Chapter-6

NATURE AND REGULATION OF UNFAIR TRADE PRACTICES

NEED FOR REGULATION OF UNFAIR TRADE PRACTICES

Fairness in action is a reasonable demand in any sphere of life including trade/business for congenial co-existence in the society where all are interdependent. The struggle for survival and the zeal to remain ahead of others restricts, prevents and more often eliminates 'fairness' in action. This has necessitated framing of Acts, Rules and Regulations to take one conform to reasonable norms of behaviour.

Consumers in a developing country need more protection than those in a developed country, since the former type are neither aware of such practices nor are fully organised to combat against them. Consumers' sovereignty is a meaningless phrase in India, since consumer exploitation takes place through a number of shoddy deals, like, underweight specifications, adulteration, deceptive hire-purchase arrangements at exorbitant rates of interest, aggressive selling techniques and misleading and false advertisements. The latter technique is the most notorious one, since it confuses maximum number of consumers all over the country. Blatantly made dishonest claims in the advertisements, especially for products like baby foods, toiletries, health tonics and cigarettes show the irresponsible attitude of the industry. It is the high pressure sales technique rather than the quality of any product accounts for the success in the market. Firms dominating the world of tobacco trade are selling products in the developing countries with significantly higher toxic emissions through advertising. High voltage sales gimmicks have virtually left the consumer helpless.

Further, consumers are subjected to the sale of hazardous toys, foods, drugs and appliances without due regard for their safety. Economic interests of the industry have gained precedence over the safety of the consumer. Prices of some items
are being increased without any relation to their cost on the ground that they are in short supply which has been artificially created.

With these background, the Sachar Committee identified the major lacuna in the M.R.T.P. Act, viz. no specific provision for consumer protection against false and misleading advertisements and similar other unfair practices. There is a greater awareness at present that the consumer should be protected against such practices resorted to by the trade and industry to mislead and dupe the customers. The statement of objects appended to the M.R.T.P. (Amendment) Bill, 1983 stated: "The Sachar Committee had inter-alia, recommended that the scope of the Act should be enlarged to cover unfair trade practices. The legislative history of the United States, the United Kingdom and other democratic and progressive countries of the world also shows that they have specific legal provisions for regulating unfair trade practices in order to supplement and bolster the law relating to restrictive trade practices... There is, indeed, a greater recognition now all over the world that the consumer needs to be protected not only from the effects of restrictive practices but also from practices which are resorted to by the trade and industry to mislead or dupe him."

As a result of recommendation of Sachar Committee MRTP Act, 1969 was amended in 1984 incorporating provisions regarding unfair trade practices. The M.R.T.P. (Amendment) Act, 1984 has bifurcated Chapter-V of the Principal Act into parts 'A' and 'B' and part 'B' has been devoted to the concept of unfair trade practices.

CODIFICATION OF UNFAIR TRADE PRACTICES

The newly inserted Section 36-A defines unfair trade practices as a trade practice, which for the purpose of promoting the sale, use or supply of any goods or for the provision
of any services, adopts one or more of the broadly classified
five practices and thereby causes loss or injury to the
consumers of such goods or services, whether by eliminating
or restricting competition or otherwise. The following are,
in brief, the various categories of unfair trade practices:

(1) **False/Misleading/Untrue Representations**

(a) about the standard, quality, quantity, grade, composition, style or model of goods/services;

(b) about the newness of the goods when they are rebuilt, second-hand, renovated, reconditioned or old;

(c) about the sponsorship, approval, performance, characteristics, accessories, uses or benefits, of goods/services;

(d) about the sponsorship, approval or affiliation of the seller supplier;

(e) about the need for, or usefulness of goods/services;

(f) of warranty or guarantee about the performance, efficacy, or length of life of products/goods which is not based on adequate or proper test;

(g) of warranty or guarantee for goods/services or a promise to replace, repair or maintain the goods/services which are not carried out.

(h) about the price of products/goods/services;

(i) disparaging the goods/services or trade of another person.

(2) **Misleading Bargain Sales**

Offer of goods/services at a bargain price without in fact intending to do so at that price or for a reasonable duration and in reasonable quantities.

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1. Included vide MRTP (Amendment) Ordinance, 1991.
(3) (a) **Misleading Offer of Free Gifts, Prizes, etc.**
To offer gifts etc., along with goods/services without intending to do so or covering, wholly or partly, the cost of such gifts etc., in the price of the goods/services.

(b) **Conduct of Contest, Lottery, Game of Chance or Skill**
To promote the sale, use or supply of any product or any business interest.

(4) **Violation of Prescribed Standards**
Selling/supplying goods not conforming to the prescribed standards, without any regard to the safety of or loss to the users of such goods.

(5) **Hoarding of goods and refusal to sell goods or provide services causing unjustifiable burden of increased cost on customers.**

I. **FALSE/MISLEADING REPRESENTATION**

The practice of making any statement whether orally or in writing or by visible representation, is covered under new provision which embraces statements expressed on an article offered or displayed for sale, or on its wrapper or container; or expressed on anything attached to, inserted in, or accompanying an article offered or displayed for sale or on anything on which the article is mounted for display or sale; or contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public. Such expressions shall be deemed to be a statement made to the public by and only by, the person who had caused the statement to be so expressed, made or contained.

Advertisement is a recognised mode of sales promotion. But, any statement, made whether orally or in writing or by visible representation would become false or misleading when
it contains wrong facts, half-truths or exaggerated claims, or omits essential information. The general impression conveyed should not be false. As such exaggeration - what is called "Hyperbole" - is permissible in advertisements to present one's products or services attractively but such exaggeration should not become indistinguishable from falsehood.

