

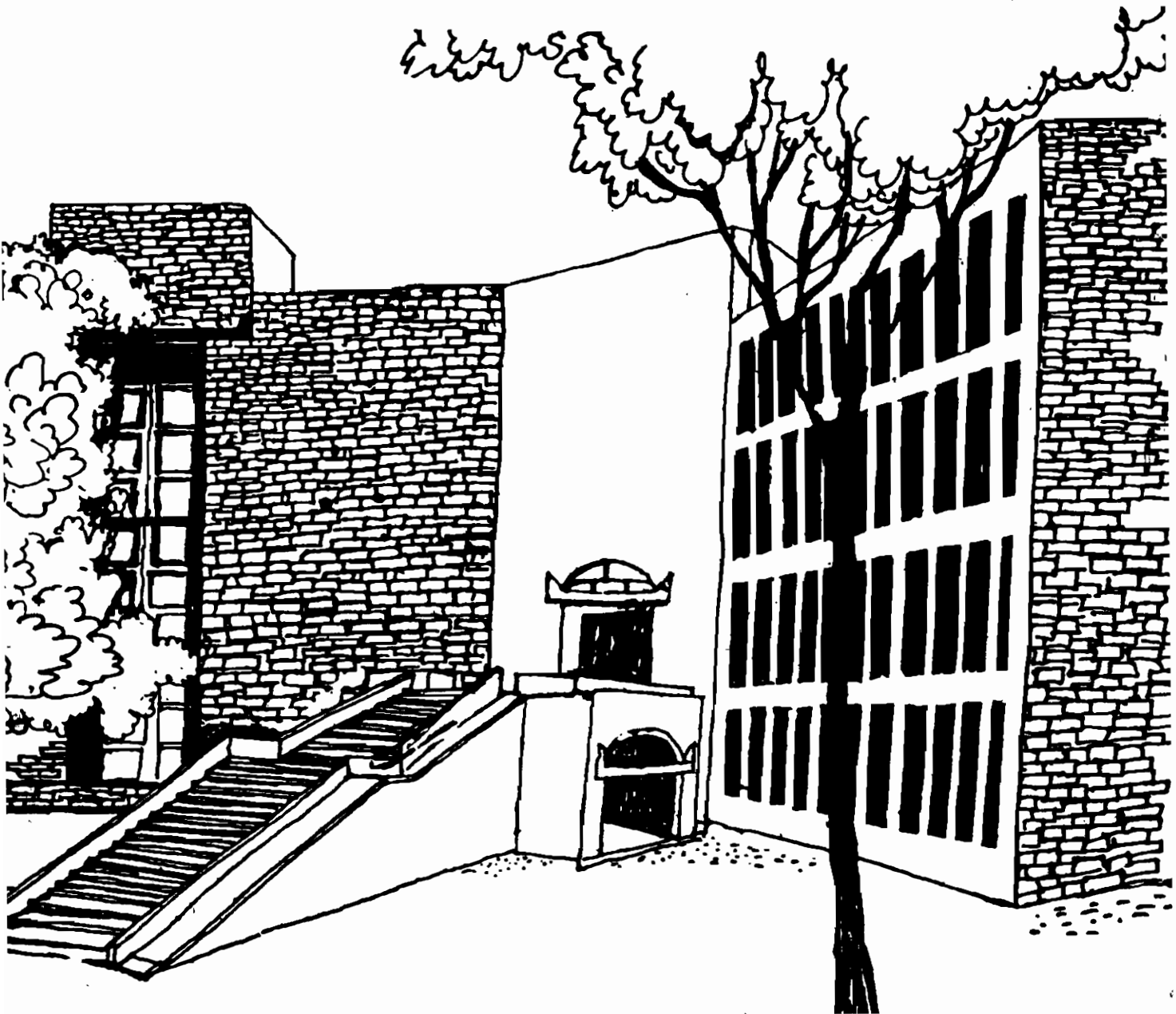


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Working Paper



**Liberalisation and Law on Comparative
Advertising in India**

Akhileshwar Pathak

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**INDIAN INSTITUTE OF MANAGEMENT
AHMEDABAD-380 015
INDIA**

LIBERALISATION AND LAW ON COMPARATIVE ADVERTISING IN INDIA

Abstract

With the liberalisation and globalisation of the Indian economy, as could be expected, firms have been aggressively and vigorously promoting their products and services. These practices raise questions about truthfulness and fairness of representation of products and services. 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. In a competitive environment, every representation of a product or service, is about what 'others are not'. This paper reviews the law in India on representations (advertisements) which have an element of comparison. The provisions on this aspect formed a part of the Unfair Trade Practices under the Monopolies and Restrictive Trade Practices Act. In the changing context of proliferation of advertisements, the law needed to be further strengthened in its application. To the contrary, even the existing law has been liquidated with the repeal of the Monopolies and Restrictive Trade Practices Act. It has been suggested that the same protection against unfair trade practices have been available under the Consumer Protection Act. Thus, the repeal of the Monopolies and Restrictive Trade Practices Act would not be of any significance. However, within the structure of the Consumer Protection Act, competing firms cannot be 'consumers' to approach a consumer forum. The paper illustrates that the opening up of the economy, on its own, is not going to create and sustain competition. Appropriate law, adequate enforcement, infrastructure and quick dispute settlement mechanism would be needed to sustain competition.

