Int. J. Educ. Stud. 04 (03) 2017. 83-91

Available Online at ESci Journals
International Journal of Educational Studies
http://www.escijournals.net/IJES

REDRESSAL MECHANISM FOR COMPETITORS AGAINST MISLEADING ADVERTISEMENTS

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A B S T R A C T

Advertisements promote products and educate consumers to enable them to draw a comparison between similar products. They are a part of freedom of speech and are protected within the ambit of Article 19. However, such advertisements must have inherent qualities of being truthful and must not be fraudulent. Usually, there is a fine line between a "*misleading advertisement*" and an exaggerated advertisement to overtly sell one's product. In cases where such misleading advertisements are detrimental towards consumers, the redressal mechanisms include a complaint to the ASCI or the Consumer Protection Act comes to his defence. However, with respect to competitors, there is a dearth of such exclusive platform for redressal. The need of a redressal mechanism for competitors is essential because there can be an irreparable injury that a competitor can face due to a misleading advertisement. The competitor cannot find shelter under the Competition Act as misleading advertisements do not fit into the ambit of "*anticompetitive activities*" or "*abuse of dominance*". Moreover, ASCI, under which a competitor could file a complaint, lost its independence as it came under the control of Ministry of Consumer Affairs, Food and Public Distribution. Therefore, its role changed from an independent redressal platform to a consumer protection unit. Therefore, an independent and a regulated body of experts should handle such grievances of competitors and the ambit of competition act must be increased to include this issue which has been hushed for a long time.

Keywords: redressal mechanism, misleading advertisements, trade practices.

INTRODUCTION

We live in a commercialized world and advertisements form its backbone. Our senses and cognition perceive advertisements all the time. Advertisements are intended to create a need for consumers and to appeal their psyche in order to increase sales. In order to achieve this goal, advertisements may be well crafted so that most consumers can identify themselves with the product. Celebrities, catchy taglines etc. are ingredients which make advertisements more appealing. Advertisements aim at promoting a certain brand and showcasing that, that one brand is superior to the majority of products available. Hence, advertisements also have an integral linkage to competition. Advertisements may not only sway the public towards a particular product, they may also reduce the market share of a competitor if an advertisement disparages a competitor's products, since such disparagement would lead to loss of public faith in such competitor's products. Therefore, there is a thin line which distinguishes appealing advertisements from misleading and unethical ones. This paper majorly aims to analyze (i) the concept of commercial speech with regards to Article 19 of the Constitution of India, (ii) the issues related to misleading advertisements, (iii) the challenges faced by competitors and the available regulatory framework and finally, (iv) suggests a revision in the existing legislation and the redressal mechanisms.

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ARTICLE 19 AND FREEDOM OF COMMERCIAL SPEECH

"Our lives begin to end the day we become silent about things that matter."

– Martin Luther King, Jr. (on his view about freedom of speech and expression)

Besides being the essence of a democratic setup, freedom of speech and expression is the ailment to scores of civil, political and other fundamental cancers that devour the state. Hence, the plinth of fundamental

rights, over which the freedom of speech and expression reclines, is only justified the most prominent one being Article 19. Article 19 of the Indian Constitution lays down the fundamental right to freedom of speech. It basically means the right to express one's opinion through various mediums. It gives individuals the right to speak as well as listen and to attain information. Even though the Article seems very clear, it has been under a lot of contention especially with respect to the meaning commercial speech and the extent to which the right can be exercised to enforce commercial speech.

A closer look at Article 19 would help us understand its evolution and current compass of the Article. Pragmatically, it has been laid down in the case of *Romesh Thappar v State of Madras* that freedom of speech and expression also include that of the press. It includes the expression of ideas through signs, pictures or movies, right to publicize his expression etc. Hence, it can be concluded, that the scope of Article 19 is a wide one. The idea behind Article 19 is to provide maximum strength to put forward one's ideas and opinions. Although initially interpreted as an Article which safeguards freedom of speech and expression of individuals, the intention was to protect any communication that reaches the masses. This, on the one hand, ensures that there is commercial freedom given to those who wish to market their product a certain way- by associating it with a tagline, jingle, assurance, guarantee or a celebrity. However, on the other hand, the reasonable restriction on this freedom is in the form of a censorship which ensures that a consumer is not stripped off his precious little, and left at the sake of a corporate giant.

