining the party from advertising pending a final decision by the court. In fact, by the time interim injunction is granted, the advertisement may have already done the damage. The law makes provision for compensating the party for 'loss of business and profit.' The courts, however, have found computing losses to be not free from 'complications and complexities.' Thus, courts have not been awarding compensation. All these factors together have left the field of comparative advertisement effectively unregulated.

The major findings of this study in this context are:

- The opening up of the economy, on its own, is not going to create and sustain competition.
- Protection against unfair trade practices has been available under the Consumer Protection Act. Thus, the repeal of the MRTP Act would not be of any significance.
- Not only the consumers but even the firms need adequate law against unfair trade practices to have some 'rules of the game' for competing among themselves. But, within the structure of the Consumer Protection Act, competing firms cannot be 'consumers' to approach a consumer forum.
- The state would need to develop adequate knowledge of the working of businesses in a free economy, enact laws, and create infrastructure and mechanisms for sustaining competition. ✓

KEY WORDS

Unfair Trade Practices

MRTP Act

Liberalization

Globalization

Comparative Advertisement

At a time of intensified competition in the post-liberalized India, the Monopolies and Restrictive Trade Practices Commission (MRTPC), described a case brought before it as ‘another legal battle between two multinational corporate giants making this Commission as a battlefield for the purpose.’¹ With the liberalization and globalization of the economy, contestation over law and practices was only to be expected. While India had a state-controlled economy, entry into production was dependent on accessing the bureaucratic-political alignment of the state to get requisite permits and licenses. In this context of the overwhelming presence of the state in the economy, the law dealing with the economy and business was meant to secure this arrangement—requiring the courts to privilege the ‘commanding heights of the economy’ in the state. For the private sector, occupying the residual space, the question more often was the fairness of the state in granting licenses. Legal knowledges were formed around this arrangement.

With the state dismantling the ‘license-permit’ system for entry into production and services in most of the sectors, business practices have undergone a transformation in the past ten years. The state has ‘opened’ the economy by executive fiat but this will not sustain or create competition in the economy on its own. As Finance Minister and one of the early architects of liberalization, Chidambaram rightly highlights:

A world class legal system is absolutely essential to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters.²

We have had these general exhortations on law, liberalization, and globalization for a decade now. As the concrete processes were yet to unfold, these issues have been mostly debated at the level of general ideas and principles or expressed as just opinions and predilections. After a decade of reforms, changes are beginning to be discernible in different fields. We need to take our understanding of the processes of law, liberalization, and globalization further by examining the micro practices in the fields of law, economy, and business.

Towards this, we take up the specific theme of law on comparative representations of products and services. In the liberalized Indian economy, as entry into production and services is no more a barrier, the thrust

of competition has shifted to aggressive and vigorous promotion of products and services. These practices raise questions about truthfulness and fairness of representation of products and services. In a competitive environment, every representation of a product or service is about what ‘others are not.’ In this sense, a study of evolution of law on comparative representation can give us insights into the working of law and business in the liberalized-globalized economy. The question is not whether a consumer has adequate remedies and protection against the unfair trade practices of a corporation but whether the warring corporations have an appropriate law against such practices and a justice delivery system to have some ‘rules of the game’ for competing among themselves.

The state came to regulate comparative representation of products and services in 1984, just a few years before the initiation of liberalization and globalization. This was done by introducing a chapter on ‘Unfair Trade Practices’ in the MRTP Act. To understand the operations of the law, we would need to become familiar with the MRTP Act.

MRTP ACT: LAW AND ITS ORGANIZATION

The MRTP Act, 1969 was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, it was amended to add a chapter on unfair trade practices. It created a body called the Director General of Investigation and Registration (DGIR). On a complaint, or on its own, the DGIR could investigate into a claim of a restrictive or unfair trade practice. It also created a judicial body called the MRTPC. The DGIR takes cases before the benches of the Commission. The Commission, on judging a practice to be an unfair trade practice, could order the offending party to cease and desist the practice.

Section 36 A of the Act lists several actions to be an ‘unfair trade practice.’ The provision which pertains to comparative representation is contained in Section 36 A(1)(x):

Section 36A. ‘unfair trade practice’ means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions 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

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

We could understand the working of the provision by studying the judgements given by the MRTPC and the Supreme Court.

