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Misleading Drug Advertisements: Busting the Myth and Protecting Consumers

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Advertisement, whether in form of television, print media, or social media, is one of the most important sources of creating demand among the consumers. Several times, pharmaceutical firms have adopted unethical marketing practices of exaggerated advertisements of drugs. The advertisement of various objectionable drugs that allege to cure venereal diseases and conditions is a major issue in India resulting in innocent people spending huge amounts of money and causing them immense harm and bodily injury. The paper aims towards analyzing the basic essence of misleading advertisements and their impact on consumers, keeping in view its legal perspective and theories. This paper is directed to examine the laws governing fraudulent drug advertisements and existing mechanisms along with various provisions of The Drugs and Magic Remedies Act, The Drugs and Cosmetic Act, and Consumer Protection Act. The paper revolves around the issue of exaggerated and misleading advertisements relating to drugs, analyzing and scrutinizing the need for imposing certain restrictions on the advertisement of pharma products, through a series of suggestions and recommendations. The research also examines how such advertisements violate consumer rights and what remedies they can avail in case of fraudulent drug advertisements. The researchers utilize writings of various jurists, books, articles, notes, commentaries, and other writings to provide a better understanding of the said topic. The study also relies upon the approach of judiciary resulting in the gradual evolution of law through a string of judicial pronouncements and looks forward to validating the submissions made in the course of research through a number of practical illustrations and recent instances.

Keywords: *pharmaceutical firms, objectionable drugs, consumer protection, judicial pronouncement.*

INTRODUCTION

Advertising is a form of communication that educates the general public about a company's existing and upcoming products and services. It is deemed as one of the most effective forms of communication having extensive reach. Advertisement is used as an effective tool by businesses to stimulate and encourage their target consumers about the use and benefits of their products.

Advertisements made through traditional or mass media include advertisements in newspapers, cinema halls, jingles, magazines, television, radio, etc. On the other hand, advertisement through new or contemporary media involves the communication of information through ads on web series, blogs, Emails, and various social networking websites like Instagram, Facebook, WhatsApp.

Advertising has a great impact on consumer's behavior and mind. Though advertisements are resourceful to the business bringing those huge profits, it is important that such advertisements are ethical and do not violate the rights of the consumer. Exaggerating claims providing unrealistic hopes to the consumers makes an advertisement redundant. Using the star power of celebrities to endorse unethical products with irrational claims is not a good practice and poses a major threat to consumers.

UNDERSTANDING MISLEADING ADVERTISEMENT

An Advertisement can be termed as "misleading" when it conveys factually incorrect or deceptive information about a product. Advertisements can be "misleading" if they contain false statements of fact, conceal or leave out important facts, include or imply a promise to do something without the intention of carrying it out, or create a false impression, even if everything is stated may be literally true.¹ A misleading advertisement is one that distorts reality, persuading consumers to buy the product which they would not have otherwise

¹ Shubhank Khare, 'Protection Of Consumers With Reference To Misleading Advertisement In India: A Critical Analysis' [2018] IJLDAI 349, 363

bought. Though false and deceptive advertising is illegal in most countries, manufactures leave no opportunity to deceive people and earn profits.

When an advertisement does becomes false or deceptive?

The Consumer Protection Act, 2019 has included the definition of “misleading advertisement”.² The act defines an advertisement as misleading when it is backed by a false description of the product or service, gives a false guarantee, conceals important information, or conveys the implied or express representation of the manufacturer as an unfair trade practice.

An advertisement becomes “misleading or deceptive” if³-

- There is a misrepresentation, omission of material facts which is likely to mislead the consumer.
- The customer acts reasonably under the given circumstances.
- Such misrepresentation or omission can affect the conduct and decision of the consumer with regard to the product or service.

MISLEADING DRUG ADVERTISEMENTS: AN ANALYSIS

Misleading advertisements giving exaggerated attributes of a drug or medicine has become a prominent issue in India. These advertisements affect consumer decisions inducing them to buy it and which eventually poses a serious threat to their health. Though there are several laws and regulating bodies to govern the advertisement of such drugs, there is still a need for better reforms.

Section 2(a) of The Drugs and Magic Remedies (Objectionable Advertisements) Act⁴, 1954 defines the term “advertisement” as any notice, circular, label, wrapper, or other documents, and any announcement made orally or by any means of producing or transmitting light,

² Consumer Protection Act 2019, s 2(28)

³ Khare (n 1)

⁴ Drugs and Magic Remedies (Objectionable Advertisements) Act 1954, s 2(a)

sound or smoke.⁵ The act restricts advertisements of certain types of drugs and magic remedies for treatment, cure, and diagnosis of certain diseases or disorders. The Act further defines “drug” as⁶ –

- a. Medicine for the internal or external use of human beings or animals.
- b. A substance that is meant to be used for diagnosis, cure, treatment, mitigation, or prevention of disease.
- c. An article other than food, which when used can affect the structure or any organic functioning of the body.
- d. Any article that can be used as a component of such medicine, substance, or article.