The Supreme Court has hence followed an interpretation that allows for maximum coverage, to provide seamless access to the public. The Supreme Court in case of *Indian Express Newspaper v. The Union of India* by implied means considered commercial speech to be partially protected under Article 19. The court stated that "*We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen and its true character is detected by the object for the promotion of which it is employed*".

In 1964, a typical example was the case of *New York Times* where the *v Sullivan* the concept of "editorial advertisement" was highlighted. An advertisement to promote an idea would come under this ambit hence there was a distinction drawn between advertisements for products like "Ban Pesticides", "Save Whale" as opposed to "use spaghetti" and "buy cars." The Court here has tried to give more freedom to promote ideas like save girl child as compared to the advertisements meant for commercial promotion of a product.

Finally, in the case of *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*. made "*commercial speech"* part of freedom of speech guaranteed under Article 19(1) (a).

Freedom of speech, therefore, includes in its ambit any form of information that is so decapitated which ensures that the individual attains self fulfillment, the discovery of truth, aims at balancing between stability and change and informs a person enough to ensure that he takes decisions. This basically widens the ambit of the right to freedom of speech and expression to the right to know as there is the transmission of factual information to the consumer on the basis of which the consumer takes a decision. There are some typical practices that are carried on by a producer for business enhancement. A few of these have been laid down below.

UNFAIR TRADE PRACTICES:

"*Advertising is legalized lying*" – H.G. Wells

The macrocosm of business is a vicious circle of rivalry and clashes. This is more than evident as competitors try to engulf on the goodwill and profit of the other market players. Various tactics to increase the sales of their product including advertisements, offers, discounts, promotional schemes are a living example of this phenomenon in the vicious cocoon of the market. Often an exaggeration is one that costs the consumer into buying a product which is capable of being a good advertisement and not a good product. The glitter of outshining others is such an attraction, that ethics in business remains a long forgotten notion.

"Unfair Trade Practices" is another controversial business tactic. Routinely, usage of terms "unfair trade practices" can be understood as any fraud or deceptive act was done by a company to earn a profit, profit at another's cost. The term is defined under Section 36 A of Monopolies and Restrictive Trade Practices Act, 1969 as: "*A trade practice which, for the purpose of promoting the sale, use or supply of any goods for the provisions of any services, adopts any unfair method or unfair or deceptive practices"*.

The above provision lays down a wide ambit covering oral, written as well as visual representations. Also, the section lays down the various possible permutations and

combinations in which the companies can be an unfair practice in its dealings.

The term has also been defined under Section 2 (r) of the Consumer Protection Act, 1986 is: "*A trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice" An* unfair trade practice includes any commercial practice that has an undesired or unfavorable interest, not in the basic consumer interest. As laid down in Section 2 (r) (i) to (iv) of the Consumer Protection Act, 1986- the practices may be in the form of a claim, fact, representation with regards to its standard, quality, quantity, grade, composition, style, model, sponsorship, its general condition etc. This section can qualify as a wholesome legislation with a strong intent and a benevolent aim, however, it does not provide for the acts which would NOT be included in unfair trade practices. This is the genesis of where the position of the competitor weakens because the section does not lay down or mark down an exception in his favor. Neither does the section outline acts as "ethical business practices" as opposed to "unfair trade practices."

Since "Consumer Protection" and not "Fair Competition" is the primary focus of the prominent legislations and definitions, it can be safely stated that these definitions though very comprehensive have very limited pertinence with respect to advertisements from the point of view of a competitor.

