



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Startups in the Health Care Sector and Advertisement Regulation in India

Dr. Pandhare Balasaheb Dashrath^a

^aAssistant Professor, AJMVP'S New Law College, Ahmednagar, India

Received 24 April 2022; Accepted 16 May 2022; Published 21 May 2022

Advertisement is an inevitable strategy for any business entity, in order to market products and services advertisements are the most favoured mode for any business organization. Individuals now a day are resorting to advisement through social media and becoming influences. In a startup environment also it is mandatory to have an advertisement for services provided by the startups. However, at the same time care must be taken while advertising any product or service that it should not violate any provisions of the law. This article discusses the advertisements by healthcare startups and different legislations affecting the advertisement. This article further highlights the lack of uniform statutory sanction to regulate advertisement in India and how the judiciary had taken care of the regulation of advertisement in India.

Keywords: *advertisement, regulation, startups, judicial discourse, legislative framework.*

INTRODUCTION

Indian Prime Minister Narendra Modi during his speech on 15th August 2015 announced a government initiative entitled startup India, to empower startup ventures to enhance

economic growth and employment in India.¹ Advertisement plays an important role in securing a quantum of success in any profit-making industry or business undertaking. To flourish in its activities, every business entity has to advertise its product and services to its potential consumers. Due to the advancement in information technology the means of making advertisements are changed drastically, and many brands take recourse to electronic media instead of print media for advertisement. The comparative impact of Print media and Electronic media in the advertisement sector is highlighted by the Bombay High Court in *Gillette India Ltd. v Reckitt Benckiser (India) Private Ltd.*² by saying that, electronic media has an everlasting strength to influence the mind of the viewers as compared to the readers of print media. Despite all these supportive legislative and judicial frameworks, it is also required that while advertising the product and services through startup certain legal and ethical standards were not adhered to and it results in violations of laws that drag the start-up to the courts. To encourage the eco-system of startups certain concessions were given by the Government in case of corporate legislation, taxation, licensing, and funding requirements.³ However, no relaxations are given from the application of other general laws that apply to normal business entities. In this article, we are going to discuss the startups working in the areas of health care services and advertisement policy to be adhered to by these startups to avoid further legal complications. For any startup working in the health sector, it is inevitable to adhere to the laws and regulations mentioned below while advertising its product and services.

LAW RELATING TO FREEDOM OF SPEECH AND EXPRESSION

The law-making in the real spirit and sense developed in India after the commencement of the Constitution of India, laying down detailed procedures subject matter, and powers by creating a legislature. Therefore constitution of India is the first law in India to regulate almost all

¹ Isha Sahai Bhatnagar, 'PM Modi to interact with over 150 startups on January 15' (*Hindustan Times*, 14 January 2022) <<https://www.hindustantimes.com/india-news/pm-modi-to-interact-with-over-150-startups-on-january-15-101642167728564.html>> accessed 15 April 2022

² *Gillette India Ltd. v Reckitt Benckiser (India) Private Ltd.*, (2017) C.S. No. 768/2017

³ Anu Thomas, 'Startup India: Policies abound but limited impact on ground' (*The Economic Times*, 8 March 2017) <<https://economictimes.indiatimes.com/small-biz/policy-trends/startup-india-lots-of-policies-and-not-much-evidence-its-helpful/articleshow/57529755.cms?from=mdr>> accessed on 12 April 2022

aspects, including advertisement. Every citizen of India is having a right to freedom of speech and expression as a fundamental right, however, this right or freedom is given to strengthen democracy in India, therefore earlier the approach of the court was only to protect that speech and expression which are non-commercial⁴. But, in the year the aspect court in *Indian Express Newspaper v Union of India*⁵ declared that even commercial speeches and expression are under the protective umbrella of Article 19(1) (a)⁶. This Judgment in a real sense opened the floodgates for the advertisement sector in India. Therefore, today one can advertise its business in a manner and a model as they wish. However, this right is not absolute as the government is empowered to impose reasonable restrictions on this freedom by making laws or through already existing laws on several grounds. Including, independence of the country, defence, sovereignty, cordial relations with the other nations, law, and order, morality, decency, instigation of a crime, contempt of judicial authorities, etc. The highest court of the country once highlighted the importance of advertisement in the matter involving the use of yellow pages in a telephone directory by saying that, commercial speech is also entitled to protection as a part of freedom of speech and expression under Article 19(1) (a) and therefore also liable to be curtailed by taking recourse to grounds mentioned under Article 19(2).⁷ To implement these restrictions advertisements for different products are banned or regulated under certain conditions. Such laws and advertisements of such products banned by such laws are discussed hereunder