Drug advertising has become a big business for companies to earn profits. The primary goal of such companies is not to help the consumers but to sell their products. The manufacturer of these drugs tries to create confusion and play with the minds of the consumer. They do not aim to fulfill the needs of the consumer but only try to cater to their wants and fancies, targeting the emotions of the consumer. Recently, 257 complaints against misleading advertisements in June and July were upheld by the Consumer Complaints Council (CCC) of the Advertising Standards Council of India (ASCI). These drugs claiming exaggerated benefits may pose a serious threat to the health and life of the consumer. Therefore, it’s high time that such advertisements are checked, and the advertisers are subjected to stricter punishments.

EXISTING LEGAL FRAMEWORK RELATING TO ADVERTISEMENT OF DRUGS

The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954

The Act aims at controlling and prohibiting of advertisement of certain drugs and remedies that claim to possess magic qualities to cure a disease or ailment. The act is devoted to putting checks and balances on the advertisement of drugs.

The term “magic remedy” has been defined under the Act to include “a talisman, mantra, kavacha and any other charm of any kind which is alleged to possess miraculous powers for or

⁵ *Ibid*

⁶ Remedies Act (n 4), s 2(b)

in the diagnosis, cure, mitigation, treatment or prevention of any disease in human beings or animals or for affecting or influencing in any way the structure or any organic function of the body of human beings or animals”⁷

Section 3 of the act prohibits the participation of a person in the publication of any advertisement that reflects the use of a particular drug for the cure, diagnosis, mitigation, or treatment of a disease or disorder given under the schedule or the rules under the act. The act stringently opposes the publication of any drug advertisement wherein⁸-

- Such drugs may lead to procurement of miscarriage in women.
- Such drugs may lead to the prevention of conception in women.
- Such drug is used for maintaining or improving sexual pleasure in human beings.
- The drug is used for curing menstrual disorders in women.
- Any drug utilized for curing, prevention, diagnosis, mitigation, or treatment of any disease or disorder enumerated in the schedule of the act. The schedule provides for a wide list of diseases or conditions including obesity, diabetes, female disorders, forms and structure female bust, blood pressure, impotence, disorders relating to nervous system cancer, rheumatism, epilepsy, heart diseases, venereal disorders such as soft chancre, venereal granuloma, and lympho granuloma.

Further, section 4 of the act also prohibits advertisement which directly or indirectly highlights false impression relating to the true character of a particular drug or remedy or makes any false claim regarding the same. The prohibition contemplated in the act extends to the advertisement of magic remedies providing either direct or indirect claims of curing a disease or disorder. The penalty for violation of the provisions attracts six months of imprisonment with or without a fine. Also, if the violation or offence continues, the said offender is liable for imprisonment up to one year with or without a fine. Also, Section 5 of the act prohibits a person from administering magic remedies and engaging in the publication of certain drugs enumerated under section 3. While discussing the objective of the said act the Supreme Court

⁷ Remedies Act (n 4), s 2(c)

⁸ Remedies Act (n 4), s 3

in the case of **Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Another V. Union of India & Others**⁹, observed that "The object of the Act is the prevention of self-medication and self-treatment and a curb on such advertisements is a means to achieve that end."¹⁰

The Drugs and Magic Remedies Objectionable Advertisement Rules, 1955

Rule 3 provides for the scrutiny of deceptive advertisements relating to drugs. If the drugs are found to be misleading, the person authorized by the State Government on this behalf can direct the manufacturer, distributor, packer, or seller to provide the composition of the said drug for scrutiny. Further, rule 6 states that no person shall be allowed to participate in the promotion and publication of drugs used for cure, diagnosis, mitigation, or treatment of any disorder or disease enumerated under the schedule of the rules.

The Drug and Cosmetic Act¹¹, 1940

The Drugs and Cosmetic Rules, 1945 formulated under the said act provides for certain diseases as mentioned under schedule J which a drug may not purport or claim to prevent and cure. It further provides that no drug may claim, purport, prevent or assist to procure miscarriage in women. Other diseases and conditions as set out in Schedule J include genetic diseases, diabetes, AIDS, obesity, cataract, improvement in vision, etc.