LIBERALISATION AND LAW ON COMPARATIVE ADVERTISING IN INDIA

The Monopolies and Restrictive Trade Practices Commission, with reference to intensifying competition in the post-liberalised India, was describing a case before it as 'another legal battle between two multinational corporate giants making this Commission as a battlefield for the purpose'¹. With the liberalisation and globalisation 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. Law dealing with economy and business was to secure this arrangement. In the context of the overwhelming presence of the state in the economy, the laws required 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 about 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 an ex-finance Minister and one of the early architects of liberalisation 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, liberalisation and globalisation 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

¹ Hindustan Lever Limited and Another v Colgate Palmolive (India) Limited, judgement of the MRTP Commission, 18/11/1998. Citation: 1999 (2) CPJ 7.

² Chidambaram, P., 'Law & Commerce: And the twain shall Meet', *The Sunday Express*, OP-ED 7, Ahmedabad, October 26, 2003.

principles or expressed as just opinions and predilections. After a decade of reforms, changes in different fields, changes are beginning to be discernible. We need to take our understanding of the processes of law, liberalisation and globalisation further by examining the micro practices in the field of law, economy and business.

Towards this, this paper takes up the specific theme of law on comparative representations of products and services. In the liberalised 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 in the working of law and business in the liberalised-globalised economy. The question is not be whether a consumer has adequate remedies and protection against such unfair trade practices of a corporation but whether the warring corporations have adequate law against unfair trade 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 initiation of liberalisation and globalisation. This was done by introducing a chapter on 'Unfair Trade Practices' in the Monopolies and Restrictive Trade Practices Act (MRTP Act). To understand the operation of the law we would need to become familiar with the MRTP Act.

MRTP Act: Law and its organisation

The Monopolies and Restrictive Trade Practices Act, 1969, (MRTP) was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, the MRTP Act was amended to add a chapter on Unfair Trade Practices. The MRTP Act 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. The MRTP creates a judicial body called the Monopolies and Restrictive Trade Practices Commission (MRTPC). The DGIR was to take 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 36-A. '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, -

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(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 v/s Ujala Case

A television advertisement promoting Ujala liquid blue showed that 2-3 drops were adequate to bring striking whiteness of clothes while several spoons of other brands were required. A lady holding a bottle of Ujala was looking down on another bottle and exclaiming 'chhi, chhi, chhi!' in disgust. The manufacturers of Regaul, a competing brand, approached the Commission that the advertisement was disparaging its goods. The bottle did not have any label. 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, the bottle did not carry any label. Further, the bottle did not have similarity with bottle of any brand. The Commission, thus, was of the opinion that it could not be 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 cases raising questions about advertisements. Lakhnapal industries Ltd. had a collaboration with Mitsubishi Corporation of Japan for manufacturing Novino batteries. Mitsubishi Corporation were the owners of the well know trade name, National Panasonic. Lakhnapal Industries, in its advertisements, was claiming that Novino batteries were made in collaboration with National Panasonic. This was technically incorrect as National Panasonic was only a trade name. Lakhnapal 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

³ M. Balasundram v Jyothi Laboratories, judgement of the MRTP Commission, 10/10/1994. Citation: 1995 (82) CC 830.

⁴ M. Balasundram v Jyothi Laboratories, judgement of the MRTP Commission, 10/10/1994. Citation: 1995 (82) CC 830.

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

The court, following this, 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 v/s Vicco Case

In a television advertisement promoting Vicco tooth powder, another tin, of oval shape and without any label is shown. White powder coming out from the can was described as useless. Colgate claimed before the Commission that this was disparaging its product Colgate toothpowder. 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 even have been no intention of depicting the can to be of Colgate. But since the advertisement created an impression in 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% 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% 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

⁵ Lakhanpal National Limited v. M.R.T.P. Commission, Judgement of the Supreme Court, dated 02/05/1989. Citation: 1989 AIR (SC) 1692.

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 emphatically emphasised in the context of inter-corporate competition in the Colgate v/s Pepsodent case.