In this paper, we, therefore, try to discuss all possible legislation made to try to solve the possible misleading advertisements and see how effective is the mechanism for providing a remedy to a competitor.

Clearly, we can conclude that the Consumer Protection Act, 1986 does not have any promises to make to a competitor.

MISLEADING ADVERTISEMENTS

Advertisements involve making choices as to what should be shown, what products be advertised and what contents have to be ignored. Between these choices sometimes the pure truth is just neglected and the useful truth is considered, which might result in misleading the consumers as well as competitors.

Misleading Advertising has been defined by P. Ramanatha Aiyar, in his dictionary Advanced Law Lexicon as:

"*Advertising that deceives or is likely to deceive those to whom it is addressed or whom it reaches and, because of its deceptive nature, is likely to affect consumers' behavior or injures or is likely to injure a competitor".*

No right is ever absolute and the same principle applies to the right of publishing advertisements. The advertisements are also required to match some value standards. There are reasonable restrictions in order to protect the interest of consumers and competitors.

With the psychological reach of marketing and advertisements through the theory of behaviorism as propounded by John B Watson, it goes without saying that the strategy of commercial giants is such that it encourages people to identify themselves and subject themselves to advertisements.

Hence there has to be attached to this phenomenon a neutralizing technique, that comes in the form of a responsibility. A corporate social responsibility that people cannot be misled into believing a false attribute of the product so supposed to be sold to them.

Misleading advertisement poses a palpable threat to the well being of the economy since they detriment, not just the consumers but also the competitors. Even though the threat is equal for both the stakeholders, more emphasis is paid towards the protection of the consumers thereby neglecting the interest of the competitors.

There often arises a question as to "how far" can the legislation distinguish between a misleading advertisement and a technique to make a product strong enough to survive the market? Ultimately a market requires both the driving forces- buyer and seller. The law related to misleading advertisements should aim at protecting both equally and fairly. If the legislation is always tilted towards the consumer, then the seller would find it hard to even introduce a product within the market whereas if only the corporates interest is protected, the advertisement will lose its very essence.

It is a basic understanding that a product cannot be viewed in false light. Hence a packet of Maggi, when sold in the market always has a pictorial representation accompanied with vegetables. The seller intends that the buyer manually "adds" such products as a taste enhancer. However, the visual representation of something that does not exist as is depicted may be a misleading advertisement if we take a strict interpretation. Since it is not possible for the competitor to add dried vegetables himself as his profit margin reduces, his intent still remains that the ultimate consumer manually adds vegetables to enhance the taste and nutrition benefits of the snack. It is a highly

suggested topping. In such a scenario would the representation of Maggi with vegetables on the outer cover qualify as a misleading advertisement or not, is a question left to interpretation.

REDRESSAL MECHANISM

Competition Act, 2002: Though misleading advertisements are not prima facie covered within the ambit of antitrust laws, a closer analysis of the dual impact that such misleading advertisements have, reveals that it effects not just consumers but also competitors. On one hand, a consumer can be influenced by a misleading advertisement and buy something which was fraudulently portrayed as a better product while on the other hand, a competitor may stand to lose his business and repute to false claims made by opponents.

The Black's Law Dictionary defines a competitor as:

"A person endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival."

The inter play of competition law and misleading advertisements can be analyzed only upon knowing the history and intent of the Competition Act, 2002. Monopolies Restrictive Trade Practices (MRTP) Act, 1969 was a precursor to the Competition Act, 2002. The MRTP Act, as is evident from its name, was enacted with a vision to prevent monopolization of markets and businesses. Since India was a relatively young independent country at the time of enactment of the MRTP Act, the Government was majorly aided in its vision by socialist principles and was, not willing to give away its right on resources to private entities. Economists in that era felt that the Indian economy is at a nascent stage required proper vigilance in order to avoid benefits to a select few at the cost of the majority, who were well below the poverty line. The MRTP Act was an elaborate act displaying the authority of the Government over its resources and implementation of the socialistic principles imbibed in the Indian Constitution.