Also, the sale, manufacture, or distribution of any drug which purports or claims to prevent, mitigate or cure any disease or ailment is verboten under section 18(a) (iv)¹² of the Drugs and Cosmetic Act, 1940.

The Cable Television Network Act¹³ and Rules¹⁴

The code for advertising has been set out under the Cable Television Network Regulation Act, 1955, and the Cable Television Network Rules which are required to be adhered to by all cable

⁹ *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Anr v Union of India & Ors* AIR 1960 SC 554

¹⁰ *Ibid* 6

¹¹ Drug and Cosmetic Act 1940

¹² *Ibid* s 18(a)(iv)

¹³ Cable Television Network Regulation Act 1955

¹⁴ Cable Television Network Rules 1994, GSR 729(E)

television networks. The advertisement code stipulated under section 6, Chapter II of the Cable Television Networks (Regulation) Act prohibits a person to transmit or re-transmit any advertisement through a cable network if such advertisement is not in conformity with the prescribed code. The violation of the said provision attracts seizure of operating equipment carrying out the advertisement. Also, the first offence attracts imprisonment which may extend to two years or a fine amounting to Rs. 2000 or both. Further, a subsequent offence carries imprisonment extending to five years or a fine of Rs. 5000 or both. The act also empowers the Central Government to take measures for contravention of the advertisement code prescribed under it.

Also, rule 7 of the Cable Television Network Rules, 1994 envisages that the advertisement of the said product or service must be fair, free from all defects and deficiencies, and must adhere to the laws of the land. Also, at the same time, the advertisement must not be such that it leads the public to deduce that the product or its ingredients possess some magical, special, or supernatural properties capable of benefitting the buyer. The said rules were amended in 2006 which provides that no advertisement for public exhibition through a cable service shall be carried out in violation of the code for self-regulation prescribed by the Advertising Standards Council of India (ASCI).

The Competition Act

False advertisements and deceptive marketing practices were undertaken to promote the use or supply of products and services are also dealt with under the Competition Act, 2002. The act deals with all types of representations made to deceive people. Where a representation induces a person to buy or use a particular product or service, it will not be acceptable. There are two regimes mentioned under the act to deal with false and deceptive marketing practices. Section 53¹⁵ of the act imposes a penalty exceeding up to Rs. 10 Lakhs for a person who publishes or is a party to such publication that misleads consumers in terms of quality, quantity, the composition of a product.

¹⁵ Competition Act 2002, s 53

REGULATORY BODIES GOVERNING DRUGS IN INDIA

The Advertising Standards Council of India (Asci): The Self-Regulation Mechanism

ASCI is a self-regulatory, voluntary, non-profit organization established in 1985, operating under the advertisement industry. The organization is committed to shielding consumer interests to ensure, maintain, and enhancing public confidence in the advertisement. The ASCI sets forth the code for self-regulation for all companies, industries, and individuals indulging in advertisement with the purported view of protecting the ultimate interests of the consumers and promoting fair advertisement practices.

In order to carry off its very objective of nurturing fair advertisement policy and safeguarding consumer interest, ASCI sprang up with a “Code for Self-Regulation in Advertising” which is a regulatory mechanism indulged in analyzing and controlling the content of the advertisement. The mechanism ensures that the content is not offensive and illegal and is not directed to mislead the consumer of its true character. The basic guidelines issued by ASCI are¹⁶-

- Promotion of fair advertisements by ensuring honest and truthful representations and claims, thereby protecting consumers from misleading advertisements.
- Advertisements must adhere to the generally accepted standards of public decency.
- Prohibition of indiscriminate use of advertisement for the promotion of such products which are harmful or hazardous to individuals and society.
- Ensuring that the advertisement is carried out while observing fairness in competition so that the canons of generally accepted competitive behavior and the need of the consumer to be informed of his choices are accomplished.

National Advertising Monitoring System (NAMS)

¹⁶ Hemant Goyal & Jitender Jain, ‘Advertising Law In India - Part 1’ (*Mondaq*, 17 August 2012) <<https://www.mondaq.com/india/advertising-marketing-branding/192384/advertising-law-in-india--part-1>> accessed 04 June 2021

NAMS is a mechanism instituted by ASCI in partnership with TAM Media Research to carry out the tracking of misleading advertisements both in print and electronic media. NAMS was established in 2012 to identify and analyze advertisements that are in potential violation of the ASCI Code. The mechanism extends to advertisements by a wide range of sectors including Banking, Finance, Auto, Educational Institutions, Health Care and Services, Insurance, FMCG, Telecom, and Real Estate. The scope of work will cover the tracking of more than 30 newspapers (all editions) which contribute to over 80 percent of national newspaper readership and all TV channels in all Indian languages.¹⁷

