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# Protecting Consumers from Misleading Advertisements: A Study of Section 21 of the Consumer Protection Act, 2019

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ASWIN S<sup>1</sup>

## ABSTRACT

*Over the last few decades, advertising has become ubiquitous to the extent that it has entered and influenced human life and society. The evolution of marketing above all factors, has targeted the consumer which resulted in an immense study of consumer behaviour and figuring out ways to alter consumer preferences to suit the interests of certain corporations. Advertising has been a key tool for marketing, it has advanced to greater extents to influence consumer attitudes towards a particular product. In the above context, it is rather pertinent to understand how advertisements have impacted consumers with reference to India given its population and the fact that it is the third largest economy in the world in terms of purchasing power parity. There is much need for statutory regulation to prevent misuse of media platforms that promote false and misleading advertisements. With the introduction of the new Consumer Protection Act, 2019 many new aspects and areas of consumer protection have been brought into picture. These are the need of the hour given the changes that have taken place in the globalised consumer market since the previous legislation. These paper seeks to highlight one of these new aspects which is the introduction of the concept of liability for misleading and false advertising dealt with in Section 21 of the Act. The objective of this paper is to analyse and look into the specific features of Section 21 and some critical reflections of its provisions with due reference to the impact of advertising in Indian society.*

**Keywords:** Advertising, consumer, central authority, false or misleading advertisements, product liability, endorsement, influence, publication, penalty.

## I. INTRODUCTION

Advertising has had many forms of its own in India. One can always trace the earliest form of advertising to pedlars and hawkers in major cities, towns and ports of ancient India. The form of print advertising found its roots in the 'classifieds' section of the newspaper. It evolved furthermore as a result of Industrialisation in Britain and spread quickly to its colonies especially

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<sup>1</sup> Author is a student at The School of Excellence in Law, Tamil Nadu Dr. Ambedkar Law University, Chennai, India.

in India. The Bengal Gazette - India's first newspaper was one of the first to advertise. In the earlier stages, advertising meant 'informing' therefore information like births, deaths, sale of household furniture etc. were generally advertised. The Swadeshi Movement (1907 – 1911) pioneered native industrialisation in India and eventually in the 1930s several Indian advertising agencies were set up.<sup>2</sup>

Although the Radio was set up during the British Raj, radio advertising gained attention post independence. The Ceylon Radio and the Goa Radio were considered good alternatives for advertising in the 50s, however, print advertising did not lose its prominence.<sup>3</sup> Televised advertising gained popularity in the 80s and 90s and paved way towards more appealing advertisements with the help of glamorous colours, music and brand ambassadors.

Finally came the form of virtual advertising which gained prominence during the internet era and is currently going through a digital revolution millions of new Internet users are getting subscribed ever year. There are nearly 4.95 billion internet subscribers in the world, which is roughly 3/5<sup>th</sup> of the entire global population.<sup>4</sup> India is expected to have 1.5 billion internet subscribers by 2040.<sup>5</sup> This will make the internet the largest platform for advertising.

## II. IMPACT OF ADVERTISING ON INDIAN SOCIETY

Having evolved over the years, advertising has unbridled its presence to the extent that it has become a part of human lifestyle. It has entered the very fabric of society and one cannot deny that one has never been influenced by advertisements even to the bare minimum degree. India, being a country with a considerable size of its huge population growing into the middle class makes it a major market in the world; as we are speaking about many hundred million consumers. This makes the people of India a target for many multinational corporations as not only as a source for its labour but also as a potential market for its services and products.

It would not require a study to prove the popularity of film celebrities among the masses. There is much influence of the Cinema over Indian society for decades, which makes it is quite natural that film stars are used to endorse and advertise products and services<sup>6</sup>. This is seen more frequently in India than in other countries. Even though the power of films actors and

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<sup>2</sup> *History of Advertising in India*, 3Dots, (December 10<sup>th</sup>, 2020, 16:32) <https://www.3dotsdesign.in/blog/history-of-advertising-in-india/>

<sup>3</sup> Ibid.

