

CONSTITUTIONALITY OF CORRECTIVE ADVERTISEMENTS VIS-À-VIS CONSUMER JUSTICE**Syed Asima Refayi*****ABSTRACT**

Advertising is essentially a thing to induce consumption and to make people buy things. Broadly speaking, every presentation for the promotion of products, services or ideas would fall within the meaning of advertising. Although, advertising as a concept is a product of the commercial age, it was in vogue in one form or the other throughout the centuries. Whether it was a product to be sold or service to be offered or a precept to be spread, some propagatory means to reach the masses where necessary and where availed of. Means varied according to the audience targeted and facilities available but attempts were always made to use them to spot light the message. The simplest form of advertising was that of the street criers and the peddlers, who went about selling their wares. The pulpit, the platform, street meeting and the village gatherings were the other modes of spreading the message. The peddler as well as the Prophet resorted to it. On sold to his wears, the other his views. Both had to persuade as large a number of people as possible to take up what they have to offer and were always in need of appropriate means to attract maximum number of such people. And sometimes resorted to misleading and false advertising which will continue to influence the customer's decision to purchase, even after it has been discontinued. Studies have indicated that there is normally a delayed response by consumers to advertisements. Therefore, remedy is to issue corrective advertisement. Question arises to what extent Constitution will accept its permissibility. In this paper, an attempt has been made to highlight the constitutionality of corrective advertisements.

Key words: Constitution, Advertisements, Consumer Justice.

Introduction

False or misleading advertisement once viewed has its own life. Once a false or misleading advertisement has been successful in creating an image among the masses, there will be residual effect of advertising, which will continue to influence the customer's decision to purchase, even after it has been discontinued¹. Studies have indicated that there is normally a delayed response by consumers to advertisements². This delayed consumer response to or residual effect of an advertisement is a recognized phenomenon in advertising³. The cease and desist order rightly called as an order to go and sin no more⁴ is often ineffective as it does not help to dissipate the false impression previously created by such advertisement.

The premise of corrective advertising is that it can prevent this continuing deception by eliminating the false impression that may result from the lingering effect of a false or misleading

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¹ Ferald J. Thain; Consumer Protection: Advertising – The FTC Responses; The Business Lawyer, April, 1972 at 894.

² International Encyclopedia of the Social Sciences. Advertising at 107 – 108 (1968) See also Charlton and Fawcett, The FTC and False Advertising, 17 UK, Law Review 599 600 (1969).

³ Id. At 108.

⁴ Robert Pitsofsky; Beyond Nadar: Consumer Protection and the Regulation of Advertising Harv. LR. Vol. 90 (1977) at 687.

advertisement. It is aimed at correcting this false impression in a manner calculated to gain exposure equal to that of the initial deception⁵.

Like MRTP, before Amendment Act, 1991 (now repealed) and Consumer Protection Act, the Federal Trade Commission Act of USA does not expressly provide any power to the Federal Trade Commission to order for corrective advertisement. However, in *IIT Continental Banking Co*⁶, the Federal Trade Commission went beyond the traditional cease and desist order. In this case respondent was falsely advertising that its bread product designated by the trade name “Profile” was effective for weight reduction. The Federal Commission gave option to the respondent, either to cease and desist from disseminating the advertisement for a period of one year from the date of this order, or to spend not less than 25% of total expenditure (excluding production cost) for each media in each market for advertising in a manner approved by the authorized representatives of the Federal Trade Commission that profile bread is not effective for weight reduction, contrary to possible interpretations of prior advertising is to be disseminated in the same print media as other advertising of profile bread.

It is submitted that this judgment has to a great extent militated the deterrent effect of the corrective advertisement by giving option to the advertiser, not to advertise his product for one year? Since the objective of the corrective advertisement is to dissipate the lingering effect of false or misleading advertisement, how this residual effect can be removed by simply stopping the advertiser from advertising the product for one year. In order to achieve the desired result from corrective advertising, proper approach is to direct the advertiser to spend not less than 25% of the total advertising cost on corrective advertising, for which false advertisement had been shown⁷.

The circumstances in which corrective advertisement may be ordered have been outlined in *Warner-Lambert Co. v. Federal Trade Commission*⁸. The tests are (1) the deceptive advertisement must have played a substantial role in creating or reinforcing in the public mind a false belief which survives even after the false advertising ceases. (2) There is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief and (3) injury cannot be averted by merely requiring respondent to cease disseminating the advertisement.