The Consumer Complaints Council (CCC)

The CCC is the complaint redressal wing of the ASCI which receives and considers complaints filed by the general public including consumer groups, government officials, and also suo moto complaints from the members of ASCI or CCC against the advertiser who contradicts the provision of the ASCI Code. considers and decides on the complaints received from the general public including government officials, consumer groups, complaints from one advertiser against another, and even suo moto complaints from the member of the ASCI Board or CCC. The council considers the complaints received by the customers and industries against false, misleading, illegal, indecent advertisements which eventually result in deceptive practices causing the violation of the Self-regulation code set up by ASCI.

However, the code of ASCI is self-imposing and not mandatory. There is no obligation on companies, industries, or individuals to adhere to the provisions of the code and therefore the code lacks a mechanism for the enforcement of its orders and directions thereby adversely affecting the consumers. Since the provisions of the code are merely recommendatory in nature, there is the fewer filing of complaints and the compliance is also low. This issue needs to be addressed.

Uniform Code of Pharmaceuticals Marketing Practices (“UCPMP Code”)¹⁸

¹⁷ *Ibid* 9

¹⁸ Uniform Code of Pharmaceuticals Marketing Practices 2014

The Uniform Code of Pharmaceuticals Marketing Practices is another voluntary and self-regulatory code issued by the Department of Pharmaceuticals in 2014. The code was established to regulate the marketing practices adopted by the Indian Pharmaceutical companies and also the medical devices industry. The main purpose behind the code is to curb unethical practices in the marketing of pharmaceuticals.

UCPMP guidelines in relation to drug promotion include-

- The promotion of the drug must not be conducted unless marketing approval authorizing its sale or supply has been received from the competent authority.
- The promotion must adhere to the terms of the marketing approval.
- The information relating to drugs must be up to date, verifiable, and must correctly reflect current knowledge and opinion.
- Such information must be fair, accurate, balanced and shall not either directly or by implication capable of misleading.
- The claims reflecting the usefulness of the said drug must be accurate and up to date based on all evidence.

The Medical Council of India

Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations¹⁹, 2002, formulated under the Indian Medical Council Act also regulates the advertisements of drugs. Chapter 6 of the said regulation prohibits a physician from aiding, abetting, or committing unethical acts. The code states that the act of soliciting patients by a physician, group of physicians, or institution/organization either directly or indirectly is “unethical” and therefore, prohibited. Use of name by a physician as or in form of an advertisement to seek attention to his skill, achievements, specialties, associations are also prohibited under the code.

The regulation further proscribes a physician from providing any approval, recommendation, endorsement, certificate, report or statement with respect of any drug, medicine, nostrum

¹⁹ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, pt III, s 4

remedy, surgical, or therapeutic article, apparatus or appliance or any commercial product or article with respect of any property, quality or use thereof or any test, demonstration or trial thereof, for use in connection with his name, signature, or photograph in any form or manner of advertising through any mode nor shall he boast of cases, operations, cures or remedies or permit the publication of report thereof through any mode.²⁰

Press Council of India

Norms of journalistic conduct²¹ formulated by the Press Council of India enunciates the compulsions and compunctions in journalistic practices. It lays down a code of conduct that acts as a guide to the journalist along the path of ethical rectitude. The council plays a vital role in maintaining public trust and confidence in media and ensuring adherence to professional ethics, accuracy, and fairness. The code is self-regulation that promotes accuracy and fairness by providing that the press must eschew publication of baseless, inaccurate, graceless, misleading, and distorted content or material.

The norms further restrict the advertisement and promotion of debunking myths relating to the prevention and transmission of HIV or those claiming to prevent it. Traditional cures backed by no scientific verification shall not be promoted. The said norms clearly state that advertisements of drugs claiming to cure HIV, STIs, tuberculosis, skin diseases, or other opportunistic diseases are false and misleading and therefore such advertisements must be checked and avoided.

FALSE AND DECEPTIVE DRUG CLAIMS: IMPACT ON CONSUMERS

Advertisements leave a great impact on consumers. Advertisements are meant to create awareness in public and educate them about the needs, uses, and benefits of the product. However, in the current scenario, manufacturers and traders in order to enhance profits have been continuously engaged in unethical advertisements making unrealistic and false claims about their products. False or misleading advertisements adversely affect consumer behavior

²⁰ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, pt III, s 4

²¹ 'Norms of journalistic conduct' (*Press Council of India*, 2010) <<http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf>> accessed 06 June 2021

and significantly influence their choice of a particular product. The undeniable impact of advertisement on consumer behavior and choices, make it even more important that such advertisements be made ethically and do not intend to mislead people.