<sup>4</sup> DATAREPORTAL, <https://datareportal.com/global-digital-overview> (last visited Feb. 2<sup>nd</sup> 2022)

<sup>5</sup> Sandhya Keelery, *Number of Internet Users in India 2010 – 2040*, Statista, (Feb. 2<sup>nd</sup> 2022) <https://www.statista.com/statistics/255146/number-of-internet-users-in-india/>

<sup>6</sup> Geetanjali Chandra & Sudha Bhatia, *Social Impact of Indian Cinema – An Odyssey from Reel to Real*, Global Media Journal (Arabian Edition) June 2019. <https://amityuniversity.ae/gmj-ae/journals/Sudha-Bhatia-Geetanjali.pdf>

advertisements to influence the consumers has been observed and recognised, and has been used for campaigning government welfare policies, there has not been any statutory provision that imposes responsibility on them. Although this may not seemingly be a cause for concern, what needs to be considered is the fact that even a prudent consumer cannot claim not to be influenced by advertisements as it has a significant impact on consumer buying behaviour.<sup>7</sup> What remains concerning is that on one hand, many who are subject to such advertisements may tend to associate the lofty values of the character played by the film star when he or she endorses a particular product or service and many may end up believing the fair qualities of a particular product or service as projected to them. This may result in certain false and misleading information about the product being conveyed to the consumer and would be as the Act states ‘prejudicial to the interests of the consumer’<sup>8</sup>.

So far other factors are concerned, the appealing nature of the advertisements through visual effects and sounds, not to mention the message conveyed, do have their own share of drawing consumers by psychological means, towards purchasing the product at the cost of reality. The Madras High Court in *Gillette India Limited v. Reckitt Benckiser*<sup>9</sup> had also recognised the lasting impact of an advertisement.

### III. AN UNDERSTANDING OF KEY DEFINITIONS UNDER THE ACT

- **Section 2(28): Misleading advertisements**

According to the Act, a misleading advertisement is one that falsely describes a product or service; gives a false guarantee thereby misleading the consumer as to the nature, substance, quality or quantity of the product or service; expressly or implicitly representing an unfair trade practice; deliberate concealment of important information.

- **Section 2(18): Endorsement**

An endorsement would constitute any message, verbal statement, demonstration or depiction of name, signature or other identifiable characteristics of the individual or depiction of name or seal of any institution or organisation which would make the consumer believe that it reflects the opinion, finding or experience of the person making such endorsement.

- **Clause-wise analysis of Section 21 of COPRA, 2019**

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<sup>7</sup> Tashrif Haider & Shadman Shakib, *A Study on the Influences of Advertisements on Consumer Buying Behaviour*, 9 Business Studies Journal, Issue 1, (2017) <https://www.abacademies.org/articles/a-study-on-the-influences-of-advertisement-on-consumer-buying-behavior-7177.html>

<sup>8</sup> The Consumer Protection Act, 2019, Section. 21, No. 35 Act of Parliament, 2019 (India)

<sup>9</sup> *Gillette India Limited v. Reckitt Benckiser (India) Private Limited*, 2017 SCC Online Bom 207

Section 21 gives rise to a new obligation for manufacturers and endorser to take responsibility of the claims made by their advertisements. It enumerates and empowers the role of the Central Authority established under Section 10 to investigate and prevent false or misleading advertisements. As discussed earlier, there has not been any express statutory provision that penalises false advertisements thereby creating responsibility on persons involved. This proves the timely response of policy makers towards much needed reforms to Consumer Protection. The penalty discussed under Sec.21(2) allows the Central Authority to penalise false advertising with fines that extend to 10-50 lakh rupees. Another interesting point to note is the Section 21(3) empowers the Central Authority to prohibit any endorser of false advertisement from making any further endorsements up to the period of 1-3 years. These penalties and prohibitions serves as a strong deterrent against celebrities from endorsing false claims in an advertisement. This also extends to publishers under Sec.21(4) who can be penalised with a fine up to 10 lakh rupees for publishing false advertisements. However, another interesting dimension of Section 21 under Clause 5 provides for the defence of an endorser if he/she had exercised 'due diligence' to verify the claims made in the advertisement. To elaborate on due diligence, a reference can be made to Crilly's Due Diligence Handbook which explains due diligence as a process that helps an individual reach an informed judgment with respect to the value and purpose of the matter in hand.<sup>10</sup> Clause 6 protects the publisher from liability if he/she had published such advertisement in the 'ordinary course of business' which can be further explained as regular operations that are consistent with the past practices and common customs of the business. The most unique aspect of Section 21 is Clause 7, where the parameters to determine the penalty based on the population and area affected by the advertisement, the frequency and duration of the same, and more importantly by pointing out the class of persons affected by such advertisements, the policy makers have shown keen attention and understanding. Valuing the gross revenue from the sales made by the advertisement is another important factor to determine the right penalty for the offence. Finally Clause 8 of Section 21 shows the respect for democratic and natural principle of having the person heard before any order is passed. This prevents the Central Authority from becoming a tool of autocracy.

#### **IV. AN OVERVIEW OF THE CLAUSES UNDER SECTION 21**

**Section 21 (1):** This provision gives power to the Central Authority<sup>11</sup> after investigating whether

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<sup>10</sup> WILLIAM M. CRILLY, DUE DILIGENCE HANDBOOK (American Management Association, 1998).