It is submitted that the case of *Warner-Lambert*, has laid down a high standard for invoking the corrective advertisement remedy. This case was unusual. It had disseminated advertisement for fifty long years and broadcast up to the date of suit. The manufacturer has claimed that the mouthwash was effective in ameliorating, preventing and curing cold and sore throats. There was persuasive evidence that the claim was believed by purchasers at least upto the time of suit. So record did not support each of those findings. It is difficult to apply this standard in hard cases. Even in America it has been argued that if these issues are made relevant in the corrective advertising content and the burden of proof for each is placed on the Commission staff, the remedy would be imposed rarely⁹.

⁵ Corrective Advertising – The New Response to Consumer Deception, 72 Colum. L. Rev. 415 (1972) at 416. However in England the Trade Description Act, 1968 Review Committee recommended against corrective advertising. It thought that it might fail to reach those who were misled. For Criticism of this view see Ross Cranston, Consumer and the Law (1978) at 61. In Australia a provision to direct advertiser to issue corrective advertisement is provided under section 80 – A of the Trade Practices Act, 1974.

⁶ 36 FED REG 18, 522 (1971).

⁷ The FTC has already recognized that in certain cases the option of refraining from advertising for a year will not be available. New York Times, Dec. 3, 1971, p. 27 Cf.

⁸ 1977, 562 F 2d. 749.

⁹ Supra note 4 at 697.

Robert Pitofsky has proposed that in order to invoke the remedy of corrective advertising, the Commission should prove that:

1. *the existence of a material fraud or deception with respect to a major advertising theme;*
2. *that his fraud created in substantial number of consumers a misconception about the product; and*
3. *this misconception significantly influenced the purchasing decision of these consumers*¹⁰.

Even Pitofsky's proposition will not at present suit Indian scheme of things. Clauses (2) and (3) will require objective analysis of consumer views which can be obtained through surveys only. In India, at present there is no Governmental or Semi Governmental agency which can undertake this job, so to elicit the consumer views about a particular advertisement is not easy.

The MRTP (Amendment) Act, 1991 has incorporated clause (c) in section 36(d) which runs as follows:

Any information, statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published as the case may be, in such manner as may be specified in the order.

Thus whether a corrective advertisement can be ordered, or not, depends upon the Commission's own assessment of the situation. If situation demands, Commission has now express powers to issue corrective advertisement which is independent of the consumer perceptions. What should be the duration of such advertisement? How long shall it go and what should be the media on which it will be displayed, are the questions which have to be decided by the Commission. Also under section.14(1)(hc),if District Forum is satisfied that the goods complained against suffer from any defects specified in the complaint or any of allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to issue corrective advertisements to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement¹¹.

Constitutionality of Corrective Advertisements

Article 19(1) (a) of the Constitution guarantees freedom of speech. The question which came for judicial determination in *Hamdard Dawakhana v. Union of India*¹² was whether commercial advertising falls within the freedom of speech? The apex court answered it in negative for the reason that the commercial advertisement propagates the efficacy, value and importance of goods and not the ideas, social, political or economic¹³. However, more than two decades later, the apex court changed its opinion in *Indian Newspaper Bombay Ltd. v. Union of India*¹⁴ and held that the observations made in the *Hamdard Dawakhana* case are too broadly stated. The commercial advertisements cannot be denied the protection of Article 19 (1) (a) of the Constitution merely because they are issued by businessmen¹⁵. In *Tata Press Ltd .v. Mahanagar Telephone Nigam Ltd*¹⁶. The Supreme Court went ahead by extending the protection of Article 19 (1) (a) not only to advertisers but also consumers. It was laid down that this Article guarantees not only freedom of speech and expression but it also protects the rights of the individual to listen, read and receive the said speech. So far as the economic needs of citizens are considered, their fulfillment has to be guided

¹⁰ Ibid.

¹¹ Subs. By Act 62 2002

¹² AIR 1960 SC 551.

¹³ Id. at 563 See also *Ushodaya Publication Pvt. Ltd., v. State of AP* (81) A. A. P 109 (FB)

¹⁴ AIR 1986 SC 515.

¹⁵ Id. At 547.

¹⁶ AIR 19995 SC 2438.

by their information, disseminated through the advertisements. The protection of this Article is available to the speaker as well as to the recipient of the speech¹⁷.

After elevating commercial advertisements to the status of speech and express guaranteed under Art 19 (1) (a), the question arises, is this freedom absolute or subject to some restrictions?