Misleading Advertisements Violates the Following Rights of the Consumer -

- **Consumer's Right to Information**

The Consumer Protection Act provides the customer the right to be informed about the quality, quantity, purity, standard, potency, price, and standard of the product. In order to make an informed choice, it is essential that the said consumer be given complete true information about a product or service. Using false paid testimonials quoting untrue uses and exaggerated benefits of a particular drug in order to convince buyers violates consumer's right to be correctly informed. At the same time, providing false information about drugs and medicines also comes under this category. Manufacturers claiming drugs for effective weight loss in small duration, dietary supplements or vitamins, anti-aging creams, curing of HIV & AIDS are generally involved in misleading advertisements.

- **Consumers' Right to Choice**

Non-disclosure of material fact which may influence the decision of the buyer makes the advertisement deceptive and misleading. To be able to choose among a range of products and services, it is important that the consumers are provided with an adequate and true description of products backed by proper evidence and research. Magic remedies or miracle cures lack the support of science and research and therefore misleading. These drugs claiming unrealistic benefits are advertised to attract consumer attention and to trap them. The manufacturers of these drugs generally deceive people by concealing relevant information. For example, advertisement of over-the-counter drugs generally does not mention the side effect of its frequent and regular use.

- **Consumer's Right to Safety**

Drugs of questionable efficacy may lead to severe repercussions on the health and safety of the customer. Therefore, greater responsibility on part of the advertiser is expected. Consumers have the right to be protected against dangerous product and services which are hazardous to their life or health. These classes of medicines exploit the vulnerability of consumers suffering from serious diseases or disorders or those who are the victim of an inferiority complex regarding their appearance and physical structure. Tempted by an advertisement, claiming to increase a person's height, Nadiya, for increasing her height. The surgery was conducted, and a ring fixator was fixed on the legs which had to be adjusted every six hours. To her dismay, Nadiya found her left leg shorter by ½ inches, and therefore she could not walk. The Commission held the hospital and the doctors negligent and deficient in their service and directed them to pay Rs 5,00,000 with costs amounting to Rs 2,000 to the complainant.²²

In the case of **Ajay Gautam v. Amritsar Eye Clinic and 6/6 Lasik Laser Centre, Dehradun & others National Consumer Disputes Redressal Commission (NCDRC)**,²³ a doctor was held liable for advertising his services and promoting his laser treatment claiming it to cure correct visual acuity. The commission deciding the case found the doctor and the hospital guilty of adopting unfair trade practices and indulging in misleading advertisements.

Recent Instances of Misleading Drug Advertisements

1. The very famous company **Lotus Herbals Ltd** was held liable for promoting its product **Lotus Herbals Youth RX** which claimed to provide ten times more geneplex youth compounds that can reverse aging and make one look younger. Complaints against the company were filed to ASCI. The company also had Shilpa Shetty endorse their product.
2. **Suraksha Pharma** is another example. The company advertised its product "**Kanthari plus Capsules**" which claimed to treat diseases like cholesterol, heart block, diabetes, obesity, eyesight, Alzheimer's, and also kidney failures. ASCI banned these

²² Deepak Saxena & Amarjeet Singh, 'Study on the Status of Law Enforcement for Misleading Advertisements in India and its Impact on Consumers' [2012] CUTS INT

²³ *Ajay Gautam v Amritsar Eye Clinic and 6/6 Lasik Laser Centre, Dehradun & others National Consumer Disputes Redressal Commission (NCDRC) First Appeal No 428 of 2004*

advertisements stating that reckless claims made in it are inducing consumers to use the product without the prescription of the doctor.

3. **Patanjali** Medicines sold on the website Fineyog.com claimed to treat sexual problems in men. The site also sold various products for sex boosters, sexual strengths, treatment of infertility in women, etc. Baba Ramdev's product '**Divya Yauvanamrit Vati**' for impotence in men was also found to be promoted. The advertisement and promotion of all such medicines violate the Drugs and Magic Remedies Act and the guidelines given by ASCI.
4. Advertisement to cure slipped disc, migraine, height deficiency was given by the company **ACU-AID**. ASCI ruled the advertisement vague and questioned its efficacy. The advertisement was ultimately banned as it violated the Drugs and Magic Remedies Act.
5. There was a news flash regarding **Ayush Ayurveda** products treating **Covid-19**. The Ministry of Ayush wrote to all states and the Advertising Standards Council of India (ASCI) to take action against misleading ads and promotions about ayurvedic treatment to prevent and cure Covid-19.²⁴

THE CONSUMER PROTECTION ACT: A RELIEF TO CONSUMERS?