New Pepsodent v/s Colgate Case

Hindustan Lever Limited advertised its toothpaste, 'New Pepsodent' in print, visual and hoarding media, claiming that its toothpaste 'New Pepsodent' was '102% better than the leading toothpaste'. In the television advertisement, samples of saliva are taken for testing from two boys, hours after brushing. One boy has brushed with the New Pepsodent while another has brushed, according to the commentary, 'with a leading toothpaste'. The test of the two samples are visually depicted side by side. The saliva of 'the leading toothpaste' shows large number of germs. While the slide of the New Pepsodent shows negligible quantity of germs. While the sample was being taken from the boys, they were asked the name of the toothpaste with which they had brushed in the morning. One boy had said Pepsodent. The response of the second boy was muted. However, lip movement of the boy would indicate that he was saying 'Colgate'. Also, when the muting was done, there was a sound of the jingle used in the Colgate advertisement.

The market share for toothpaste for Colgate and Hindustan Lever was 59% and 27% respectively. The Commission, thus, was of the view that a reference to 'leading brand' and 'famous brand' was to Colgate. A doubt, however, arises that the statistics on market share are produced by market research agencies. The consumers do not know these. 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. The Commission in addition noted that the jingle in the background was a familiar one of Colgate. The comparative product in the television commercials could, thus, be identified as Colgate dental cream.

⁶ Palmolive (India) Limited v Vicco Laboratories, judgement of the MRTP Commission, dated 20/03/1997. Citation: 1997 (5) CTJ 488.

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 from the facts and circumstances. Thus, in the advertisement of 'Kiwi Liquid Wax Polish', a bottle is described as X from which liquid is dripping while from a bottle marked Kiwi liquid does not drip. From the shape of the bottle marked X, it could be identified as that of Cherry Blossom. Also, Cherry Blossom had a design registration for the shape of the bottle. Thus, 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 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 other brands than Colgate.

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

⁷ Reviewed in Reckitt and Coleman India Limited v Jyothi Laboratories Limited, a judgement of the MRTP Commission, dated, 18/11/1998. Citation: 1999 (34) CLA 46.

⁸ Chambers English Dictionary published by Allied Publishers Ltd. in its 1992 reprint at p. 409.

⁹ In the New Shorter Oxford English Dictionary published by Clarendon Press Oxford, 1993 at p. 696

... 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 word special, uncommon, unusual, extraordinary and the like 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 characterised by peculiar or unusual circumstances¹³. 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 any identifiable 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 the remedies which could be availed. As a

¹⁰ Hindustan Lever Limited and Another v Colgate Palmolive (India) Limited, judgement of the MRTP Commission, 18/11/1998. Citation: 1999 (2) CPJ 7.

¹¹ M. Balasundram v Jyothi Laboratories, judgement of the MRTP Commission, 10/10/1994. Citation: 1995 (82) CC 830.

¹² in New Webster's Dictionary of the English language at p. 667.

¹³ In Black's Law Dictionary, 6th edn. at p. 1097.

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 ordered the advertisement to be stopped.

Ujala v/s Robin Blue Case

Ujala whitener was advertised as insta violet concentrate, a post wash 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% 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 v/s VASMO Case

The television commercial of VASMO 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 stated this to be the result of use of inferior dye containing harmful chemicals. The advertisement ended with the picture of "Vasmo 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' used for dyeing hair. Godrej's contention was that the pictorial depiction of two cylindrical bottles would identify it as its product. Godrej claimed its products were disparaged not only

¹⁴ Reckitt and Coleman India Limited v Jyothi Laboratories Limited, a judgement of the MRTP Commission, dated, 18/11/1998. Citation: 1999 (34) CLA 46.

by insinuating that these contained harmful chemicals but also by calling these as 'Sadharan' (ordinary). The Commission stated the principles:

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

The Commission, however, in relation to the case 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 is 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 the similar cylindrical bottles like Vellatone, ROCCO, Royal, etc.¹⁶

To summarise 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 practice? In the Indian context, should the balance in interpreting the law not be tilted against such advertisement? The conflicting claims would need to be assessed in the context of constitutional provisions on the Fundamental Rights, privileging the freedom to speak.

Constitutional Provisions

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

¹⁵Godrej Soaps Limited v Hygienic Research Institute, judgement of the MRTP Commission, 30/05/2001. Citation: 2001 (43) CLA 300.

¹⁶ Godrej Soaps Limited v Hygienic Research Institute, judgement of the MRTP Commission, 30/05/2001. Citation: 2001 (43) CLA 300.

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 Fundamental Right 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 are 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.

¹⁷ Tata Press Limited v Mahanagar Telephone Nigam Limited and Others, judgement of the Supreme Court, dated, 03/08/1995. Citation: 1995 AIR(SC) 2438.