The American Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*¹⁸ made it clear that the extending of protection of first Constitutional amendment to commercial advertising does not mean that the protection is absolute and admits no restriction. Some forms of commercial speech regulations are surely permissible¹⁹ and in *Central Hudson Gas and Election Corp. v. Public Service Commission of New York*²⁰, the court laid down four pronged test to enable the advertisement to reap the benefits of first amendment. These are: (1) to determine whether the activity is lawful i.e., it should not be misleading. (2) Whether the asserted Government interest is substantial, if both inquires yield positive answers, then it must be determined (3) whether the regulation directly advances the Governmental interest (4) and whether it is not more extensive than is necessary to serve that interest. The restrictions propounded in the Central Hudson are in-applicable in India for the reason that the courts in India do not enjoy the freedom to impose restrictions which they consider reasonable like the American courts. In America, the first amendment simply says that “Congress shall not make any law..... Abridging the freedom of speech or of the press”. In India restrictions are mentioned in Article 19 itself which are declared reasonable and courts have no scope to impose any restriction which is not mentioned in Art.19(2). This restriction on the power of courts is realized by the Apex court also. In *Tata Press Ltd. v. Mahanagar Telephone Nigam*,²¹ it was aptly made clear:

Unlike the first amendment under the American constitution, our Constitution itself lays down in Art.19 (2) the restrictions that can be imposed on the Fundamental rights guaranteed under Art.19 (1) (a) of the Constitution.

This corrective advertising generated a debate in America as to its Constitutionality.

Roseden²² believes that the corrective advertising remedy is devoid of constitutional mandate for the following reasons:

1. Corrective advertisements are indirect or secondary restraint imposed by an administrative action²³. Such restraints are prior restraints which are permissible either in a statute imposing penal sections under the far reaching procedural safeguards provided in the American legal system²⁴ or if it comes within one of the established exceptions to the bar of first amendment.

¹⁷ Id at 448. (1976) 425 US 748.

¹⁸ Id. At 1830.

¹⁹ Id at 1830.

²⁰ (1980) 447 US 557.

²¹ AIR2005Kant.189

²² Roseden: A Treatise on the Law of Advertising Vol. 1. 1978 at 9 – 43.

²³ Roseden is in agreement with the classification of prior restraint propounded by Prof. Emerson in his Article. “The Doctrine of Prior Restraint”, 20 Law and Contempt problems 648 (1955). Prof. Emerson divides the circumstances to which prior restraint applies into 4 classes. The fourth class is “Indirect or secondary restraints”. This covers the restraint imposed by the administrative action. Roseden is of the opinion that this fourth class of prior restraints cover corrective advertising also Id. 9 – 10.

²⁴ Roseden Opines that if a civil proceeding is available against a prior restraint and if such civil proceeding contains safeguard equal to those governing a criminal proceeding such prior restraints may be also permissible in matters other than those concerning obscenity. This observation of Roseden is infact based on the combined effect of the cases; *Near v. Minnesota*, 283 US 697, 717; *Kingsley Books Inc. v. Brown* 354 US 513 (1958) and *Speiser v. Randall*

Since Federal Trade Commission Act, 1914 is not a penal statute, nor procedural safeguards as that of penal sanction are provided, and it also does not come under any of the exceptions to first amendment, so corrective advertising is unconstitutional.

2. Corrective advertisements are not in comport with the first amendment as the thesis underlying the corrective advertising is that it erases the residual effect of the deceptive advertisement but no reliable surveys as to such retention are available. So its duration and its effect are purely speculative. To invade the property right of the persons on the ground of a speculative concept is wholly arbitrary. Furthermore, the retention for any length of time extends only to the name of a product or to a slogan that has been repeated incessantly and possibly to the general purpose of the product. Therefore, unless past deception is inherent in the name of a product or in the slogan, there is little if any retention. It is certainly unwarranted to infer from the fact of retention of a brand name or a slogan those details of advertisements which have been deceptive²⁵.

Roseden while questioning constitutionality of corrective advertising has his eye on the first and the Fifth Amendments of the American Constitution and judicial gloss put on these amendments. It is to be seen how far his observations hold true to Indian Constitution.

US Supreme Court has ordered to issue corrective advertisements to disseminate dangers of Cigarette smoking.²⁶

The fundamental right of freedom of speech and expression incorporated in Art. 19 (1) (a) stands on different footing than the first amendment to American Constitution. The American Constitution does not contain any restriction to the freedom encompassed. Whereas Art. 19 (2) itself lays down the restrictions which can be imposed on freedom of speech and expression. This marked difference was realized by *Doughlas J. in Kingslay Corporation v. Regents of the University of New York*²⁷, it was laid down:

If we had a provision in our Constitution for reasonable regulation of the press such as India has included in her's, there would be room for argument that censorship in the interest of morality will be permissible.