The practices which are treated as misleading advertisement and false representations have been described in Chapter-4. Therefore, in this chapter a study of various types such cases has been made particularly with reference to cases as decided by M.R.T.P. Commission.

(I) False Claims by Educational Institutions
Recently it has been observed that private educational institutions have been engaging in unfair trade practices. Some educational institutions have put false claims by publishing misleading advertisements and defrauded public. These practices generally have following forms:

1. Keeping the name of the institution with the word 'University'.
2. Misrepresenting that diploma/certificate granted by institution is recognised by Government.
3. Misrepresenting that educational institution is affiliated to a foreign university. These claims were made mostly with respect to more attractive degrees like M.B.B.S., M.B.A. etc.

These malpractices have been examined by MRTP Commission and orders have been issued against these educational institutions.

In the following para the cases as decided by M.R.T.P. Commission with respect to false and misleading advertisement by educational institutions have been discussed.
(1) **Using the Word 'University'**

According to the University Grants Commission Act, 1956 only a University established or incorporated by or under a Central Act, Provincial Act or a State Act or an institution deemed to a University under the said Act, could describe itself a University. In case of the Director General of Investigation and Registration Vs. M/s Shree Narayan Open University, Quilon (UTPE No. 387 of 1989) it was alleged that respondent was neither a University established under a Central or State legislature nor a deemed university under the U.G.C. Act, Shree Narayan Open University was an undertaking of Shree Narayan Samaskarika Samithy, a registered body under the Charitable Societies Act, and was a private education centre. Therefore, using the word 'Open University' by the respondent amounted to unfair trade practice under the M.R.T.P. Act.

The respondent, during the pendency of the proceedings, made a statement that it had changed the name of institution to 'Shree Narayan Open Education Centre' and also had stopped conferring any degrees to the students. M.R.T.P. Commission accepted the application of the respondent whereby it could run the institution under the changed name.

(2) **Degrees Recognised by Government**

In case of D.G. Vs. Principal, Katihar Medical College, Patna (I.A. No.5/1988 UTPE No. 10/1988) following facts emerged:

i. Katihar Medical College was a society registered under the Societies Registration Act. Principal of the college issued an advertisement relating to admission of students to the M.B.B.S. course of the said college.
ii. Medical College was not recognised by the Central Government and the Medical Council of India as required under the Indian Medical Council Act, 1956 nor it was included in the Ist Schedule (containing recognised institutions) under the said Act.

iii. It had no affiliation with any university.

iv. It did not have any facility of a hospital for proper imparting of the medical education.

M.R.T.P. Commission felt that Institution should have clearly specified in the advertisement as well as in the prospectus that the Medical College was not recognised, was not affiliated to any recognised university and had no facilities of a hospital for medical education. As respondent stated that college would be getting recognition, affiliation etc. in due course of time, M.R.T.P. Commission issued temporary injunction restraining the respondent from indulging in the unfair trade practice of giving such false advertisement and misleading representation.

When respondent could not get recognition and affiliation as expected, Director General filed an application suo moto against the Principal, Katihar Medical College, to restrain the college to indulge in unfair trade practice. The respondent came up with new draft of advertisement. New draft of advertisement depicting true picture of the college, was approved by Commission. Further, respondent was instructed to supply copy of new prospectus in future to the D.G. and submit an affidavit of compliance of the instructions.

In the similar case (D.G. Vs. R.M.P. of India, Pondicherry I.A. No.116/1987 UTPE No.425/1987) Rural Medical Practitioner Association of India (RMP of India) was restrained from making false and misleading claims regarding award of certificates. The Association was not an All India Association as claimed.
Further, course was not recognised as approved by Medical Council of India and Association was not affiliated to any recognised university or medical college.

(3) **Affiliation with Foreign University**

It has also been found that advantage of the craze of foreign degrees has been taken by some persons. Some educational institutions claimed falsely that their institution was affiliated to a foreign university. In the case of D.G. Vs. M/s Management Professionals Association, Madras (I.A. No.106/1987: UTPE No.417/1987), respondent made deceptive representations to the complainant that he was eligible for Ph.D. Degree from New York University, U.S.A. by private study. Complainant remitted Rs. 12,000.00 as coaching fee. The complainant was also issued a Coaching Completion Certificate, later the complainant was informed that his papers were being forwarded to Stantan University, U.S.A. for award of degree. Respondent also informed that New York University and Stantan University were same.

On investigation it was found that so called Stantan University was not accredited by U.S. Government, Deptt. of Education and that no degree purported to have been issued by such university was granted recognition. The so called Stantan University could not be traced at the address given by the respondent. The respondent had collected vast sums of money from students by deceiving them. It was also found that respondent made false representation and misleading statements with respect to following:

i. Governing Council of the Association consisted of eminent judges and bureaucrats.

ii. Post graduate/engineering/Ph.D. Degrees of New York University and other U.S. Universities could be obtained by private study in India.
On the basis of above findings, M.R.T.P. Commission issued an ad interim injunction restraining the respondent from indulging in such unfair trade practices.

In a similar case (D.G. Vs. Institute of Managerial Science and Technology, Goa - UTPE No.269/1988) false and misleading claims were made regarding Clayton University, U.S.A. Institute was making false and misleading claims through advertisement that the three year correspondence course provided by it was equivalent to MBA Degree and degree was to be provided by Clayton University of U.S.A. which was one of the best universities of the world and its award were recognised internationally.

In this case also it was found that Clayton University was not an University accredited by the Education Deptt. of Government of U.S.A.