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 Judgement of the American Courts. The American Courts in 1940s had doubts if advertisement could be protected by the freedom of speech. This doubt had reflected in the Indian Supreme Court's decision in 1960 in the Hamdard Case.²⁰ The Supreme Court, giving the judgement in the Tata Yello Pages Case in 1985, in the backdrop of revisions which had taken in the position of the American courts, 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

¹⁸ Tata Press Limited v Mahanagar Telephone Nigam Limited and Others, judgement of the Supreme Court, dated, 03/08/1995. Citation: 1995 AIR(SC) 2438.

¹⁹ Tata Press Limited v Mahanagar Telephone Nigam Limited and Others, judgement of the Supreme Court, dated, 03/08/1995. Citation: 1995 AIR(SC) 2438.

²⁰ Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Another v. Union of India and others, a judgement of the Supreme Court. Citation: [SCR 1960 (2) 671].

²¹ Tata Press Limited v Mahanagar Telephone Nigam Limited and Others, judgement of the Supreme Court, dated, 03/08/1995. Citation: 1995 AIR(SC) 2438.

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 recognised even '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 Constitution.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 could be specifically identified, it would not be a case of disparagement of goods. Moving further, even if a representation has qualified 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 use of 'false or misleading facts'. Thus, even in the 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 can often require scientific and technical assessment of the claims. As it came out in the Pepsodent v/s Colgate case, it has not been easy for our courts to decide these claims.

Scientific and Technical Details

²² M. Balasundram v Jyothi Laboratories and Another, Judgement of the MRTP Commission, Dated 10/10/1994, Citation: 1995 (82) CC 830.

²³ M. Balasundram v Jyothi Laboratories and Another, Judgement of the MRTP Commission, dated 10/10/1994, Citation: 1995 (82) CC 830.

²⁴ Hindustan Lever Limited v Mudra Communications Limited and Another, decision of the MRTPC, dated 28/08/2001, Citation: 2002 (50) CLA 1.

As summarised 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% superiority over Colgate tooth paste. Both the parties produced opinion of experts, from India and abroad, to do both, substantiate their claims and refute the claims of the other party. Both parties tried to refute the other's expert opinion on the grounds that proper protocol of doing analysis was not followed. The Commission, thus, 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 was to later note:

... 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 settling on doing a conclusive test.²⁷ The case brought to the fore several issues connected with 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

²⁵ Colgate Palmolive (India) Limited and Another v Hindustan Lever Limited, a judgement of the MRTP Commission, dated, 06/11/1997. Citation: 1998 (92) CC 54.

²⁶ Hindustan Lever Limited v. Colgate Palmolive (I) Limited, Supreme Court, judgement delivered on December 17, 1997. Citation: AIR 1998 SC 526.

²⁷ Colgate Palmolive (I) Limited and Another, Applicants v Hindustan Lever Limited, a judgement of the MRTP Commission, dated, 18/11/1998. Citation: 1999 (2) CPJ 19.

Lever submitted that this was Colgate Ltd.'s ploy to make public their formulation of the toothpaste. The Hindustan Lever Limited 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 side. 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 is going to be in being compensated for the loss of business and profit. This involves assessment of working out the actual losses. According to the Commission, such task was always,

... 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 a final decision would always take time, the key issue for the rival parties in such cases becomes, whether there would be an interim injunction or not. The legal principle for granting interim injunction is based on the principle of 'balance of convenience'. The question which 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 v/s Pepsodent case, the Commission noted that 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 were to turn out to be untrue, consumers would have been 'duped' without any recourse to compensation. The Commission contrasted with the implication of an interim injunction for the Hindustan Lever Ltd.:

As against this, the respondent is not likely to suffer much on account of grant of interim relief inasmuch 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 technical and monetary claims. Thus, often, the 'balance of convenience' may 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 firms to make exaggerated claim against the other, and secure lasting benefits. This will only lead to chaos of multiple representations of each claiming superiority over the others.

Conclusion

The changing context of liberalisation and globalisation required better regulation and strengthening 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 monopolies, and restrictive trade practices and 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 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 Protect Act was being enacted in 1986, the provisions on unfair trade practices had already had a life for two years under the MRTP Act. Since a consumer needed protection not only from being supplied with defective good and deficient service, but also unfair trade practices, the provisions on unfair trade practices were copied from the MRTP Act into the Consumer Protection Act. The Consumer Protect 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 large number of cases on 'defect in good' or 'deficiency in service', the provisions on unfair trade practice 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 to the Central or 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.

²⁸ Report of the High Level Committee on Competition Policy and Law, May 2000, see at www.nic.in/dca/comp

To conclude, the opening up of the economy, on its own, is not going to create and sustain competition. Appropriate law, adequate enforcement, infrastructure and 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 in the state leaving the economy unregulated. The state would need to develop adequate knowledges of the working of businesses in a free economy and enact law, create infrastructure and mechanisms for sustaining competition. In the absence of it, we would only be regressing from 'license-permit raj' to 'jungle rule of the market place'. The processes of liberalisation and globalisation are nascent. It is not late to make a beginning.