The Supreme Court of India also in unequivocal terms made it clear in *Santokh Singh v. Delhi Administration*²⁸. It was held:

*In our opinion, it is hardly fruitful to refer to the American decision particularly when this court has more than once enunciated the scope and effect of Art. 19(1) (a)... Our Constitution provides reasonable, precise, general guidance in the matter. It would then be misleading to construe it in the light of American decision given in the different context*²⁹.

357US 513 (1958). However, he himself admits that in any event, we have rarely, if ever seen civil proceedings, so that in final analysis, the broadening of the exceptions as contained in *Kingslay* and *Speiser*, is unlikely to have any practical effect.

²⁵ Supra note 22 at 9 – 29.

²⁶ U.S Inc. 2006 a.

²⁷ 360 US 684, 98.

²⁸ (1973) 3 SCR 533 see also *Iran – Cochin v. Bombay Co. Ltd.* 1952 SCR 112 *Bombay v. M. D. Chamarbaug – walla* 1957 SCR 878.

²⁹ M. H. Seervai: Constitutional Law of India, 3rd ed. Vol. 1 at 491.

Thus the opinion of Roseden shall not apply mutatis mutandis to the Indian Constitution. However, the question which needs an answer here is whether the effect of prior restraint of corrective advertising is sufficient to quash this remedy as unconstitutional? The Supreme Court of India in a *K Abbas v. Union of India*³⁰ allowed the pre-censorship of cinematography films and opined that it does not violate freedom of speech and expression as these restrictions are permissible on the grounds of decency and morality. On the same analogy prior restraints in the guise of corrective advertising shall not infringe Art. 19(1) (a) provided of course Art. 19(2) permits such restrictions. In *Tata Press Ltd. v. Mahanagar Telephone Nigam*³¹, the apex court declared that the false, deceptive and untruthful advertisements would be hit by Art. 19(2) and can be regulated/prohibited by the State. However, the court did not give any inkling about the ground under which such advertisements will be prohibited, as the grounds like false, deceptive and untruthful do not find place under Art. 19(2) which runs as under:

Nothing is sub clause (a) of clause (1) shall affect the operation of any law or prevent state from making law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with the foreign state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Furthermore, it is now well established through judicial dicta³² that the restrictions which are imposed for securing the objects which are enjoined by Directive Principle of state policy included in part IV of the Constitution may be regarded as reasonable restrictions within the meaning of clauses (2)-(6) of Art. 19. Therefore, Art. 38(1) merits mention here:

The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Further Art 14 permits classification and not class legislation. A classification between fair and false/deceptive advertisement is permissible under Art 14.

Thus Art 14, 19(2) and 38(1) allow reasonable restrictions to be imposed on commercial advertisements on the grounds of public order, decency, morality³³ and for the welfare of the public. These

³⁰ (1971) 2 SCR 446.

³¹ AIR.2005 Kant 189.

³² *State of Bombay v. Valsara (1951) SCR 682; Bejoy Cotton Mills v. State of Ajmer, AIR 1955 SC 33 Orient Weaving Mills v. Union of India 1962 Supp. 3 SCR 487; Hanief Qureshi v. State of Bihar; AIR 1958 SC 731.*

³³ It is worthwhile to mention here that after amendments to MRTTP Act in 1991, the definition of unfair trade practice is almost similar to section 5 of the Federal Trade Practices Act. 1914 as amended by the Wheeler Lea amendment Act 1938. The Supreme Court of America in *FTC v. Sperry and Hutchinson* laid down the tests to determine whether a trade practice is an unfair one. These tests revolve round the broad parameter of decency and morality which are as follows:

- a) Whether a practice without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise – whether, in other words it is within atleast the penumbra of some Common law, statutory or other concepts of unfairness.
- b) Whether it is immoral, unethical oppressive or unscrupulous.
- c) Whether it causes substantial injury to consumers; 405 US 233, 244 – 54 (1972).

expressions are of wide connotation³⁴ but they are circumscribed by an equally important condition, that is, these restrictions must have a rational relation to the object sought to be achieved. The problem in India is to determine modus operandi of these restrictions. Section 36-D of the MRTP Act, 1969 (now repealed) gives option to the MRTP Commission now dissolved either to pass cease and desist order or consent order. The Commission has been armed with the power by MRTP (Amendment) Act, 1991) to direct the respondent that any information statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published as the case may be in such manner as may be specified in the order³⁵. This power of the Commission is wide enough to include affirmative disclosure as well as corrective advertising³⁶. Thus where the MRTP Commission believes that mere cease and desist order or consent order will not dissipate the lingering effect of false or deceptive advertisement, the trader will be asked to issue corrective advertisement or have affirmative disclosure in future advertisements and how much he shall spend on such advertisement is for the Commission to determine.