University Grants Commission had identified 27 such Self-Styled Universities. These universities are neither established under any State or Central Legislature nor recognised by U.G.C. The list of these universities has been given in Appendix

(ii) False Claims for Miraculous Cures, Treatments etc.
Several persons and centres offering wonder drugs and treatments for skin disorders, baldness etc. have been restrained from proceeding with such misleading advertisements. An interesting case relates to tall and false claims made by a company to promote its product "Ferro Redoxon" which was recommended for covering up iron deficiency, anaemia, etc. (D.G. Vs. M/s Roche Products Ltd. Bombay, UTPE No.277/1988). It was claimed with reference to medical authorities that the product when taken would increase the absorption of iron three times
and if taken in a larger quantity of 200 mg, it would increase the absorption sixfold, as it contained ascorbic acid. According to medical experts and reports obtained by the Commission it was found that ascorbic acid when present in an amount of 200 mg or more increased the absorption of medicinal iron by at least 30 per cent and the increased uptake could be associated with increase in the incidence of side effects.

As the unsubstantiated advertisement created a wrong impression upon the minds of credulous consumers, the Commission issued an ex-parte temporary injunction on 05.05.1988 and made it absolute on 10.06.1988 as it was found that several essential facts relating to the medicine were suppressed.

Similarly in various other cases, the claims have been found false and/or misleading. Some cases are being discussed hereunder:

(A) **Weight Reduction (Body Wrap's Case)**

The Monopolies and Restrictive Trade Practices Commission (MRTPC) has restrained. Body Wrap, a Bombay-based concern, from making claims about the efficacy of its treatment for obesity.

A petition was filed before the Commission in 1985 based on published claims by the concern that it had weight and girth reducing technology from Sun Wrap Inc. of USA which helped persons undergoing treatment for an hour to reduce upto 2.5 kg. of body weight and lose 5-15 inches. Other untenable claims were also made. There were complaints that concern was not rendering satisfactory service to consumers which was an unfair trade practice. In some cases loss or injury was caused to many consumers.

The Commission found that the treatment disturbed normal metabolism, affected the nervous system, and impaired
respiratory functions because of sudden loss of weight. Also, that Body Wrap had not obtained any technology from USA. Besides, Sun Wrap's technique was not approved by the Federal Drug Administration (FDA) or any other US Governmental Agency for weight loss.

The respondents were ordered to pay it Rs. 10,000.00 towards the cost of proceedings.  

(B) Cure for Infertility

A RMP Doctor the U. Murli Mohan of Vijaywada issued advertisement that childless couples would be bestowed by a child if they took Herbal Treatment prescribed by him. (UTP Enquiry No.154 of 1987). On enquiry by MRTP Commission it was found that Mr. Mohan was not a qualified Doctor. Further it was found that treatment proved successful only in 17 cases out of 41 patients treated during the period from 1st March, 1986 to 31st December, 1986. MRTP Commission found that representation made by the respondent in the advertisement was misleading and false. In this case respondent gave on undertaking not to issue any advertisement in future and Commission issued a cease and desist order.  

(C) Lucky Stones


The respondent had issued an advertisement in the newspaper 'Hitavada' pompously titled 'The Touch-Stone of Fortune: Let it Touch You and See Your Future Change'. One of the side titles of the advertisement carried the words 'International Acclaim for Research on Lucky

Stone'. The advertisement also carried a picture of small stones under the heading 'Unique Lucky Stones'.

The advertisement further contained copies of certificates from at least seven persons from Nagpur who had purchased the lucky stones. These certificates left one with the impression that by wearing these stones they had witnessed improvement in monetary position, increase in will-power and happiness, solution to financial, personal and health problems, meritorious results in the college and university examination, realisation of dreams, improvement in career, etc. Actually, it was claimed in the advertisements that 17000 certificates and letters thanking the owner, and his Institute had been received.

The investigations made by the D.G. showed that the proprietor of the Institute had been in this business for the past 21 years.

According to the D.G., the respondent had not furnished any evidence to prove that there was any scientific basis in such claims. The respondent had relied on a book on "Gem's Therapy" written by Dr. Bhattacharya, M.A., Ph.D., but this was only a theoretical analysis and could not be equated with any rational scientific explanation.

**Decision and Reasons**
The Commission held that the claims as made by the respondent in the advertisements were highly misleading, unscientific and irrational. The respondent did not have the expertise to treat semi-precious stones and invest them with magical powers. What he was selling was ordinary stones by exploiting the credulity of the common man and his faith in stars and lucky stones. The Commission, in fact felt that the respondent was promoting superstition and blind faith and discouraging persons from handling their problems in a rational, self-
reliant manner. The adverse effect of such advertisement on illiterate poor people, who constituted a sizeable portion of our country, was too patent. The Commission further felt that though the respondent had held out "money back guarantee" in the case the stone did not work, the effort and the expenditure involved in claiming the price paid was in itself a financial burden, apart from the trail of disappointment that it left behind.

In view of the above, the Commission held that the respondent had indulged in unfair trade practices under section 36A(1)(i) and (ii) of the MRTP Act, and that the aforesaid unfair trade practices were prejudicial to public interest as well as to the interest of those persons who were taken in by the tall claims made by the respondent in respect of what he called 'lucky stones'.

A cease and desist order was accordingly passed by the Commission under Section 36D(1) directing the respondent to pay a sum of Rs. 1,000.00 to the D.G. as costs.  

(D) Headache Treatment

M/s Burroughs Wellcome (India) Ltd., Bombay was manufacturing and marketing a medicine under the name "Ridake Paracetamol Tablets" for 'clearing' headaches. Respondent issued an advertisement in respect of the said medicine. That advertisement appeared in a daily newspaper, "The Hindu" of March 11, 1986. In that advertisement it was stated to the effect that the aforesaid medicine was the 'Safest Way to Clear Headaches' that the same did not have the side-effects like Aspirin which caused 'erosive gastritis with occult and overt gastrointestinal bleedings, and gastric ulcer'. For supporting the aforesaid assertion that the side-effects were caused by aspirin, reliance in the advertisement was placed on

4. Chartered Secretary, January 1990.
on an editorial which appeared in British Medical Journal known as "The Lancet". Such an advertisement was repeated in the 'Decean Herald' dated April 17, 1986 (UTP Enquiry No.55/1986).