The Consumer Protection Act, 2019 provides the customer the right to seek redress against the false and misleading advertisement and provides for claiming compensation for the loss that occurred to them as a result of such advertisements. Such deceptive and false advertisements are referred to as "unfair trade practices". The new Act of 2019 has widened the scope of unfair trade practices to also include all kinds of representation, claims made under online electronic media, audio and visual publicity on the internet and websites, etc. Replacing the decade-old act of 1986, the new act provides for a more effective mechanism for resolving consumer grievances including those caused by misleading claims.

²⁴ Sharanya Ranga & Nidhi Tandon, 'Misleading Advertisements during Covid-19' (*Advayalegal*, 15 June 2020) <<https://www.advayalegal.com/blog/misleading-advertisements-during-covid-19/>> accessed 08 June 2021

Section 2(47) of the Consumer Protection Act, 2019 defines “unfair trade practices” as trade practices that are adopted for promoting the sale, use, or supply of a particular good or service by means of unfair or deceptive methods. Among the various unfair trade practices enumerated under the said section, one of the practices involves making the false or misleading representation, claim in respect of the need or usefulness of a product or service.²⁵

The Act also defines “misleading advertisement” under section 2(28). An advertisement is misleading if²⁶-

1. It gives a false description of a product or service.
2. Provides false guarantee about the product and such false guarantee can mislead the consumers in respect of the nature, quality, and substance, quantity of the said product or service.
3. It conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or
4. Deliberate concealment of important information regarding the product or service.

Centre Consumer Protection Authority (CCPA)

The new act empowers the Centre Consumer Protection Authority (CCPA) to issue directions/orders and impose liabilities upon those indulging in misleading advertisements by making false and unrealistic claims. CCPA has been authorized to act as a regulator and protector of the rights of consumers and dealing with to inquire, investigate and take stringent actions on violation of the provisions of the act. The Act confers three major powers with the Central Authority under section 21 to regulate misleading and false advertisements-

1. Order for discontinuation or modification of advertisement-

When CCPA, after the investigation is satisfied that a particular advertisement is misleading or false, it may direct or issue an order to the trader, manufacturer, or advertiser for discontinuation or modification of such advertisement.²⁷

²⁵ Protection Act (n 2), s 2(47)(f)

²⁶ Protection Act (n 2), s 2(28)

2. Imposition of penalty-

The CCPA can take actions against the advertiser as well as against the endorsement of such advertisement and can impose penalties. CCPA is authorized to impose a penalty upon the manufacturer or endorser for the false and misleading advertisement of up to Rs. 10 Lakhs in case of first violation and up to Rs. 50 Lakhs for every subsequent violation.²⁸ Also, the authority is empowered to grant imprisonment for up to 2 years in such cases. In case of subsequent violation, imprisonment may extend up to 5 years. Therefore, misleading endorsement by celebrities attracts penalties provided that there is a failure of observance of due diligence on part of such celebrities. These celebrities are deployed to make unrealistic claims regarding a particular product. Hence, in order to refute liability, the endorser must take onus and exercise due diligence, and ensure that the claims made in the advertisement are true.

3. Prohibition on an endorsement -

Under the said Act, the CCPA can initiate suo moto proceedings against the person violating the provisions. The CCPA can prohibit the endorser involved in the misleading advertisement from endorsing any product or service for a period of up to one year. This period of one year may extend up to three years in case of subsequent contravention.²⁹ CCPA can also issue directions to recall products and discontinue services and demand refunds to consumers. Another effective tool for curbing the violation of consumer rights is taking of class action by CCPA on behalf of multiple consumers to address their grievances.

Recently, amidst the outbreak of the novel coronavirus, several industries have used the exponential fear of virus among the public to promote vaccines and medicines that falsely claim to cure the said virus. Leading companies like Facebook and Amazon have delisted various products claiming to cure the virus.³⁰ The promotion of false claims relating to

²⁷ Protection Act (n 2), s 21(1)

²⁸ Protection Act (n 2), s 21(2)

²⁹ Protection Act (n 2), s 21(3)

³⁰ Rupin Chopra, 'Rise In False And Misleading Advertisements Amidst Coronavirus Outbreak' (*Mondaq*, 13 May 2012)

medicines must be checked and it must be ensured that no such claim shall be made unless backed by scientific evidence or proper R&D.