Regaul vs Ujala Case

A television advertisement promoting Ujala liquid blue showed that two-three drops of this brand were adequate to bring striking whiteness of clothes while several spoons of other brands were required for the same effect. A lady holding a bottle of Ujala was looking down on another bottle without any label, exclaiming '*chhi, chhi, chhi!*' in disgust. The manufacturers of Regaul, a competing brand, complained to the Commission that the advertisement was disparaging its goods. The Commission elaborated the meaning of the provision:

In order to bring home a charge under clause (x) of Section 36A(1) it must be established that the disparagement is of the goods, services or trade of another. ... the words 'goods of another person' have a definite connotation. It implies disparagement of the product of an identifiable manufacturer.³

The Commission was of the view that 'a mere claim to superiority in the quality of one's product'⁴ by itself is not sufficient to attract clause (x). In the advertisement, neither did the bottle carry any label nor did it have any similarity with the bottle of any other brand. The Commission, thus, was of the opinion that it could not be classified as a case of disparagement of goods.

Novino Batteries' Case

The judgement of the Supreme Court in the Novino Batteries' case has had an important influence on all the cases raising questions about advertisements. Lakhanpal Industries Ltd. had a collaboration with Mitsubishi Corporation of Japan for manufacturing Novino batteries. Mitsubishi Corporation was the owner of the well-known trade name, National Panasonic. Lakhanpal Industries, in its advertisements, claimed that Novino batteries were made in collaboration with National Panasonic. This was technically incorrect as National Panasonic was only a trade name and Lakhanpal Industries could not have collaborated with a trade name. The Supreme Court ruled:

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 statement and is misleading and further 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 by merely 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 sometimes more effectively too than a literally correct statement. It is, therefore, necessary to examine whether the representation complained of contains the element of misleading the buyer. Does a reasonable man, on reading the advertisement, form a belief different from what the truth is? The position will have to be viewed objectively and in an impersonal manner.⁵

Following this, the court held that, even though, literally, the representation made by Lakhanpal Industries was inaccurate, it could not be held to be an unfair trade practice. In the next case, we would see how the judgement in the Novino Batteries' case found an application.

Colgate vs Vicco Case

A television advertisement promoting Vicco tooth powder showed another oval-shaped tin without any label. The white powder coming out from the can was described as useless. Colgate claimed before the Commission that this was disparaging its product, Colgate tooth powder. The Commission found that the shape and colour combination of the can shown in the television commercial resembled Colgate's tooth powder can. Following the Novino Batteries' case, the MRTPC noted that the advertisement did not explicitly mention Colgate. In fact, there may not have been any intention of depicting the can to be that of Colgate. But, since the advertisement created an impression among the viewers that the can was of Colgate, it would be a case of disparagement. The Commission took into account the nature of the Indian audience:

... disparaging remarks about the uselessness

of such toothpowder come through a mysterious invisible voice. It cannot be disputed that a TV set has become more or less a household kit and more than 90 per cent of the country is covered by the TV network. It cannot be gainsaid that illiteracy in India is all pervasive to the extent of 70 per cent of the population. To the ignorant and illiterate people, mysterious invisible voice would be likened to the voice of God. Such people might be inclined to believe that the white toothpowder contained in a red-and-white coloured oval-shaped can would be an absolutely useless substance.⁶

The issues involved in the case came to be strongly emphasized in the context of inter-corporate competition in the Colgate vs Pepsodent case.

New Pepsodent vs Colgate Case

Hindustan Lever Ltd. advertised its toothpaste, 'New Pepsodent' in print, visual, and hoarding media, claiming that this particular brand was '102 per cent better than the leading toothpaste.' In the television advertisement, samples of saliva of two boys were taken for testing hours after brushing. One boy had brushed with the New Pepsodent while the other one had used, according to the commentary, a leading toothpaste. The test of the two samples was visually depicted side by side. The slide carrying the sample of 'the leading toothpaste' showed a large number of germs while that of the New Pepsodent showed negligible quantity of germs. While the sample was being taken from the boys, they were asked the name of the toothpaste they had used for brushing. While one boy said Pepsodent, the response of the second boy was muted. However, the lip movement of the boy indicated 'Colgate.' Also, when the muting was done, the music played in the background resembled that of the jingle used in the Colgate advertisement.