However, with the advent of time and adrift in economic agendas, the MRTP Act's applicability gradually withered away. There were gradual changes in the economic policy of India as it shifted from the Nehruvian model to a liberalized economy, attracting and encouraging new domestic and foreign players to enter the market without too much Government intervention. As a consequence, the Raghavan Committee was set up in order to formulate a new law repealing the MRTP Act, 1969. Based on the committee report the Competition Act was enacted on 13th January 2003.

Anticompetitive activities: Agreements relating to Anti-Competitive activities are prohibited under Section 3 of the Competition Act. Section 3 prohibits agreements relating to:

"production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India"

An anti-competitive agreement is an agreement having an appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to-

"an agreement to limit production and/or supply; an agreement to allocate markets; an agreement to fix the price; a bid rigging or collusive bidding; a conditional purchase/ sale (tie-in arrangement); an exclusive supply/distribution arrangement; a resale price maintenance; and a refusal to deal."

The above list of agreements is not exhaustive, but it can be used to understand the intent of the legislators. The concept of anti-competitive agreements is generally in reference to contractual relationships between parties to the same production, supply or distribution chain. An advertiser, who agrees to publicise a company's products cannot possibly fall into the category of parties referred above. The nature of the relationship between an advertiser and a company is that of a service provider and client and hence the publication of the false claims by an advertiser cannot possibly fall under this section.

Further, this part in no way expressly prohibits any corporation from making false claims in their visual or print advertisements. Even if we interpret this section in the broadest sense, in no way it would be possible to encompass misleading advertisements in it.

Abuse of Dominance: This concept deals with situations where a company with a considerable market share misuses its position in order to dominate its competitors, take undue advantage by charging consumers more or impose restrictions on the supply of their products. Basically, anything that violates the existence of a healthy competition comes within its ambit.

Dominance refers to a position of strength which enables an enterprise to operate independent of competitive forces or to manipulate its competitors, consumers or the market in its favor. Abuse of dominant position includes: imposing unfair conditions or price, predatory pricing, limiting production/market or technical development,

creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access and using a dominant position in one market to gain an advantageous position in another market.

The term abuse of dominance is self-explanatory. The problem of making false claims is not restricted to a dominant company. We see in our everyday life that a lot of emerging companies use these tactics to establish their brand name or to increase their market share. The thought of considering misleading advertisements a habit of the big fish in the pond is illogical and incomplete.

Section 18 obligates the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India but this duty of the Commission is subject to the provisions of the Act, which nowhere mentions misleading advertisements.

Section 19 empowers the Commission to conduct an inquiry into certain agreements and dominant position of the enterprise. The Act provides for criterion based on which the Commission determines if the transaction results in the appreciable adverse effect. The legislators could have easily added deceptive practices of marketing as of the criterion but the same does not find a place in the abovementioned Section.

It is pertinent to mention here that the MRTP Act, 1969 while defining Unfair Trade Practices in Section 36 specifically included misleading advertisements. However, the Competition Act, 2002 as discussed above does not provide for redressal against misleading advertisements.

Such omission in the Competition Act, 2002 can be gauged by the varying legislative intents behind both acts. The legislative intent of the MRTP Act illuminated that the provisions dealing with Unfair Trade Practices were primarily consumer-oriented whereas the Competition Act seeks to redress the grievance of competitors with regards to unfair trade practices. Due to the redundancy of MRTP Act, the need for a new statute was felt. During the same time, the Consumer Protection Act, 1986 was passed seeking to redress consumer grievances against manufacturers, producers, suppliers, and retailers. The Act incorporated provisions regarding fraud and deceptive practices hence developing a new law for unfair trade practices. In light of the same, the need to include provisions regarding unfair trade practices was not felt during the enactment of the Competition Act. The Competition Act broadly serves the interest of consumers and smaller competitors against their contemporaries. Though the act has dealt with their problems to a larger extent, it still has some grey areas including the issues arising due to misleading advertisements and their implications on the competitors.