JUDICIAL PRONOUNCEMENTS OVER THE YEARS

In the landmark case of **Hamdard Dawakhana v. Union of India**,³¹ the constitutional validity of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 was challenged on the ground of violation of right given under art. 14, right to freedom of speech under art. 19(1) (a)³² and right to carry on trade and commerce under art. 19(1) (f)³³ & (g)³⁴. The court while deciding the present case gave the following observations-

1. To analyze whether an act violates fundamental rights, it is necessary to examine the true nature and character of the act. For this purpose, all factors including the history, objective, purpose, surrounding circumstances have to be taken into consideration.
2. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.³⁵

Analyzing the history of the enactment, the court observed that the object of the act is to prevent self-medication and self-treatment to ensure the safety of the public and not merely to curb advertisements that offend against decency and morality. Therefore, keeping in view the purpose of the act, the court held that the restrictions imposed by it reasonable and in the interest of the general public. The court further stated that advertisements do not form part of freedom of speech but come under commercial speech.

In the case of **K.S. Saini and Anr. v. Union of India (UOI)**,³⁶ the publication of two pamphlets was contended to be against section 3(b) and (d) of the DMR Act on the ground

<<https://www.mondaq.com/india/advertising-marketing-branding/932574/rise-in-false-and-misleading-advertisements-amidst-coronavirus-outbreak>>accessed 09 June 2021

³¹ Remedies Act (n 4)

³² Constitution of India, art 19(1)(a)

³³ Constitution of India, art 19(1)(f)

³⁴ Constitution of India, art 19(1)(g)

³⁵ *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* 1958 AIR 538

that the said publication suggested the use of drugs for the “maintenance or improvement of the capacity of human beings for sexual pleasure”. The court observed that there is no mention of word “drug” in the said advertisement neither it can be inferred from the plain reading of the pamphlet that it intends to use the drug in the treatment. The advertisement stating “for those men who always feel restless and have lost vigor due to use of narcotics or by ill-practices during their young days or for those who feel pain in calves or back or experience darkness insight due to weakness of the brain, this general tonic for men has been prepared in Santan Research Laboratory from 75 herbs collected from the Himalayas and other fields in India by Ayurvedic System and scientific methods.” does not implies suggestion for use of drugs for maintenance or improvement of the capacity of human beings for sexual pleasure.

In **Zaffar Mohammad Z.M. Sarkar v. The State of West Bengal**,³⁷ the appellant advertised a drug claiming to cure certain diseases using “new methods, new machines of science and electric treatment”. The court, in this case, observed that the terms “machines of science” used in the advertisement imply a substance used in diagnosis, cure, or treatment of disease as stated under section 2(b)(ii) of the Drugs and Magic Remedies Act. The said advertisement was intended to trap the ignorant and the unwary and therefore misleading.

The Delhi High Court in the case of **H.T Media Ltd. & Ors. Petitioners v. State**³⁸ asserted that the said advertisement does not advertise any drug. The advertisement provided instant relief from diseases like sugar and high blood pressure by the use of ayurvedic medicine. The advertisement does not disclose the name of the drug but instead advises to consult Dr. Bengali. Based on the same, the court held that the advertisement does not intend to use any drug for diagnosis, cure, or treatment of a particular disease or disorder.

In another case of **K.C.Abraham v. The State of Kerala Peethaambaran Kunnathoor, Chennai**,³⁹ the advertisement of ‘Musli Power Xtra’, a herbal aphrodisiac manufactured by

³⁶ *KS Saini & Anr v Union of India* AIR 1967 P&H 322

³⁷ *Zaffar Mohammad ZM Sarkar v State of West Bengal* 1976 AIR 171

³⁸ *HT Media Ltd & Ors v State* CLR MC 3060/2010

³⁹ *KC Abraham v State of Kerala Peethaambaran Kunnathoor, Chennai* WP (C) No 11410 of 2011

the company Kunnath Pharmaceuticals in Kerala was held in violation of section 7 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 on the ground that the said advertisement is inducing citizen for self-medication. The credibility and efficacy of the said drug were under question and were contended to have negative effects on the human body. The Proprietor KC Abraham was subjected to the penalty of Rs. 50000 and imprisonment for four months under the act. The judgment also provided for rigorous imprisonment of three months in case of default in payment of the said amount.