The market share of toothpaste for Colgate and Hindustan Lever was 59 per cent and 27 per cent respectively. The Commission was, thus, of the view that a reference to a 'leading and famous brand' implied Colgate. A doubt, however, arises from the fact that the statistics on market share are produced by the market research agencies and the consumers may not be aware of this. Thus, a viewer need not necessarily interpret 'leading brand' to mean Colgate. The Commission, however, was of the view that Colgate has been in the business of manufacturing and selling toothpaste in India for

more than 50 years. According to the Commission, the word toothpaste has become synonymous with Colgate over the years. In addition, it noted that the jingle in the background was the familiar one of Colgate. The comparative product in the television commercial could, thus, be identified as the Colgate Dental Cream. Thus, it became a case of comparative advertisement and a claim could be made of disparagement of Colgate's products.

Cherry Blossom Case

The principle, thus, emerged that a case of disparagement arises only if the product in question is identifiable. Identification could be explicit or drawn from the facts and circumstances. Thus, in the advertisement of 'Kiwi Liquid Wax Polish,' a bottle is described as X from which liquid is shown dripping while from a bottle marked Kiwi, liquid does not drip. From the shape of the bottle marked X and from the fact that Cherry Blossom had a design registration for this shape, the bottle could be identified with Cherry Blossom and the advertisement became a case of disparagement.⁷

Colgate Dental Cream-Double Protection Case

In June 1998, Colgate introduced its new brand of toothpaste as Colgate Dental Cream-Double Protection (CDC-DP). It gave wide publicity through print and television that the toothpaste was 2.5 times superior to any ordinary toothpaste in fighting germs. Hindustan Lever Ltd. moved the Commission alleging that the advertisements disparaged toothpastes manufactured by it under various brand names. It contended that a reference to 'ordinary' toothpaste was to all brands other than Colgate.

The word 'disparagement' was not defined in the Act; therefore, the Commission explored its dictionary meaning. It noted that dictionaries define it as 'to dishonour by comparison with what is inferior'⁸ 'bring discredit or reproach upon; dishonour; lower in esteem; speak on or treat slightly or vilify; undervalue; and deprecate.'⁹ The Commission concluded:

... for the purpose of disparaging something or some product, some comparison with what is inferior is necessary. ... disparagement or an act of disparaging would occur only by comparison with some identifiable product.¹⁰

The Commission was only reiterating the principle which was established in the Ujala case. The Commission

with approval quoted from the judgement:

... the words 'goods of another person' have a definite connotation. It implies disparagement of the product of an identifiable manufacturer.¹¹

The Commission was of the view that a reference to 'ordinary' toothpaste does not identify any specific product. It noted:

The word 'ordinary' has to be understood in contradistinction with the words special, uncommon, unusual, extraordinary, and such similar synonyms. The word 'ordinary' is defined to mean customary, usual or normal, of the usual kind, not distinguished in any important way from others¹².... not characterized by peculiar or unusual circumstances.¹³ The word 'ordinary' as an adjective would not refer to any particular or special item, product or thing.

Thus, the Commission took the position that the claim of 2.5 times superiority of CDC-DP over any ordinary toothpaste did not refer to any identifiable product or manufacturer. As a result, it could not be a case of disparagement of goods.

It should be noted that 'disparagement' is not the only ground for an advertisement to be an unfair trade practice. The same advertisement could still be contested as an unfair trade practice under Section 36A(1)(a) on the grounds of misrepresenting quality. But, this would be a different issue as to who could approach a court and what remedies could be availed. As a matter of fact, the Commission took the view that there was nothing called an 'ordinary' toothpaste. Thus, a claim of 2.5 times superiority was misleading and hence it ordered the advertisement to be stopped.