INDIAN MEDICAL COUNCIL ACT, 1956

This Act is enacted to provide for the establishment of the medical council of India to regulate the standard of medical education in India and also to provide for the registration of doctors and the standard of professional conduct of medical practitioners. to regulate this professional conduct medical council is had issued a regulation called as Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.⁸ As per the provision of this

⁴ *Romesh Thappar v State of Madras* (1950), AIR 124

⁵ *Indian Express Newspaper v Union of India* (1985), AIR 515

⁶ Constitution of India, 1950, art. 19(1) (a)

⁷ *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and others* (1995), AIR 2438

⁸ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, s 4

regulation, Physicians are not allowed to advertise their services in any form or manner of advertising by using any form, such as soliciting patients directly or indirectly, by a medical professional, by a group of medical professionals, or by institutions or organizations is contrary to medical ethics.

THE CIGARETTES AND OTHER TOBACCO PRODUCTS (PROHIBITION OF ADVERTISEMENT AND REGULATION OF TRADE AND COMMERCE, PRODUCTION, SUPPLY, AND DISTRIBUTION) ACT, 2003

Advertisement of tobacco products is prohibited directly or indirectly through majority forms of mass media. This legislation also imposes restrictions on sponsorship and publicity of such sponsorship⁹. In *Mahesh Bhatt v Union of India*,¹⁰ Delhi High Court declared rules framed under this act as unconstitutional on the ground that they violated freedom of speech and expression. The rules in question inter alia ban the scenes in movies or on television wherein activity of smoking is telecasted. Therefore any Startup while disseminating any kind of information under its banner must ensure that they are not promoting tobacco products directly or indirectly through its portals.

THE TRANSPLANTATION OF HUMAN ORGANS ACT, 1994

The primary object of this law is to regulate the removal; storage and transplantation of human body organs for therapeutic purposes and to prevent commercial dealings in human organs. This Act provides for elaborate provisions relating to the authority for removal and preservation of human organs and regulations of hospitals engaged in the removal storage or transplantation of human organs.¹¹ From the perspective of a startup working in healthcare services, it is important to note that this law also prohibits any kind of advertising inviting persons to supply, offering to supply, any human organ for payment.

⁹ Cigarette and other tobacco products (Prohibition of Advertisement and regulation of trade and commerce production supply and distribution) Act 2003, s 5

¹⁰ *Mahesh Bhatt v Union of India* (2009) Writ Petition (Civil) No. 18761/2005

¹¹ Manisha Sahay, 'Transplantation of Human Organs and tissues Act-"Simplified"' (2018) 12 (2) Indian Journal of Transplantation, 84-89 <https://www.ijtonline.in/temp/IndianJTransplant12284-6040671_164646.pdf> accessed 10 April 2022

THE DRUGS AND MAGICAL REMEDIES (OBJECTIONABLE ADVERTISEMENTS) ACT, 1954

The object of this Act is to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities, and to provide for matters connected therewith. In *Hamdard Dawa khana v Union of India*¹² Drugs and magic remedies (objectionable advertisement) Act, 1954 was challenged on the ground that restriction on advertisements was a direct abridgment of the freedom of expression. The court ruled that the predominant object of the Act was not merely to curb advertisements offending against decency or morality, but also to prevent self-medication by prohibiting instruments, which might be used to advocate or spread the evil. The court stated that an advertisement promoting drugs and commodities, the sale of which is not in the public interest, could not be regarded as propagating only an idea and, as such, could not claim the protection of Article-19 (1)(a)

INFANTS MILK SUBSTITUTES, FEEDING BOTTLES, AND INFANT FOOD (REGULATION OF PRODUCTION SUPPLY AND DISTRIBUTION) ACT, 1992

Parliament passed this Act to provide breastfeeding and to regulate the production supply and distribution of infant milk substitutes. The Act is a step forward toward the nation's agenda to reduce the rate of child mortality. Breastfeeding is the process of nature that provides ideal nutrition for a healthy infant and increases the baby's immunity against infection. This source is a valuable source found in nature itself but unfortunately overlooked by the people. Artificial feeding deprives the babies of the natural immune and special antibodies contained in their mother's milk as well as the psychological and emotional bond that breastfeeding created. This Act prohibits the promotion of infant foods, infant's milk substitutes, and feeding bottles advertisement of all commercial milk formulae and feeding bottles.¹³