The case of the Director General (I & R) was that the respondent had made misrepresentations in as much as it highlighted that part of view of the British Medical Journal which deals with the side-effects of Aspirin but suppressed the view of the said Journal to the effect that Paacetamol (which is the medicine manufactured and marketed by the respondent) adversely affects the liver, and that, therefore, in that way the latter had indulged in an unfair trade practice within the meaning of Section 36A(1)(i) of the MRTP Act. It was also contended by the Director General (I & R) that respondent had been guilty of an U.T.P. within the meaning of Section 36A(1)(x) of the M.R.T.P. Act by disparaging 'Aspirin' by highlighting the view of British Medical Journal regarding its side-effects and extolling the quality of 'Ridake'.

Upon enquiry M.R.T.P. Commission found the respondent company guilty of unfair trade practice and an ex parte temporary injunction was passed on 02.06.1986. This injunction was made absolute on 26.06.1986. Subsequently respondent company undertook not to repeat the impugned advertisement and not to infringe the injunction order. The application of the respondent was accepted by the Commission.

REPRESENTATIONS HELD AS FAIR

(A) Reduction in Weight (Sheri Louise Slimming Centre's Case-UTP Enquiry No.48 of 1984)

In this case MRTP Commission concluded that advertisements given by the Respondent company were not suffering from the vice of misrepresentation, hence enquiry was closed.

5. 'UTP Enquiries' by M.L. Sachdeva, Page 127.
6. Ibid.
(B) Improvement in Vigour and Vitality
(UTP Enquiry No.16/1985 MRTP Order dated 17.10.1986)
Indo-German Pharmaceuticals, Bombay advertised for its drug 'Energy-Forte', claiming that adults will be benefitted from the medicine by improvement of the vital functions of the body and personality. After enquiry Director General submitted that the medicine is actually meant for improving sexual potency, but advertisement indicates that it is useful for improvement in vigour and vitality.

MRTP Commission did not find any misrepresentation in this case and observed "There is no finding by the Director General that this medicine is a sexual stimulant for a temporary gratification without accompaniment of improvement in general health. There is no finding that this medicine does not serve as a tonic".

(iii) False Claims with Regard to Foreign Collaboration/Foreign Brand Names

It has been found that business houses claim in their advertisements that they have foreign collaboration-technical and/or financial - for their products. On enquiry it has been found in many cases that they did not have any collaboration as represented. Few of such cases have been discussed below:

1. Technical Collaboration Falsely Claimed
(UTP Enquiry No.58/1984, MRTP Order dated 03.06.85)
M/s Kelvinator of India Ltd. has been manufacturing, besides other products, 50 cc. Mopeds and 150 cc. 'Avanti' scooters, and M/s Expo Machinery Ltd. was the dealer for sale and servicing of these vehicles. The two respondents have been issuing advertisements in newspapers representing that 150 cc. 'Avanti' scooters and 50 cc. Mopeds were being manufactured
in technical collaboration with Agrati Gerelli of Italy. Enquiries, however, revealed that the foreign collaboration was only in respect of the manufacture of 50 cc. Mopeds whereas for the manufacture of 'Avanti' 150 cc. scooters, the respondent no.1 had received merely technical guidance from Avanti-Garelli of Italy.

Respondents contended that technical guidance was virtual technical collaboration. But this contention was not acceptable to MRTP Commission. Consequently respondents took the undertaking that in future they will not advertise or represent that they have any technical collaboration agreement for the manufacture of 'Avanti' 150 cc. scooters.

(B) In a case (UTP Enquiry No.102/1987 MRTPC Order dated 31.10.1988 - In the matter of M/s Bigston).

Representation by the T.V. manufacturing company that T.V. manufactured by them were based as 'Latest Japan Technology', when company was not having any foreign collaboration, was treated as unfair trade practice.

The respondents submitted that their Colour T.V. circuits etc. were based on the state of art technology of Japan because they had adopted the latest chroma circuit, U.P.C. 1365 from NEC, which practically gave noiseless colour reproduction. It was, however, admitted that they did not have any technical collaboration with the foreign T.V. manufacturer.

Decision and Reasons
The question arose whether the assumption that the respondent company had adopted chroma circuit UPC-1365 from NEC entitled them to claim that the T.V. sets manufactured by them were based on "Latest Japan Technology".
The Commission held that if the respondent company was sanguine that the adoption of chroma circuit UPC-1365 from NEC brought their product to the level of the foreign made product, they might advertise that fact, that is, the T.V. Set carried chroma circuit UPC-1365 from NEC. The embellishment of their advertisement with the epithet "Latest Japan Technology", was explicable on no hypothesis other than that they wanted to represent to the customers that their T.V. sets based as they were on foreign technology, were manufactured in India in collaboration or in affiliation with the said foreign manufacturing company, the Commission ruled.

A cease and desist order under Section 36D(1)(a) was consequently passed against the respondent directing that the respondent shall desist from using the representation "Latest Japan Technology" in their advertisements for Bigston T.V. sets - Black & White and Colour. 7

(2) Use of Foreign Brand Name/Insignia

(UTP Enquiry No.63/1985 MRTP Order dated 09.10.1987)

In a leading case (Indian T.V. Manufacturers' Association Vs. M/s Pieco Electronics & Electricals Ltd., Calcutta and others) it was found that respondent company was unauthorisedly using Trade Mark "PHILIPS" in its advertisements and on the T.V. sets marketed by it and had been claiming that it was the largest and most experienced television manufacturer in the world. Further use of trade mark 'PHILIPS' indicated that T.V. sets being marketed use technology of Philips of Holland. On enquiry, it was further found that T.V. sets were actually manufactured by Orientronicks Equipments Ltd.