Ujala vs Robin Blue Case

Ujala whitener was advertised as insta violet concentrate, a post-wash whitener for white clothes. The advertisement disparaged 'Neel.' The makers of Robin Blue contended that this was a case of disparagement under Section 36A(1)(x), as their product was also 'Neel.' The makers of Robin Blue claimed that they were the market leaders in India with a market share of 56.4 per cent in the blue powder category. Thus, disparagement of 'Neel' would definitely mean disparagement of their product. The Commission was not in agreement. It noted:

Simply because Robin Blue is stated to be commanding the market share to the tune of

56.4 per cent is no ground *prima facie* to come to the conclusion that in common parlance it is known as 'neel.'¹⁴

Godrej vs Vasmol Case

The television commercial of Vasmol Hair dye opened with a lady dyeing her hair with instant hair dye made by mixing hair dye and developer contained in two cylindrical bottles. The bottles were labelled as 'Sadharan' (ordinary). The picture then widened to show the anguish of the lady with falling hair. The commentary attributed this to the use of inferior dye containing harmful chemicals. The advertisement ended with the picture of 'Vasmol 33 Hair Dye' which is stated to contain Ayurprash, a natural way of blackening the hair and strengthening the roots of the hair.

Godrej Ltd. was aggrieved with the advertisement. It had products like 'Godrej Hair Dye' and 'Godrej Kesh Kala' for dyeing hair. Godrej's contention was that the pictorial depiction of two cylindrical bottles would identify it as its product. Godrej claimed that its products were disparaged not only by insinuating that these contained harmful chemicals but also by calling these as 'Sadharan' (ordinary). The Commission stated the principles as follows:

...disparagement could be by way of comparison through words, gesture, gimmicks pointing out indirectly to the inferiority of the informant's product.¹⁵

With reference to this case, however, the Commission noted:

Under the provisions of Section 36A(1)(x) of the Act, the product of another manufacturer has to be identified before it can be said that the same has been disparaged by way of making false and misleading statements. The advertisement in question no doubt refers to instant hair dye and Godrej hair dye as one amongst many instant dyes available in the market. So are the two cylindrical bottles like that of Godrej in which are contained other various instant hair dyes. These in themselves are not sufficient to identify the informant's product which is one amongst many in the market contained in similar cylindrical bottles like Vellatone, ROCCO, Royal, etc.¹⁶

To summarize the interpretation of the Commission, an advertisement could disparage other products and

yet, it would not be a case of 'disparagement' so long as the disparaged product is not identifiable. Is the law adequate to prevent unfair trade practices? In the Indian context, should the balance in interpreting the law not be tilted against such an advertisement? The conflicting claims would need to be assessed in the context of the constitutional provisions on the Fundamental Rights, privileging the freedom to speak.

CONSTITUTIONAL PROVISIONS

Article 19 (1)(a) of the Constitution of India invests:

19. Protection of certain rights regarding freedom of speech, etc.:

(1) All citizens shall have the right:

(a) to freedom of speech and expression;

This freedom has been available for public speaking, radio, television, and press. However, the freedom of speech and expression has limitations. Article 19(2) permits the state to limit the freedom:

... in so far as such law imposes reasonable restrictions ... in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The question had arisen before the Supreme Court whether advertisement was 'commercial speech' and, thus, had the protection of the Fundamental Rights under Article 19(1)(a). The Supreme Court had maintained in its judgment:

...'commercial speech' cannot be denied the protection of Article 19(1)(a) of the Constitution merely because the same is issued by businessmen.¹⁷

The Supreme Court was categorical in its position in the Tata Yellow Pages case:

Advertising as a 'commercial speech' has two facets. Advertising which is no more than a commercial transaction is, nonetheless, dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated

through advertisements. The economic system in a democracy would be handicapped without there being freedom of 'commercial speech.'¹⁸

The Supreme Court had continued:

Examined from another angle, the public at large has a right to receive the 'commercial speech.' Article 19(1)(a) not only guarantees freedom of speech and expression; it also protects the rights of an individual to listen, read, and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfilment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of 'commercial speech' may be having much deeper interest in the advertisement than the businessman who is behind the publication.¹⁹

The Supreme Court was significantly led by the Judgement of the American courts. The American courts in 1940s had doubts if advertisements could be protected by the freedom of speech. This doubt had reflected in the Indian Supreme Court's decision on the Hamdard Case in 1960.²⁰In the backdrop of revisions which had taken place in the position of the American courts, the Supreme Court, giving the judgement on the Tata Yellow Pages case in 1985, was categorical:

We, therefore, hold that 'commercial speech' is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.²¹

No doubt, the freedom is subject to restraint under Article 19(2). However, in the order of rights, 'commercial speech' has to be privileged and curtailed only to the extent it is reasonable for protection of general interests. Understandably, the courts have taken the position that 'publicity and advertisement of one's product with a view to boosting sales is a legitimate market strategy.'²² In fact, following the position of American courts, the Commission has even recognized 'a certain degree of puffing up of one's product.'²³ The Commission has followed the constitutional freedom:

A party has a right to advertise its product making commendation about its quality. Advertisement being a commercial speech which is a part of the freedom of speech is guaranteed under article 19(1)(a) of the Consti- tution.²⁴

CORRECTNESS OF REPRESENTATION

We have been examining the position taken by the Commission on comparative advertising. The Commission has maintained that unless a product is specifically identified, it would not be a case of disparagement of goods. Moving further, even if a representation qualifies to be a case of 'disparaging others goods,' disparagement on its own is not an unfair trade practice. Within Section 36A (1)(x), a disparagement of another's good becomes an unfair trade practice only if there is a use of 'false or misleading facts.' Thus, even in cases where the first criterion for disparagement is satisfied, it has to be established that the facts in the representation are false or misleading. This would often require scientific and technical assessment of the claims. As it came out in the Pepsodent vs Colgate case, it has not been easy for our courts to decide these claims.

Scientific and Technical Details

As summarized earlier, Hindustan Lever Ltd. had started a campaign for its New Pepsodent which was held to be a case of disparagement of Colgate Dental Cream. The point was the veracity of its claim of 102 per cent superiority over Colgate toothpaste. Both the parties produced the opinion of experts, from India and abroad, to do both — substantiate their claims as well as refute the claims of the other party. Both tried to refute the other's expert opinion on the ground that proper protocol was not followed for the analysis. The Commission noted:

Examination of the truthfulness of such claims involves a highly scientific approach. It might be hazardous on our part to base our conclusion, even our *prima facie* opinion, on the experts' opinions available on record as both the sides have brought on record their rival versions.²⁵

The Commission thus proceeded to set up an independent expert body to assess the rival claims. As the Supreme Court later noted:

... both sides were relying upon laboratory tests or opinions of their own experts. These opinions were conflicting and the Commission had no machinery of its own to verify the claims of the parties unless a body of experts could give its opinion to the Commission.²⁶

The matter of this kind is often technical and can take a long time to settle. The contested advertisements were issued in the second quarter of 1997 and, thereafter, the matter was brought to the Commission. Till November

1988, the expert panel was still doing a conclusive test.²⁷ The case brought to the fore several issues concerning the settlement of such disputes. Colgate had argued before the Commission that there was nothing new about 'New Pepsodent,' compared to its earlier 'Pepsodent.' In response, Hindustan Lever submitted that this was Colgate Ltd.'s ploy to make public their formulation of the toothpaste. It offered to show its formulation of New Pepsodent to the Commission on the condition that it was kept a guarded secret and not shown to the other party. The Commission on this point noted:

...the respondent has tried to claim a privilege with respect to its formulation of New Pepsodent as its trade secret. We wonder whether such claim of privilege can be accepted in the context of the law of evidence as in force in this country.

Assessing Loss of Business and Profits

A key concern of the rival parties in such advertisement lies in being compensated for the loss of business and profit. This would involve an assessment of working out the actual losses. According to the Commission, such a task was:

...not free from all sorts of complications and complexities. It is not shown to us how many manufacturing units the respondent has for its toothpaste production. It is also possible that it might get its toothpaste products manufactured by some small scale units on supply of its formulations. It would, therefore, be difficult exactly to find out what would be the extent of injury in clear terms on account of loss of the market share in toothpaste on the part of Colgate.

Interim Injunction: Make or Break

As the final decision always takes time, the key issue for the rival parties in such cases would be to know whether there is an interim injunction or not. The legal principle for granting interim injunction is based on the principle of 'balance of convenience.' The question that is asked is: As the 'truth' cannot be discovered immediately, would it serve the ends of justice to continue the advertisement or stop it? What would be more 'convenient' from the point of view of securing justice for the parties? In the Colgate vs Pepsodent case, the Commission noted that the viewers of television and print medium by far believe what they see and read.