DRUGS & COSMETICS ACT, 1940

¹² *Hamadard Dawakhana v Union of India* (1960), AIR 554

¹³ Bibha Tripathi, 'Infants Right to Health some reflections' (2008) 114 CRLJ 19

This Act protects injurious drugs with the onward march of science and complexities of living processes, and hitherto unknown diseases are notified. New and emerging diseases, combined with the rapid spread of pathogens resistant to antibiotics and disease-carrying insects resistant to insecticides, are daunting challenges to human health. The gap between the ability of microbes to mutate into drug-resistant strains and man's ability to counter them is widening fast. To meet the new challenges new drugs have to be found. The Central Government is empowered to prohibit in the public interest, manufacture, sale, or distribution of any drug which is likely to involve any risk to human beings or animals or if does not have the therapeutic value claimed by the *Organization of pharmaceuticals producers of India v Union of India*,¹⁴ In this case, it was stated by the Supreme Court that there could be no fundamental right to manufacture such drugs and formulations, which are injurious to human health. In *Vincent Panikur Langara v Union of India*¹⁵ directions were sought from the Supreme Court for banning the import, manufacture, sale, and distribution of the drugs, which were recommended for banning by the Drugs Consultative Committee, and for cancellation of all the licenses authorizing such drugs.

THE FOOD SAFETY AND STANDARDS ACT, 2006

This Act was enacted by repealing the previous Prevention of Food Adulteration Act, 1955, as it was found to be inadequate by the parliament of India to prevent the adulteration of a food item. The present legislation consolidated all laws relating to food and established an independent authority called as Food Safety and Standards Authority of India.¹⁶ This authority is entrusted to prepare standards having a scientific base for food products and activities related to it including preventing an advertisement of food items offered for sale in the market and found to be adulterated by using such kind of ingredients which are hazardous to the health and hygiene of human being.¹⁷ Further, this act also confers powers upon the central government to frame regulations to make effective implementation of this Act.¹⁸ While using

¹⁴ *Organization of Pharmaceuticals Producers of India v Union of India* (1987), AIR 1414

¹⁵ *Vincent Panikur Langara v Union of India* (1997), AIR 990

¹⁶ Food Safety and Standards Act, 2006, s 4

¹⁷ Food Safety and Standards Act, 2006, ss 16, 24, and 53

¹⁸ Food Safety and Standards Act, 2006, s 92

the power the central Government framed Food Safety and Standards (Advertising and Claims) Regulation 2018.¹⁹ This regulation defines the concept of advertisement by covering almost all aspects through which any communication can be disseminated to the public relating to any product or service. It covers both video and audio means of communication as well as conventional modes such as newspapers, magazines, pamphlets, etc. This regulation is important for those health startups who were dealing with nutritional services like offering diet plans etc. as we come across several claims made by nutrition experts by preparing diet plans and advertisement of such diet plans. These regulations impose an obligation to observe certain general principles while advertising any article of food and also the information claimed on labels attached to the food products.²⁰ These general principles inter alia provide for truthfulness, and unambiguity, must not be misleading, and should be helpful to the consumers. In the case of nutritional and health attributes claimed in a product, it must be scientifically substantiated by the valid methods which form the basis of such product. Advertisement must not discourage in any way the already established healthy lifestyles. No deceptive practice inculcating advertisement among consumers is permitted under these regulations.

CONSUMER PROTECTION ACT, 2019

This act is enacted to confer certain rights on consumers and to provide a speedy remedy in case of violations of such rights by taking recourse to separately established forums as compared to civil courts. In the context of the present article, this act protects the rights of consumers which is available to them against the marketability of such goods and services which are hazardous to the property and life of consumers. It also relates to the information right relating to price, quality, standard, purity, and quantity of goods and services. Now health startups are dealing with the patient and doctors as well. Patients are consumers, and this act applies to the medical profession in India governing doctor-patient relationships.²¹ Therefore while advertising any claim relating to products or services by the

¹⁹ Food Safety and Standards Act, 2006, s 3(1) (h)

²⁰ Food Safety and Standards Act, 2006, s 18

²¹ *Indian Medical Association v V.P. Shanta* (1996), AIR 550

health care startups they must have to comply with this legislation also. This act protects the patients from any false or misleading claim made by a doctor or a hospital through an advertisement. This act defines misleading advertisement as any claim which gives a false guarantee about the nature, quality, quantity, or substance of any product and service or intentionally hides any information.²² This Act, establishes, The Central Consumer Protection authority known as the central authority to regulate matters relating to violation of consumers' rights because of misleading advertisements.²³ District Magistrate was also empowered to receive complaints and investigate or inquire against any complaint made to it or referred by central authority relating to misleading advertisement.²⁴ Central Authority is also empowered to issue directions and impose penalties against false or misleading advertisements. It includes inter alia discontinuing or suggesting modification in such advertisement, imposing a penalty up to 10 lakh, prohibiting such advertisement for one year, to impose a penalty on the publisher of advertisement up to 10 lakh.²⁵ This act also makes provision of punishment up to two years or a fine of up to ten lakh in case of misleading advertisement.²⁶