The **Nirmal Baba case**⁴⁰ is the epitome in this context. In this case, the petition states that Nirmaljit Singh Nirula, popularly addressed as “Nirmal Baba” has been involved in the advertising of certain drugs in various print media and electronic forms referring to them as “magical treatments” for some diseases. The self-styled baba uses to mislead people into buying his products by claiming himself as the “representative of God”. The petition further stated that Baba used his tactics to convince common people and has earned more than Rs.200 crores within a few years through such advertisements. These advertisements taken up by the Baba violates the provisions of the Drug and Magic Remedies Objectionable Advertisement Act, 1954.

The Maharashtra Medical Council for the first time in the case of **Dr. Anjali Malpani v. The State of Maharashtra and 13 Ors.**,⁴¹ cancelled the registration of doctors over the misleading advertisement. The ASCI filed a complaint against two Colaba doctor couples for advertising their services and claiming guaranteed pregnancy on their website and also ensuring a refund of the amount of the treatment failed. The registration of the doctor couple was ultimately suspended for three months and they were also not allowed to practice elsewhere in this duration.

In **Creative Diagnostic Medicare Pvt. Ltd. v. State of Tamil Nadu**⁴², the label of the drug stated “Allergen extracts for immunotherapy, the choice of treatment in the management of allergic asthma, rhinitis, etc.” was alleged to be in violation of section 3(d) of the Drugs and

⁴⁰ Khare (n 1)

⁴¹ *Dr Anjali Malpani v State of Maharashtra & Ors* WP (L) No 1071 of 2016

⁴² *Creative Diagnostic Medicare Pvt Ltd v State of Tamil Nadu* WP (C) No 2205 of 2020

Magic Remedies Act, 1954 and Rule 6 of Drugs and Magic Remedies Rules, 1955. The court allowed the petition quashing proceedings against the petitioners asserting that the said advertisement only states that the drug is a choice of treatment and not a choice of treatment in curing the given diseases and therefore does not violate the act and rules.

CONCLUSION AND SUGGESTIONS

With the objective to reap profits, misleading advertisements claiming to give unrealistic benefits to the consumers have become a common marketing practice. These claims made by advertising companies are not backed by any scientific evidence or proper research and development. Above this, outdated laws and the ignorant attitude of the consumers further encourage manufacturers and trades to indulge in unfair trade practices. Despite having so many laws concerning the advertisements of false medicines and drugs, consumers are still falling trap by such advertisements. We have already seen that in this era of the pandemic, manufactures are continuously giving false advertisements of drugs and medicines for curing the novel coronavirus. These drugs are dangerous and can pose major health threats to consumers. Hence, it is advisable that the consumers be aware of such traps and make sure that their rights remain protected. Some of the recommendations are as follows-

1. Currently, the Advertising Standards Council of India is a self-regulatory voluntary organization whose recommendations are not binding. Taking into consideration the tremendous potentiality of the ASCI code, and its effectiveness in controlling the advertisement of misleading products, it would be beneficial to include the code in the existing legal enforcement structure relating to advertisements. The same can be in two ways-
 - a. Giving the ASCI code legal recognition by including it in the legal regime governing and controlling advertisements. The code has been made legally applicable under the television advertisement mechanism⁴³ and must be done for the advertisements in relation to other sectors as well.

⁴³ Cable Television Network Rules 1994, Rule 7

b. Providing legal status to the decisions given by ASCI. To avoid misleading advertisements, it is important that the decisions taken by the ASCI become enforceable. This can be done by involving Courts in the implementation of such decisions. This entire procedure though time-consuming would be very effective. The entire constitution of CCC would have to be changed for this purpose.

2. Passing of the Drugs and Magic Remedies Bill, 2020

The current act is decade old act that has been criticized for not having kept pace with the continuously changing time and technology. The draft bill of 2020 proposes to add 24 new diseases to the existing list of 54 diseases under the existing act. The bill also proposes an increased penalty of 2 years and a fine up to Rs. 10 Lakhs in case of first contravention and a penalty of 5 years with a fine up to Rs. 50 Lakhs for subsequent contravention.

3. Legal policies followed in other countries can be adopted. The Canadian Pharmaceutical Advertising Advisory Board approves the advertisement of the drug before it is to be promoted. This board comprises representatives of physicians, consumer groups, medical journalists, advertising boards, and pharmaceuticals. The establishment of a similar board in India would help in preventing deceptive and false drug advertisements.

4. Creating awareness among all stakeholders including advertisers, consumers, endorsers, advertising agencies about how such misleading advertisements can affect the economy and society.

5. Educating the consumers is very important. The consumers must know and understand that not every information available in the advertisement is credible and these are mere tactics adopted by advertisers to trap them.

6. Regulatory bodies must work effectively and efficiently in controlling and checking the telecast of such misleading drug advertisements.