Thus,

...such comparisons might affect the sales of similar products and more particularly of the product which enjoys the market leadership.

Another concern in favour of granting interim injunction was that if the claim made in the advertisement turned out to be untrue, consumers would be 'duped' without any recourse to compensation. The Commission contrasted with the implication of an interim injunction for Hindustan Lever:

As against this, the respondent is not likely to suffer much on account of grant of interim relief in as much as the amount saved on the advertisement campaign at present can always be spent with greater vehemence and vigour if it ultimately succeeds at trial.

One could not disagree with the decision of the Commission. However, the implication of an interim injunction for parties can be staggering. Putting all aspects of comparative representation together, on the one hand, a manufacturer can claim disparagement of its product only if the product can be identified. On the other hand, once it has become a case of disparagement of goods, the legal system may not be well-equipped to quickly settle the technical and monetary claims. Thus, the 'balance of convenience' may often be in suspending the advertisement. All this makes the existing law weak and inadequate. As a result, the field of comparative advertising is effectively unregulated. The context encourages the firms to make exaggerated claims against the other and secure lasting benefits. This will only lead to a chaos of multiple representations, each claiming superiority over the other.

CONCLUSION

The changing context of liberalization and globalization required better regulation and strengthening of the institutional support. The reverse seems to have happened in India. Even the limited protection available through the MRTP Act has gone away. The MRTP Act regulated the monopolies and restrictive trade practices and the unfair trade practices. The Government of India constituted a Commission to recommend legislative measures for protecting and enhancing competition in the economy. Following the recommendations of the Competition Commission, the government has repealed the MRTP Act. Instead, a Competition Act has been enacted to regulate the monopolies and anti-competitive

or restrictive trade practices. This is to be done by creating Competition Councils in different regions of India. The Competition Commission was of the view that the Competition Act should not be burdened with unfair trade practices.²⁸ This was, instead, to be given effect under the Consumer Protection Act, 1986.

While the Consumer Protection Act was being enacted in 1986, the provisions on unfair trade practices had already had a life of two years under the MRTP Act. Since a consumer needed protection not only from being supplied with defective good and deficient service, but also from unfair trade practices, the provisions on unfair trade practices were copied from the MRTP Act into the Consumer Protection Act. This Act creates three-tiered quasi-judicial bodies — District Forum, State Forum, and National Forum — through which a consumer can seek remedy. While the consumer forums have judged a large number of cases on 'defect in good' or 'deficiency in service,' the provisions on unfair trade practices have almost never been contested before the consumer forums. The cases on unfair trade practices were taken to the MRTP Commission.

The provisions on unfair trade practices, in the course of being copied from the MRTP Act into the structure of the Consumer Protection Act, have acquired a new meaning. Within the Consumer Protection Act, a 'consumer' cannot take up a case of an unfair trade practice before a consumer forum. It can only be taken up by a consumer association, central government or the state governments. Thus, within the existing law, a manufacturer whose product is disparaged has no *locus standi* to seek a remedy. The only option is to bring it to the notice of a consumer association or represent the case to the central or the state government. These are only oblique routes of seeking justice. Even if a firm were to succeed in getting an advertisement stopped through this route, as it is not a party to the case, it would not get any compensation for loss of profit. Thus, effectively, the field of comparative representation has become unregulated.

To conclude, the opening up of the economy, on its own, is not going to create and sustain competition. An appropriate law, adequate enforcement, strong infrastructure, and a quick dispute settlement mechanism would be needed to sustain competition. Retreat of the state, in the context of free economy, is not to be misunderstood as the state leaving the economy unregulated. The state would need to develop adequate

knowledge of the working of businesses in a free economy, enact laws, and create infrastructure and mechanisms for sustaining competition. In the absence of it, we would only be regressing from a 'license permit raj' to

the 'jungle rule of the marketplace.' The processes of liberalization and globalization are nascent. It is not late to make a beginning. ♡

ENDNOTES

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