The Act is not exhaustive and operates hand in hand with other laws and the provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law.

FOOD SAFETY AND STANDARD ACT, 2006 AND ADVERTISEMENT STANDARDS COUNCIL OF INDIA

False claims about food articles and their consequent violation are punishable under the FSS Act 2006. The definition of "misbranded foods" under Section 2 (zf) includes food articles which have misleading or deceptive claims. In order to be punishable by misleading advertisements under the FSS Act, 2006, two conditions must be satisfied:

1. Such advertisement has to meet the criterion laid down under Section 2 (b) of the FSS Act which deals with "advertisements" i.e "*any audio or visual publicity, representation or procurement made by means of any light, sound, smoke, gas, print, electronic media, internet and website and included through any notice, circular, label, wrapper, invoice to other documents;*
2. Such advertisement must be incomplete, incorrect or ambiguous to attract the penal provisions under Section 53. Section 53 clearly lays down that a person who publishes or is a party to the publication of an advertisement which falsely describes food or is likely to mislead a consumer with respect to the nature, quantity or composition of the food would be liable to a penalty extending to Rs 10 lacs.

By virtue of there being a large number of provisions under the FSS Act, 2006 that highlight the meaning, issue, and forms of misleading advertisement, it is often assumed that the concept is covered in its entirety. It is only after a detailed analysis of all statutory provisions, that the realization of a lack of redressal for the competitor under the FSS Act, 2006 brims up.

Legislatively speaking, Section 23 of the FSS Act, 2006 elucidates that the packaging and labeling of the food needs to be appropriate and not misleading. It includes broad and concrete guidelines which lay down instances

of misleading advertisement. The marking and labeling for such consumer goods, majorly edible foods should be strictly in accordance with Section 23 of the FSS Act, which talks about "Packaging and Labeling of Foods". In addition, there should not be any labels, statements, claims, designs etc. in the packaging which has untruthful statistics about the nutritive value or the quantity of the product. Moreover, there should be no medicinal or therapeutic claims.

The ambit of Section 23 further extends to the shape, appearance, packaging materials, manner in which they are arranged and the display is not misleading either. The language and intention of the FSS Act, 2006 is *prima facie,* to protect the consumers from deceptive business operators. Even though the provision provides detailed as to what all constitutes misleading advertisements, the act in its essence is consumer-centric. It does not take into account the grievances of the competitor.

Further, misleading advertisements or false representations are prohibited under Section 24 of the Act as they are an unfair trade practice. Such prohibited activities include the following:

a. Falsely representing that the foods are of a particular standard, quality, quantity or grade-composition;
b. Making a false or misleading representation concerning the need for, or the usefulness of the product;
c. Giving to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof;

These activities according to such legislation have an unfair impact on the public at large. This is a fair yet an incomplete approach. The limitation arises because there is nothing in the FSS Act, 2006 which prevents a competitor from disparaging the product of another competitor through a misleading advertisement.

Instead, broad classifications are laid down primarily to protect the interest of the public, thus clearly indicating that the Food Safety and Standards Authority of India is an agency being run only in public interest ensuring that there are minimum adulteration and deceit with regards to advertisement, labels, packaging etc. It is not a legislation that revolves around the competitor or the market conditions. The competitor still faces a dearth of options here.

The lack of support for competitors is further supported by the following instances: A latest controversial example of this would be a derogatory advertisement of mustard oil by "Patanjali" against which a show cause notice was issued. A typical scenario that arose here was that a false claim in relation to the extraction process of the oil was made and it drew this comparison with the other vegetable oil manufacturers in the field. FSSAI and ASCI being "public oriented" bodies took action on the advertisement of the product because such false advertisement would widely cheat the public.

However, as far as the other vegetable oil producers were concerned, towards whom such advertisement may have been derogatory, false and probably would have the effect of substantially lowering their sale and decreasing their profits margin, such entities did not really have a legal recourse under specific statutes to protect their interest.