The respondent company was found guilty of unfair trade practice and it undertook to discontinue the misleading advertisement that T.V. sets marketed by PIECO were

Philips T.V. sets. Respondent also issued circulars to its dealers instructing them not to use Trade Mark 'Philips' in any of their Stationery, advertisements, hoardings etc. The Commission was satisfied with the steps taken by the respondent company and it passed orders directing company to:

(a) give an undertaking that it will not use brand name Philips while marketing its T.V. sets in future;
(b) issue a circular to the dealers instructing them not to represent to customers that its PHX models T.V. sets are Philips models, either orally or through hoardings/display board or through invoices/delivery challan. 8

(3) Foreign Association Falsely Claimed

In a case (UTP Enquiry No.141/86 MRTPC Order dated 23rd February, 1990 - In the matter of Iveon Laboratories, Bombay) it was found that deliberate misrepresentation was made by the Pharmaceutical Company to mislead the Consumers regarding its association with a foreign company for the manufacture of medicines. There was no such association. Only a machine of that foreign company was purchased for packing of medicines.

The enquiry was instituted on a complaint received from one Shri J.C. Pandit of Madras. The complainant alleged that the respondent was manufacturing 0.9 per cent W/V sodium chloride injection I.P. - 'large volume fluid' and that on the label of the medicine was mentioned. In association with Rommelag, Switzerland, the fact was that M/s Rommelag, Switzerland were manufacturers of plastic moulding machines and not 'large volume fluid'.

This misrepresentation made by the respondent was also confirmed by the D.G. in his report and a notice of enquiry was sent by the Commission to the respondent.

The respondent filed a reply against the notice of enquiry and refuted the allegation levelled against him. In support of the contention the respondent heavily relied upon para 6 of the agreement with M/s Rommelag, Switzerland which gave exclusive right to use Rommelag name on the product pertaining to large and small volume parenterals fluids as follows:

Made in India by:
IVEON LABORATORIES
Divn. of Bombay Potteries & Tiles Ltd.
In Association with,
Rommelag, Switzerland, W. Germany.

Decision and Reasons
After going through all the records and facts of the case, the Commission observed that there was no doubt that the respondent had obtained the exclusive right to use Rommelag's name on the product labels and literatures pertaining to large and small volume parenterals fluids. But as per facts of the case, the respondent had been simply packing the machine with the help of a machine purchased from M/s Rommelag, Switzerland. In no way, there was a nexus with the foreign company in the formulation, etc., of the medicine. There was a real distinction between the contents (medicine) and the container (bottle) and the respondent had no connection with the contents. It was a clear case of deliberate misrepresentation to mislead the consumers, the Commission added. It was, therefore, held that the respondent had indulged in the unfair trade practice and a cease and desist order was passed against under Section 36(1)(d) of the M.R.T.P. Act.⁹

(iv) Baseless Claims in Prospectus Inviting Subscriptions to Shares and Debentures
(A) In a case (D.G. Vs. Universal Luggage Mfg. Co. Ltd., Bombay - UTP Enquiry No.27/1987, MRTPC Order dated 29.01.1987) following statements in prospectus were considered unfair:

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⁹. Chartered Secretary, June 1990.
1. Unrealistic and over-optimistic projections of growth of turnover, net worth etc.

2. Claim as established dividend paying company when in fact dividend was declared only in two years during a period of five years.

3. Claims based on calculations contingent upon several factors.

(B) In another case (D.G. Vs. Khaitan Chemicals & Fertilizers Ltd., New Delhi - UTP Enquiry No.215/1986, MRTPC Order dated 17.11.1986) when the company declaring a public issue of shares claimed in its advertisements that 26 per cent pre-tax return was guaranteed by the government and the investment ensured consistent returns to the manufacturers and investors, it was found that such claims were based on contingent factors and had the potential to influence the investors by misconceptions about the benefits arising from the investments. The company gave an undertaking not to issue such advertisements and also issued modified advertisements subsequently.

(C) Assurance of specific high returns of 50 per cent on investment made at a time when there is a boom in the share market. This is speculative as boom may not continue for long. The statement was considered unfair by MRTP Commission. (D.G. Vs. ALB Share Trading Co. Ltd. - UTP Enquiry No.256/1986, MRTPC Order dated 31.03.1987).

(D) A claim that if a person invests in fully convertible debentures issued on rights basis he would earn more than 80 per cent per annum. The assurance is based on the presumption that debentures converted into shares would fetch a particular prices on any date in future, giving misleading picture about the benefits from investments. (D.G. Vs. The Indian Rayon Corpn. Ltd., Bombay - UTP Enquiry No.5/1987, MRTPC Order dated 22nd May, 1987 and 7th January, 1988).
Catchy Statements Inviting Investments

Several advertisements inviting investments with promises of high returns from holiday resorts, plantations, farms, etc., have been dealt with by the Commission and structures passed against them. The Commission in all such cases has made it very clear that it will never interfere with the legitimate business of any person, but then investors should be given full facts and not half-truths. More serious amongst such cases has been the advertisements from private finance concerns inviting deposits from the general public guaranteeing security as well as very high rates of interest and also making tall claims of the services available to investors. Such advertisements and mushroom growth of such private bodies have been severely condemned by the Commission as they create a parallel banking system adversely affecting the efforts of the nationalised and recognised financial institutions to mobilise funds for investment in productive channels. Such accepting of deposits by private bodies also violates the provisions of the Reserve Bank of India Act, 1934. (D.G. Vs. Oriental Finance & Exchange Co., Madras - UTP Enquiry No.54/1987, MRTPC Order dated 19.02.1987).