<sup>11</sup> The Consumer Protection Act, 2019, Sec.10, No. 35 Act of Parliament, 2019. (India)

an advertisement<sup>12</sup> in question is false or misleading<sup>13</sup> and is prejudicial to the interests of the consumer or in contravention of consumer rights<sup>14</sup>, to issued directions to the trader<sup>15</sup>, manufacturer<sup>16</sup>, endorser<sup>17</sup>, publisher or advertiser to discontinue or modify the advertisement within the time stipulated in the order.

**Section 21 (2):** Gives power to the Central Authority to penalise any endorser or manufacturer for such false advertisement with a fine which may extend to 10 lakh rupees and for every subsequent contravention the fine may extend to 50 lakh rupees.

**Section 21 (3):** The Central Authority may prohibit the endorser of a false or misleading advertisement from making any further advertisement for a period of 1 year and for every subsequent contravention, the prohibition may extend to 3 years.

**Section 21 (4):** The Central Authority may penalise any person who publishes false or misleading advertisement with a fine which may extend to 10 lakh rupees.

**Section 21 (5):** The endorser shall not be liable to penalty or prohibition if he had exercised due diligence to check the validity of the claims made in the advertisement.

**Section 21 (6):** The publisher shall not be liable to penalty if such false advertisement was published in the ordinary course of business. However this defence may not apply if the publisher had previous knowledge about the order passed by the Central Authority for the withdrawal of such advertisement.

**Section 21 (7):** Criteria for determining the impact of false advertisement:

- a) Area and population affected.
- b) Frequency of Advertisement.
- c) Class of persons impacted.
- d) Gross revenue growth due to the advertisement.

**Section 21 (8):** This clause requires the Central Authority to hear the person before any order is passed.

## **V. PENALTY PROVISION UNDER CHAPTER VII**

**Section 89** Lays down the punishment for false and misleading advertisements prejudicial to

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<sup>12</sup> The Consumer Protection Act, 2019, Sec.2(1), No. 35 Act of Parliament, 2019. (India).

<sup>13</sup> The Consumer Protection Act, 2019, Sec.2(28), No. 35 Act of Parliament, 2019. (India).

<sup>14</sup> The Consumer Protection Act, 2019, Sec.2(9), No. 35 Act of Parliament, 2019. (India).

<sup>15</sup> The Consumer Protection Act, 2019, Sec.2(45), No. 35 Act of Parliament, 2019. (India).

<sup>16</sup> The Consumer Protection Act, 2019, Sec.2(24), No. 35 Act of Parliament, 2019. (India).

<sup>17</sup> The Consumer Protection Act, 2019, Sec.2(18), No. 35 Act of Parliament, 2019. (India).

the interest of the consumer which shall attract imprisonment to the extent of 2 years and a fine that May extend to ten lakh rupees, and for every subsequent offence the punishment and fine will duly increase to the extent of imprisonment upto five years and fine of upto fifty lakh rupees respectively.

### **(A) Provisions concerning misleading advertisements under Consumer Protection Act of 1986**

Under the previous Consumer Protection Act of 1986, Section 2(1)(r) dealt with the definition of unfair trade practices and Section 14 dealt with the manner in which the courts could decide on cases concerning such unfair trade practice. Damages could be claimed for loss occurring due to such unfair practices. Sec 14(h)(c) dealt specifically with the power of the court to direct “corrective advertisement to neutralise the misleading advertisement” and such measures to be taken at the cost of the party responsible for the misleading advertisement. This was the position of dealing with misleading advertisements before the commencement of the new Act, and unfortunately it remained ineffective in curbing the misleading of consumers.

### **(B) Some notable case laws on false and misleading advertisements**

- **Horlicks Limited v. Zydus Wellness Products Ltd<sup>18</sup>**

The petitioner approached the Delhi high Court seeking to restrain the respondent from broadcasting and publishing an advertisement of their product that seemingly compares the quality of their product with that of the respondent and the advertisement further claims to be better than the same. The Court granted interim injunction and the respondent altered the advertisement by adding a disclaimer. The Court granted its interim relief to the petitioner stating that the advertisement was misleading although there was a disclaimer.

- **Dabur India v. Colourtek Meghalaya Pvt. Ltd.<sup>19</sup>**

The Delhi High Court laid down certain guidelines with regard to misleading advertisements. They are as follows:

- Advertisements are considered as commercial speech and they are well within the ambit of Article 19(a) of the Constitution of India.<sup>20</sup>
- Advertisements must not be untrue and misleading.
- An advertisement that glorifies a company and its product may not be deemed false or

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<sup>18</sup> Horlicks Limited v. Zydus Wellness Products Limited, CS (Comm) 464 of 2019.