While theoretically, the competitors could approach FSSAI along with the aggrieved consumers. FSSAI being a body that has a bias towards the consumers might not take action, if only the rights of the competitor are violated in the market and not of the consumers. This is precisely the issue that the competitors of Patanjali faced. The controversy was highlighted only when the consumers felt that the advertisement was misleading them and FSSAI and ASCI being consumer-oriented bodies have been given the power to suo moto deal with the cases of misleading advertisements. Even today, Indian laws are silent on the recourse available to the competitors who have to bear the adverse effects of such misleading advertisements.

Apart from FSSAI, ASCI play a prominent role in trying to curb misleading advertisements. ASCI is a nonstatutory, voluntary body which is a corroborative platform for advertisers (Indian Society of Advertisers), advertising agencies (Advertising Agencies Association of India) and media (Indian Newspapers Society). It is set up as an independent body as it is run by an elected Board of Governors who are leaders and professionals in the field of advertisement.

However, a pragmatic understanding shows that ASCI was an independent body and after May 26, 2016, GAMA (Grievance against Misleading Advertisements), regulated by FSSAI corroborated with ASCI GAMA is essentially run by the Department of Consumer Affairs under the Ministry of Consumer Affairs, Food and Public Distribution, India. Hence, ASCI indirectly act under the Government for consumers, to ensure that the faith of

the public remains intact in advertisements and such advertisements are truthful, legal, honest and decent.

This formalized corroboration of the two bodies has ensured yet again that in the interest of the consumers at large, misleading advertisements should be curbed. The corroboration was done primarily to protect consumers. The Consumer Complaints Council of ASCI 's role is to deal with the complaints received from the consumers and industry. However, as an independent voluntary body, its role remained majorly limited to recommendations. The corroboration of ASCI with GAMA and also the Department of Consumer Affairs has ensured that ASCI has a direct platform to redress the grievance of the consumers and take legal action along with as well as update FSSAI advertisement norms as well as the market functioning. The independence that was taken away from ASCI, practically changed its agenda to the extent that competitors lost their faith in being protected against misleading advertisements, as this platform treated consumers with an upper hand. The motto of ASCI itself, which is "Advertising that works with a conscience, a salute to Indian **Consumerism**" makes the scenario more evident.

The Advertisement Standard Council of India's code as a backbone to the motto lays down the framework within which advertisement is permissible and public interest is not diminished. The intricacies of the lack of options with the competitors can be understood by studying another guideline laid down in the code. Chapter IV of the ASCI code, dealing with permissible comparisons is worded as follows:

Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided:

a. It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.
b. The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
c. The comparisons are factual, accurate and capable of substantiation.
d. There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.
e. The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.

However, allowing this comparison is a slightly vague idea because it ensures, that the negative aspects of the competitor are highlighted overshadowing the positive implications of a product.

An example of this here would be a seller who manufactures beverages with artificial sweeteners, comparing his product on the basis of calories with his competitor manufacturing a similar beverage with sugar. The comparison maker, i.e. the manufacturer producing beverages with the artificial sweetener gets away with the implications on the health of such artificial sweeteners in the long run. Such sweeteners are carcinogenic, have been banned by massive world-class consumers including the US, may further cause sugar cravings and have the same reaction in the brain that nicotine has. A popular argument given by the comparison maker in this scenario is that the consumer makes an "informed choice". The irony of this "informed choice" is that most consumers fall prey to the unchecked comparisons and choose carcinogenic substances over naturally occurring ones, since the competitor, the beverage manufacturer with real sugar remains paralyzed and has no chance to rebut the accusation he is arrowed with.