Advertisements by non-banking companies offering a package of benefits and advantages from deposit schemes have been held to fell within the term "Services" defined in the MRTP Act which cover service of any description which is made available to potential users. (Sahara India Saving & Investment Corpn. Ltd., Lucknow - UTP Enquiry No.497/1987 MRTP Order dated 18.08.1987). On the basis of an application moved by the Director General of investigation and registration in the company affairs department, MRTP Commission held that certain claims made by the company in its advertisements for "Gold Leaf Cash Certificate" Deposit Scheme were misleading.
and false. It had accordingly ordered the company to refrain itself from making these claims in future.

Subsequently company was found guilty of breach of the order of the Commission. In a land work decision made on 06.09.1989, MRTP Commission convicted the company and its subsidiary for violation of an earlier order. This was a rare occasion that a company faced prospects of being punished for the violations of the Commission's Order.

Similarly in another case (D.G. Vs. Auditya Finance & Investment (India) Ltd., Bombay - UTP Enquiry No.283/87, MRTP Order dated 17.07.1989), company was carrying the business of inviting and accepting deposits from the public. In order to attract the depositors, company issued a brochure in which he gave a number of allurements to the intending depositors, such as loan to depositors without guarantee, return of 145 per cent in three years etc.

On the basis of the application moved by Director General and various complaints of depositors MRTP Commission passed ex-parte cease and desist order.

In the case of a plantation company (D.G. Vs. Krishna Farms - UTP Enquiry No.214/1986, MRTPC Order dated 24.02.1989) it was found that company, engaged in eucalyptus plantations, made tall claims of high return on investments. Company advertised return of 400 per cent on investment, 100 per cent security of investments, tax free income, loan on investment etc. Commission found that claims made by company were difficult of achievement. It passed a 'cease and desist' order against the company.

In another case (D.G. Vs. 10 FIC Leasing Ltd. - UTP Enquiry No.14/1987, MRTPC Order dated 24.10.1990) the company introduced a scheme aimed at getting funds from the public, under
which it floated "gold bonds" worth Rs. 10,000.00 each, which would be worth Rs. 20,000.00 each in 54 months. The purchaser of the bond could take the said amounts in the form of gold jewellery. The deposits so received by the company were to be utilised for the business of leasing. In an application under Section 36B(c) of the Monopolies and Restrictive Trade Practices Act, 1969, the Director General of Investigation and Registration alleged that, in its advertisement, the company had made the following misleading claims which amounted to unfair trade practices:

- that the claim that the deposits were covered by bank guarantees from nationalised banks was true only to the extent of 5 deposits;
- that, even in these cases, the principal of Rs. 10,000.00 alone was covered and not interest;
- that the company had failed to show any good leasing business done by it;
- that the company could have obtained guarantees from nationalised banks only if the entire amount was deposited with the nationalised bank, and no amount could, therefore, have been invested in leasing;
- that the company had accepted deposits from investors for a period exceeding three years and at a rate of interest exceeding 15 per cent, which were the limits prescribed by the Reserve Bank of India for the purpose of Section 58A of the Companies Act, 1956;
- that the reference to denominations of 100 gms., 50 gms. in the "Gold Bonds" was misleading as the company would return only jewellery worth Rs. 20,000.00;
- that there was no question of 50 per cent discount, as the jewellery was to be sold at the rates prevailing after 54 months;
- that the claim that the company was the "largest profit-yielding system" was false as many other investment companies paid higher interest of 30 per cent or more;
- that no lucky draw had ever been held as claimed.
Held, that there was no rebuttal of these allegations and that there was enough evidence to come to the conclusion that the company had indulged in unfair trade practices within the meaning of Section 36A(1)(i), (ii), (iv), (vi) and (viii) of the Monopolies and Restrictive Trade Practices Act, 1969. The company was ordered to cease and desist.

(vi) Misleading Guarantees and Poor After Sales Service

In some cases it has been found that manufacturers have misled consumers with regard to guarantee period. In the case of D.G. Vs. Polar Fan Industries Ltd. (UTP Enquiry No.289/1988, MRTPC Order dated 20.05.1988) it was found that company proclaimed a guarantee of seven years but according to the guarantee card, the guarantee was only for two years after which the company would charge for the replacement of parts at company's price list.

Similarly, in another case of Escorts Ltd. (UTP Enquiry No.78/1985, MRTPC Order dated 05.10.1987) dealer of the company failed to remove the defect in the tractor within the warranty period. In this case commission not only condemned the concerned dealer for undue delay in servicing but also directed that company should keep an eye on its dealers to ensure prompt after-sales-service.

(II) Misleading Bargain Sales

Bargain sales means offer of goods or services at a bargain price - a price lower than the normal price of the offered goods/services. An offer can be said to be at a bargain price when -

(i) it is specifically stated as a bargain price with reference to an ordinary price or otherwise, or
(ii) it is reasonably understood to be a bargain price by any person who reads, sees or hears the advertisement.

Bargain sales will be unfair when the offerer has no intention to sell the goods/services at the offered bargain price, in reasonable quantities, and for a reasonable period. As to what is reasonable period or quantity should be determined having regard to the following factors:

(a) Nature of the market in which the business is carried on
(b) the nature and size of such business; and
(c) the nature of such advertisement.

The MRTP Commission has issued detailed guidelines to be followed by those offering goods/services at bargain prices.

