



Misleading Advertisement: Consumer Protection Act Amendment 2019

Shannu Narayan¹
Salamah Ansari²

Abstract

This paper reviews the recently amended Consumer Protection Act 2019. The specific contours of the provision on misleading advertisement is analyzed using Doctrinal Research approach. While analyzing the amendment in the backdrop of the old statute of 1986, that it replaces; the paper highlights some loopholes that can be corrected in subsequent amendments.

Keywords: Consumer Protection Act Amendment 2019, misleading advertisement, consumer rights.

Introduction

Enacted to streamline consumer protection regulation and laws; and safeguard the rights of consumers in India; the Consumer Protection Act 2019 (the Act) replaces the 1986 Act with the same nomenclature. Some of the key provisions in the revised Act include the appointment of a Central Consumer Protection Authority (CCPA) specific to the requirements of consumer redressal commissions; stringent guidelines for e-commerce and e-service providers; novel calculation of the money spent on purchase of a product or service; provision for seeking court hearing through video conferencing mode; and strict penalties for misleading advertisements. With the advent of e-commerce and online retailing, this Act gives a timely response to the needs of Indian consumers. The focus of this paper is on the special provisions for misleading advertisements in the Act. Since advertisement form the cornerstone of all forms of marketing, it is relevant to inquire the merits and inadequacies of this Act in the Indian ecosystem of marketing. The normative contribution of this paper lies in reviewing the need to reconsider the definition of 'consumer' in the Act as well as the popular rhetoric.

Review of the Act:

The Act regulates matters pertaining to consumer rights violation; unfair trade practices and misleading advertisements in the same vein as all three are prejudicial to public interest. According to Section 2 (28) of the Act; any product or service has indulged in misleading advertisement, if it:

- (i) falsely describes such product or service; or
- (ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or
- (iii) 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
- (iv) deliberately conceals important information.

It sets the protocol of how an instance of misleading advertisement will be dealt with by the Indian judicial system. The Act leverages the existing decentralized public administration system whilst creating a separate appellate authority. The Act empowers the District Collector to investigate consumer rights violations through misleading information and submit report to the CCPA (Section 16). The Act allows search and seizure of the suspected premises/ documents/ record articles as may be necessary to ascertain

¹ Assistant Professor, IIM Kozhikode, Kerala, India, shannu.narayan@iimk.ac.in

² Faculty Fellow, IIM Kozhikode, Kerala, India, salamah@iimk.ac.in

consumer rights violations. The Act stipulates that if the CCPA finds any advertisement to be misleading or in contravention to the rights of the consumers, it may order the discontinuation of such advertisement to the concerned endorser/ trader / advertiser/ manufacturer (Section 21, sub section 1). Further, the Act authorizes the CCPA to levy appropriate penalty for the same. The amount of the penalty can extend up to INR 10 lakh and/or imprisonment up to two years. Subsequent offences shall be dealt with more strictly with the fine increasing up to 50 lakh INR and imprisonment up to five years. Along with a requirement to cease from promulgating the misleading advertisement, the CCPA can direct the violator to “issue corrective advertisement to neutralize the effect of misleading advertisement (Section 21, sub section 1).”

Another significant development is the drafting of the legal definitions of various terminologies relating to marketing and advertising such as puffery, bait advertising, comparative advertising, surrogate advertising and so on, vide Draft Guidelines (Ministry of Consumer Affairs, 2020). The draft guidelines that sought public comments as consultation, also reiterates the role of endorsers and brand ambassadors who promote the products of various companies. The Act and Draft Guidelines, 2020 emphasizes of penalties for any false claims which may lead to prohibition on endorsing any product or service for one year. The liability on such implicated endorsers could be disputed only by proving that they had exercised due diligence to verify the truthfulness of such claims in the advisement. The draft guidelines also mandate liabilities upon manufacturers, service providers and advertising agency without making a distinction between their role in the life-cycle of the product or service. One of the positive effect from these legislative changes will be to regard children as consumers and to consider such class also one of the stakeholders in consumer related legislations (as per Section 11 of the Draft Guidelines, the wordings are ‘advertisements that are of interest to children’). It is necessary to also highlight the jurisdictional overlap between CCPA and Advertising Standards Council of India (ASCI) in promulgating advertisement standards.

Study Implications

A perusal into the issue, this paper is aimed at sharpening a critical understanding of the legal loopholes of the Act. The analysis aims to present the policymakers with appropriate alternatives to bolster the statute.

Methodology

The paper employs a combination of doctrinal research methodology and hermeneutics to critically analyze the merits and inadequacies of the Act.

Policy Prescriptions/ Results

Granting that the Act is a robust step in streamlining not only the consumer protection laws; but also delineating an unambiguous procedural law as far consumer protection laws are concerned. Our analysis suggests some fundamental limitation of the statute which undermines the objectives of the Act.

Firstly, the Act does not define what constitutes ‘unfair’ while defining misleading advertisement. As per the definition, any advertisement can be considering misleading if by act of commission or omission it leads to unfair trade practices. However, the unfairness remains a subjective interpretation and runs the risk of being misused.

Secondly, the Act over emphasizes the role and rights of consumers. Only a person who is a consumer of a particular product or service is eligible to file a claim in a court of law or to CCPA. However, there are instances when a legal person may not be a consumer, nevertheless would want to file a claim in public interest. An Act that clearly states protection of public interest as its primary objective ironically does not create an avenue for vigilant citizens to file a case in public interest or a Public Interest Litigation.

Thirdly, the Act is premised upon a normative assumption that only consumers have rights that are violated. The Act does not recognize the right of firms and companies and hence does not allow firms to avail legal remedy in the consumer courts. A firm is a legal person but is not a consumer as per the Act. The Act does not cater to the rights of other competing firms which are invariably a part of any product/ service market. Rival firms in the market may indulge in advertisement which may be misleading for their competitors and not for them per se. For instance, Coca Cola and Pepsi frequently indulge in this type of unfair marketing strategies. The Act is silent on such issues which are a considerable menace in the marketing world. A legal institutional mechanism is necessary for deterring such marketing practices by rival firms. However, the Act is silent on this important aspect of unfair marketing which has considerable financial and reputational costs.

References

1. Ministry of Consumer Affairs, Government of India (2020), *Draft Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020*, available at <https://consumeraffairs.nic.in/sites/default/files/file->