Misleading advertisement does not bar comparative advertisement, as a service provider is allowed to say that his services are the best and better than the services offered by his business rival or competitor, while doing so he is not under obligation to establish the betterment of his services or product with scientific precision, he can also compare the advantages and disadvantages with other, but he must not disparage or defame the product of others.²⁷ In this context, *Horlicks Limited & Anr v Zydus Wellness Products Limited*²⁸ Delhi High Court Justice Justice Mukta Gupta on 14 May 2020 granted an injunction in favor of Horlicks and prevented Zydus from telecasting the advertisement of their product named Complian which was found to be misleading and disparaging the product of Horlicks.

²² Consumer Protection Act, 2019, s 2(28)

²³ Consumer Protection Act, 2019, s 10(1)

²⁴ Consumer Protection Act, 2019, s 16

²⁵ Consumer Protection Act, 2019, s 21(2)

²⁶ Consumer Protection Act, 2019, s 89

²⁷ *Reckitt & Colman of India Ltd. v M.P. Ramchandran* (1988) CS No. 31/1996

²⁸ *Horlicks Limited & Anr. v Zydus Wellness Products Limited* (2020) CS (COMM) No. 464/2019

THE ADVERTISING STANDARDS COUNCIL OF INDIA (ASCI)

The advertisement standards Council of India henceforth referred to as ASCI registered under the Companies Act, 1956 as a nonprofit self-regulatory body in the year 1985. It consists of advertisers, media advertising agencies, and other professionals connected with the advertising practices. It is a voluntary self-regulation council committed to self-regulation of the advertising in India to protect the interest of the consumers.²⁹ It is not a body neither established by the government nor established under a particular statute; therefore it does not formulate any laws or rules for the general public or the concerned industries. It only seeks to ensure that any advertisement conforms to legal, decent. Honest and truthful standards are established by the already existing laws which were discussed above. In another word, it lays down a code for self-regulation in advertising. This code serves the purpose of content controlling in the advertisement if the content of the advertisement is in any way found to be offensive. This code is accepted as binding by the persons dealing with the advertisements and it is prepared by them only, in consultation with the representative of people affected by advertisements. ASCI declares certain fundamental principles to be adhered to by the advertised while advertising, these principles are, Honesty, Decency, Non-harmfulness, and Fair play in a competition.³⁰ It imposes responsibility on all concerned with the advertisement that they shall not violate this code while advertising any advertisement in India even though that advertisement is created abroad. In the context of health care startups, ASCI has a Self-Regulation guideline on Advertising of Food and Beverages (F&B), these guidelines inter alia provide that the advertisers shall not mislead the consumers that the product advertised is directly changing once intelligence, physical ability, health or nutritional claims without the scientific proof or substantial evidence. It must not disparage people from already established standards in dietary practice such as having fresh fruits or vegetables. It shall not encourage any excessive consumption of food or beverages. Should not undermine a healthy lifestyle, the role of parental care and guidance in proper food choices for the children must be respected.it

²⁹ John Sarkar, 'Bollywood Celebs found violating ad norms: ASCI' (*Times of India*, 28 January 2022) <<https://timesofindia.indiatimes.com/business/india-business/jacqueline-fernandez-and-ranveer-singh-among-social-media-influencers-found-violating-advertising-guidelines-asci/articleshow/89165390.cms>> accessed on 18 April 2022

³⁰ *Ibid*

shall not be projected as a meal replacement unless nutritionally designed as such. Claims made on the label or package must be consistent with the product. Any advertisement must not be endorsed by any government agency or professional body there is compliance to that effect by the advertisers.

CONCLUSION

Since the Covid-19 pandemic hit India, teleconsultations and online purchasing of medicines have increased tremendously, therefore healthcare startups in India have been working to establish quality health care services not only in metros but also in rural parts of India. Many startups have adopted their ways and strategies for the advertisements of health services. Therefore ignorance of these legal aspects relating to an advertisement may create hurdles in the development of such startups. Therefore they should have in-depth legal consultations before the advertisement of the product and services offered by them. Further, it can be said that India needs a comprehensive and one umbrella legislation to regulate all kinds of advertisements be it related to health care products or any other products or services.