ASCI guidelines state that advertisement must not be misleading or deceptive. All scientific claims should be backed by studies and experiments and should not show inappropriately large portions of any food or beverage. Examples of specific instances of its operation off late have been written notices by ASCI to:

1. ITC, for "Aashirvaad Multi grain aata" the nutritive value of which does not substantiate the label,
2. Pan Parag for not having a proper disclaimer,
3. Dabur for adulterated honey etc.

The analysis of such application of guidelines shows that complaints majorly came into light after consumers objected or approached it. Needless to say, while competitors can approach ASCI as well, it remains evident that they are "second-class citizens" in respect of misleading advertisements owing to the intent behind setting up of ASCI legal notices and legal actions are given by ASCI in corroboration with giving the impression that it works in the interest of the public majorly.

Therefore, it can be concluded that the two bodies act in symbiosis for the interest of the public. Competitors may

approach ASCI but the practicality of this has been reduced widely, simply because of the intent behind setting it up (which favors the interest of public over the interests of competitors) and also because there has been a loss of its independence as it has been acting in corroboration with FSSAI.

CONCLUSION AND SUGGESTIONS:

Though there exist legislations covering unfair trade practices and market balances, they still lack specific provisions with respect to the adverse effects of misleading advertisements on competitors. A part of that can be attributed to the fact that such competitors inherently want to stay away from legal hassles even if it is at the cost of their rights, while others are themselves knee-deep into committing this offense. Most competitors would find even the slightest legal proceedings defamatory as well as expensive. There also exists a major risk of false legal notices by competitors to degrade a popular brand name in the market. Moreover, most consumers approach ASCI or consumer forums and keep a basic check on the quality levels, packaging etc., even if the issue of misleading advertisements may not be taken up by them on a day to day basis.

As discussed earlier, the major issue with the current approach is that India being a welfare nation, the primary focus is on the issues faced by consumers and not the issues faced by the competitors. We cannot blame the legislators makers entirely, as this problem has not been highlighted by the competitors themselves for various practical consequences that may follow. At the end of the day, they all are doing the same thing. However, the radar of the Competition Act needs to be increased further to include this issue, which has for a long time been hushed between voices of corporate survival.

Competition Act is aimed at promoting healthy competition and curbing unhealthy competitive practices. Changes in the existing regime to a great extent can contribute to improving the competitors' plight. Section 18 and 19 should specifically include misleading advertisements, empowering the Commission to take appropriate measures in order to prevent competitors against misleading advertisements.

Further, FSSAI and ASCI should encourage competitors to raise claims before it, since in the broader sense a competitive environment also promotes the public interest.

In furtherance, there needs to be an independent redressal platform for competitors. An independent redressal platform for competitors essentially means one which does not give prime importance to the grievances of the consumers and treats consumers as well as competitors on the same wavelength.

Most organizations like ASCI have lost independence and have now become majorly consumer-oriented grievance platforms. This independent platform should comprise of fifteen people, including experts like data analysists and nutritionists, for a more versatile opinion about every case. This panel should have retirement by rotation and experts running it should be nominated luminaries in the field of advertisements.

Further there should be a Presiding Officer, who would be the senior most member of the panel, however, he should be given an edge only to supervise the general discussion and debate for every case that comes up to them. Veto power is not necessarily required for such presiding officer. Every member should have an equal say in the issue in front of the panel for discussion and there should be a quorum as well that must be ensured. The decisions should be taken by the simple majority and the losses faced by a competitor due to unfair advertisements should be carefully scrutinized while such decision is to be given. This would ensure fairness and practicality as it would be a fairly independent body. If the court feels that such injunctions, penalties etc. are prima facie irrational an order curtailing such act of the quasi judicial tribunal may be passed. This would keep a check on the power of the panel and ensure there would be no misuse.

Also, there should be a time limit of 6 months for the efficient analysis and decision making by such panel. Moreover, there should be a strict procedure for removal of members from the panel if decisions by such member are taken in his personal interests etc. A body like this, with the said variation in its constitution and a diversity of legal opinion along with a strong check on its effective functioning, would ensure that there is light for a redressal mechanism for competitors.

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