GUIDELINES FOR BARGAIN SALES

(A) Period of Sale to be Minimum 10 Days

(i) The period of discount sale shall invariably be mentioned which should be reasonable. The initial period may not be less than 10 days, but extension could be for a shorter period. Such extension will have to be in continuation of the original discount sale period, but if there be a gap or interruption in the sale period, the second advertisement will again have to be for a period of not less than 10 days.

(ii) A reasonable period of discount-sale having record to the availability of the stocks and the daily turnover, shall be mentioned so that there is no necessity of extending the total discount-sale period in dribblets.

(B) Normal and Bargain Prices to be Stated

(iii) The normal prices of the items broadly categorised shall be indicated so that the customers may be aware of the original price and the bargain price at which articles of particular categories would be available. If this
is not possible on account of too many varieties of goods put up for sale, as an alternative, the advertisement shall indicate, as far as possible, the price ranges of the representative items along with the disclosure of rate/rates of discount available on goods or different categories of goods.

(iv) Ordinarily one rate of discount on particular category or variety of Sarees or other garments should be announced. If it is intended to give varying rates of discount, then at least the ordinary price ranges of the representative items along with the range of bargain prices or rates of discount therefor be indicated.

(v) If the varying rates of discount are given on account of the quality of the goods, the same shall be indicated.

(C) Quality of Goods & Nature of Bargain Sale to be Indicated

The quality of the articles at which the maximum and the minimum discount would be available shall also be mentioned as far as possible. If the sale is during off-season, it may be so indicated.

In a case where one of the guidelines ordered to be followed, was violated by Snowhite Clothiers. The Commission considered the question of prosecution under the Act, but took a corrective measure short of prosecution by asking the firm to pay heavy costs so as to persuade them to cure the defects in the advertisement and not to violate the guidelines in future.

UNFAIR BARGAIN SALES

(A) Period of Sale Unreasonably Short

When period of sale is unreasonably short the expression 'till stock lasts' is not indicative of bargain sale period. This decision was given by MRTP Commission in the case of Snowhite Clothiers, New Delhi (UTP Enquiry No.13/1984, MRTP Order dated 02.05.1986).
(B) Offer of 50% Discount Without Giving Original Price
(UTP Enquiry No.4/1984, MRTPC Order dated 29.01.1985)

M/s Hira Lal Bros. of New Delhi, who were dealing in
readymade garments, advertised that on various textile
items the sale discount would be given 50% and above.
It was noticed that original price was not given in
the advertisement. On enquiry it was found that actually
discount offered ranged from 21% to 65% on various items,
but respondent firm had categorically stated that the
discounts would be 50% and above, implying thereby the
minimum discount would not be any way less than 50%.
The respondent gave an undertaking that in future he
would not indulge in such unfair practice and matter
was closed by MRTPC.

(C) Period of Sale, Quality of Goods not mentioned

It has been found in several cases that while advertising
discount sales, companies do not specify quality of
goods offered for discount/bargain sale and period of
sale.

In the case of Dayal Novelties, Hyderabad (UTP Enquiry
No.33/1985, MRTPC Order dated 24.02.1986) it was alleged
in the notice of enquiry that the advertisement announc­
ing the sale does not mention the 'period of sale'
and 'quality of goods' offered for discount sale.
Initially, the respondents contested the charge of
alleged unfair trade practice but later gave an under­
taking that it would not indulge in such practice in
future.

Similarly in the case of Heera Silk House, Hyderabad
it was found that 'quality of goods' offered for discount
sale was not mentioned in the advertisement. The respon­
dent, although initially contested, gave an undertaking
not to indulge in such unfair trade practice in future.
In case of M/s Novex Pvt. Ltd., New Delhi (UTP Enquiry No. 15/1984, MRTPC Order dated 17.03.1986) upon enquiry following unfair trade practices were found - (i) Period of sales was not given; (ii) Quality of goods not given; (iii) the advertisement mentioned that all the goods were of Raymonds Mills while that was false because many other goods were sold; (iv) Respondent did not allow discount of 50% even in one case, although it advertised to allow discount of 50%.

In this case, respondent accepted the fault and gave an undertaking not to indulge in unfair trade practice as alleged.

FAIR BARGAIN SALES

(1) An announcement, "FESTIVAL DISCOUNT UPTO 40% TILL DIWALI" is quite specific about duration. In this case relating to sale of Carpets, even though no range of discount was given in the announcement, the discount was actually given, and the range was not actually wide. It was between 25-40% not linked with quality or age of Carpets but based on the size - higher discount for small size and vice versa. It was found that there was no element of deception.

(2) The caption "CLEARANCE SALE" is sufficient to indicate that goods offered at a discount could not have been otherwise disposed off in the normal course.

(3) Reasonable Quantity - Where the announcement of a Clearance Sale of left-over readymade garments etc., offered a discount upto 50%, and more than 25% of the items were sold at an offered discount of 50%, it was held to satisfy the criterion of reasonableness of quantity as to a bargain sale. It was observed that 25% could by no means be regarded as a small or negligible proportion of the total sales.
(4) When a Sale is a Retail Outlet and Not Discount Sale

In a case where a manufacturer had no permanent business place for retail and had to arrange on rent the premises, a strict view was not taken for a sale of short periods of 3 days.

However, it was laid down by the Commission that so long as the normal business was carried on from factory itself on wholesale basis and the retail outlet was required to be arranged only occasionally, not more than 5 to 6 times in a year, sale on any one occasion should not be for less than 4 days. The maximum sale period on each occasion will have to be announced in the very first advertisement and not in driblets.

(III) Gift Schemes, Contests and Lottery

(A) Gift Scheme - Section 36A (3)(a)

According to sub-section (3)(a) of section 36A, any offer of gifts, prizes or other items would be a unfair trade practice, when -

i. the offerer has no intention to give the gifts or prizes; or

ii. illusory gifts are given, that is, a misleading impression is created that some item is offered free of charge as gift, whereas its cost is fully or partly covered by the amount charged in the transaction as a whole.