<sup>19</sup> Dabur India v. Colourtek Meghalaya Pvt. Ltd. , 2010 SCC OnLine Del 391

<sup>20</sup> Indian Constitution, Art. 19(a).

misleading.

- However, should such advertisement go beyond glorifying by adding false or misleading information, it would not be protected under Article 19(a).

- **Reckitt Colman of India Ltd v. M.P.Ramachandran**<sup>21</sup>

The Calcutta High Court held that an advertisement can compare the advantages and disadvantages of a product with that of another product. However it must be minded that there must not be any defamation. If there is no defamation no cause of action for misleading advertisement can be filed.

- **Havells India Ltd v. Amritanshu Kaitan**<sup>22</sup>

The Delhi High Court discussed the difference between comparative and disparaging advertisements. It held that the former encouraged the spirit of competition while the latter was grossly misleading thereby giving rise to a cause of action for false and misleading advertisements.

- **Gillette India Limited v. Reckitt Benckiser**<sup>23</sup>

The Madras High Court recognised the greater impact of electronic media compared to print media and had observed that electronic advertisements certainly leave a lasting impact on the persons subjected to it.

- **Francis Vadakkan v. The proprietor, A-one medicals and Ors.**<sup>24</sup>

The Kerala High Court had directed the manufacturer of a hair growth cream and the endorser of the brand to pay damages to the complainant as it found deficiency in its service which had aggrieved the complainant who was influenced by the misleading advertisement.

## VI. CRITICAL REFLECTIONS

- **‘Prejudicial to the Interests of Consumers’**

The above phrase has been mentioned under Section 21 and it carries a considerable meaning, however it has not been defined by the Act. This may allow the phrase to be interpreted by the Central Authority to the extent that any advertisement that hurts the interests of a group of consumers can be considered to be false or misleading. This may cause certain serious implications to freedom of speech protection under Article 19 of the Constitution.

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<sup>21</sup> Reckitt & Colman of India Ltd. v. M.P. Ramchandran , 1998 SCC OnLine Cal 422

<sup>22</sup> Havells India Ltd. v. Amritanshu Khaitan , 2015 SCC OnLine Del 8115

<sup>23</sup> Gillette India Limited v. Reckitt Benckiser (India) Private Limited, 2017 SCC Online Bom 207

<sup>24</sup> Francis Vadakkan v. The proprietor, A-one medicals and Ors. CC No.345 of 2012



- **The Principle of Caveat Emptor**

The 21<sup>st</sup> Century has made many examples that indicate the shift from the principle of Caveat Emptor (which was introduced and made prevalent since the advent mercantilism) to the principle of Caveat Venditor.<sup>25</sup> However, one could argue whether this change of principle holds good in law given the fact that many laws and judgements were pronounced in favour of the principle of Caveat Emptor.

- **Pre-absolved liability of endorsers**

Although Section 21 provides for the penalty of false and misleading advertisements, it also under Section 21(5)&(6) absolves the liability of endorsers and publishers under the reasoning of exercising their due diligence. However, over the past few years the practice of absolving the endorser's liability has always engaged under the pretext of having exercised due diligence. Therefore, the question that arises is whether the courts can absolve the endorser entirely on the basis of their due diligence. There is a need for additional parameters to ensure that the endorsers are veritably not acting to mislead consumers.

- **Bringing unfair terms and conditions under Section 21**

It is unclear whether unfair terms and conditions of special offers made in advertisements in return for purchasing a particular product come under the purview of Section 21. These special offers are put in place to attract and convince consumers to buy the product, however they do not at all times keep up their promise under the terms and conditions. This has widely been recognised as marketing tactics but there are no provisions to govern the same.

## VII. CONCLUSION

*“A customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not an interruption in our work – he is the purpose of it.”*

*Mahatma Gandhi*

Section 21 brought in a strict responsibility on those who have the power to influence consumers for their own interests. As mentioned earlier, there has not been any express statutory provision that creates a liability on persons who are responsible for advertisements. There has been considerable insight on the part of the policy makers to bring out such a provision which is most needed at the current disposition. Although there are certain critical aspects, this can be

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<sup>25</sup> Marco Pistis, *From Caveat Emptor to Caveat Venditor - a Brief History of English Sale of Goods Law*, Mondaq, (26<sup>th</sup> Jan 2018), <https://www.mondaq.com/italy/arbitration-dispute-resolution/40206/from-caveat-emptor-to-caveat-venditor--a-brief-history-of-english-sale-of-goods-law>

considered to be a major step towards protecting the interests of the consumers.

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