Second important challenge posed by Roseden's observations is that the corrective advertising order does not satisfy constitutionally necessary substantive prerequisites. He opines that the residual effect, which through corrective advertising is attempted to erase, is based simply on conjectures and constitutionally protected right cannot be taken away on mere conjecture. He also questions the present approach of the FTC to order respondent to issue corrective advertisement for all products alike. These observations of Roseden hold well under the present Indian scheme of laws also. The residual effect which corrective advertisement has to rub off must be proved and not based on surmises. Similarly, the MRTP Commission cannot evolve a general rule applicable to all and sundry but has to examine the facts and peculiarities of each case. The approach of FTC to issue corrective advertisement for one year and spend 25 percent of the advertising expenditure for all products alike may in certain situations fail to serve the purpose or may be more than that demanded by the situation. So the duration and the amount to be spent must be kept open and dependent upon the circumstances of the case.

Conclusion

It is said that in a free market, consumer is king. But in India, which boasts of rapid growth and aims for great power status, the buyer is shortchanged by toothless regulations

In India, consumers often read about such huge settlements being made abroad between consumers and companies. But rarely do they see anything of the sort closer home where they are bombarded day and night by ads that make true, semi-true or false claims with little accountability. Most successful consumer cases in court are about faulty appliances or defective or inadequate services. There aren't many cases regarding misleading claims, which lead to large and exemplary settlements like in the developed world.

Though there is legal redress for misleading claims under the Consumer Protection Act 1986, people hesitate to approach consumer courts as the whole process takes too long. As per the Consumer

³⁴ The words decency and morality should not be given narrow interpretation as enunciated in *R. v. Hicklin* (1868) 3 QB 360 or as provided under statutory definition incorporated in Obscene Publication Act, 1959 of England but what may be regarded as decent and moral from the business point of view.

³⁵ Section 36 – D (c).

³⁶ Corrective advertisement may be compared to, and is variant of affirmative disclosure yet it differs in certain important respects. Traditionally, affirmative disclosure have been required only where the failure to reveal certain facts in current advertisement might actively mislead the consumer where as corrective advertising is a remedy designed to counteract abuses brought about through past false advertisement. See Note; Corrective Advertising – The New Response to Consumer Deception 72 Col. L. Rev. 415, 419.

Protection Act (1986), the time limit for disposal of a complaint is 90 days, and if product testing is involved, it is 150 days. However, a recent study by Consumer Unity and Trust Society (CUTS) in Rajasthan showed that only 26 per cent of the cases were disposed of within the stipulated time period of 90-150 days. The delay could be up to 3-5 years or more due to various reasons in various consumer fora,

Several consumer rights groups also approach the Advertising Standards Council of India (ASCI) regarding misleading advertisements. However, the ASCI usually takes three to four months to decide on the complaint. The life of an ad is usually only about four months and so, by the time the decision is taken the ad is already off the air. Then, the ASCI ruling has absolutely no effect on the advertiser other than some amount of negative publicity if the matter gets reported in the media. Even then the benefits of having run the ads for over three to four months far outweigh this. And the damage done to the consumers by the misleading advertisement cannot be reversed and there is no provision here for compensation for affected consumers, The delay in deciding on a case of misleading ad means the damage will already be done. Moreover, ASCI, being a voluntary organisation guided by a code for self-regulation in advertising, does not have any legal powers. "It is not a government body and has no regulatory authority or framework. It is only now that the ASCI Code has been brought under the purview of the Cable Television Networks (Regulation) Act, 1995.

Most important is to take disciplinary measures against false ad claims such as corrective advertising. For instance, last year, in Australia, Coca-Cola ran "myth-busting" ads claiming that Coca-Cola did not make children fat, did not rot their teeth and was not packed with large amounts of caffeine. The Australian Competition and Consumer Commission (ACCC) came down hard on Coca-Cola and the company had to carry corrective advertisements titled "Setting the Record Straight" in over seven newspapers across the country. "Corrective advertising is a must to nullify the influence of misleading ads and a good deterrent. But so far, there is no such measure in India.

However, the CPA does suggest that in case of unfair trade practices, the court order for corrective advertisements to neutralise the effect of misleading advertisements at the cost of the party responsible for issuing the ad. "But, consumer courts neither have the power nor the infrastructure to investigate misleading advertisements or take up such cases *suo moto*. They can only take action on complaints filed before them. However, consumer forums can issue interim orders stopping such advertisements pending disposal of the case within the parameters of Constitutionalism need is to make misleading and false advertisements *per se* actionable.