Not every gift scheme may involve participating in a contest.

FAIR GIFT SCHEME

The gift schemes offered by any person will not be unfair -

(i) when the gifts, as advertised, are actually given without charging the customer for the gift in any manner.
(ii) when the increase in the price of the product before, during or after the scheme is due to increase in excise duty, etc., or increase in the cost of raw material.

(iii) when the gifts offered are of negligible value in comparison to the cost of the original transaction.

In the case of M/s Camera Works Pvt. Ltd., the company announced a scheme called "GET-A ROLL FREE SCHEME" whereunder the customer who sent two or more rolls for printing and developing with a specified minimum print order would get one free roll of film. The preliminary investigation revealed that the price of the popular size roll was actually reduced from Rs. 3.50 to Rs. 3.00 per print, and the gifts were actually disbursed and the cost thereof was not recovered by increase of the cost of prints. The Commission held, therefore, that there was no question of proceeding with the enquiry in the circumstances of the case. (UTP Enquiry No.64/1985, Order dated 06.01.1986).

UNFAIR GIFT SCHEMES

Gift Schemes become unfair when there is an increase in the price of the original transaction or a customer is required to pay extra amount or the gifts given are illusory. Some of the cases where gift schemes have been found unfair are as under:

(1) In a scheme of 'Great Fans, Great Gifts', organised by M/s Khaitan Electricals Ltd., a purchaser of their fan, in order to obtain the gift coupon carrying a wide range of gifts of unequal value, was expected to pay Rs. 13.00 extra. The scheme was for a limited period till stocks lasted. This was clearly held to be an unfair trade practice under clause 2(a) of section 36A (3) followed by an interim injunction which was also made absolute. Ultimately, the company gave an undertaking not to indulge in such practices. (D.G. Vs. Khaitan Electricals Ltd., UTPE No.15/1986, Orders dated 21.02.86 and 31.03.86).
In the case of 'Pakwan Sure-Prize Contest' organised by M/s Kochar Oil Mills Ltd., Delhi, it was announced that every purchaser who participated in the contest would get a beautiful surprise gift, worth Rs. 24.00. In fact, 12 Gift Coupons worth Rs. 24.00 were given. Their only utility was that one would have to buy twelve packs of oil to get a nominal rebate of Rs. 2.00 per pack before the expiry of the scheme. Thus, this was an offer of gift which was not intended to be provided as advertised. Further, to enter the contest, one had to buy a pack of oil too. (Re: Kochar Oil Mills Ltd., UTPE No.53/1985, Order dated 01.02.1987).

Contests, Lottery & Games of Chance - Section 36A(3)(b)

Contests, in general, have not been viewed favourably by the Commission. According to sub-section (3)(b) of section 36A -

"Conduct of any contest, lottery, game of chance, or skill will be unfair when it is for the purpose of promoting, whether directly or indirectly:

(i) the sale, use or supply of any product; or

(ii) any business interest,

and loss or injury is caused to consumers.

Mostly, in practice, the gift schemes and contests are inter-woven. However, not every gift scheme may involve participating in a contest or game of skill or chance.

The Commission has in a few cases tried to interpret the scope of clause (b) of sub-section (3) of section 36A to imply that the very act of arranging contests, lottery etc. is by itself inherently unfair. Nevertheless, the Commission has consciously applied in almost all the cases, the concept of 'loss or injury' given in the main part of section 36A. It is a different matter that the term 'loss or injury' has been interpreted in the broadest possible sense in some cases to cover
the schemes and contests where the distinction between actual loss or injury and potential to cause loss or injury seemed to be very thin. Some of the important cases relating to contests, lottery etc. decided by the Commission are as under:

Contests Held Not Unfair

(1) Solving Puzzles of Specialised Interest
In a contest organised by the Competition Success Review Pvt. Ltd., any aspiring contestant had to buy a copy of the Competition Success Review and solve the puzzles given there. The Commission said that it might be argued that the magazine covered serious matters of general knowledge etc., meant for specialised readership and the puzzles were devised only for them who would even otherwise be interested only for them who would even otherwise be interested in contributed to the magazine. In other words, there would be no additional cost to the readers entering the contest. This aspect necessitated a departure from the view that loss or injury was inherent in contests under section 36A(3)(b). The Commission observed that, "even if the concept of loss or injury was stretched so as to bring the particular contest within the definition of an unfair trade practice, it was difficult to hold that it was prejudicial to public interest or to the interest of any consumer or consumers generally", a condition which must be satisfied before the Commission could pass cease and desist orders. (UTPE No. 7/1985, Order dated 24.12.85)

(2) Contest Encouraging Interest in Sports
In another contest, organised by M/s Mid-day Publications Pvt. Ltd., the contestants had to incur a nominal cost of 0.50 paise to buy a copy of 'Mid-day', an evening newspaper, and to pick the ideal World XI Cricket Team,
which was to be later matched with the actual team selected by experts and prizes given to winners. The Commission could not hold the practice as unfair and prejudicial to public interest and said that promotion of sports or games actually served public interest as it encouraged youth to participate in a healthy past time and added to the national prestige by achieving victories in international competitions. (UTPE No.50/1985, Order dated 12.03.1986).

(3) Educational Contest
In the case of a competitive contest described as "Think 'N' Stick Contest" held by a school at the instance of Pidilite Industries, the students were compulsorily required to participate in the contest, which required making boat from cardboard and colour paper. They were also required to buy a tin of Fevicol manufactured by the company. The Commission dropped the proceedings as it was not possible to ferret out any conspicuous loss or injury to the participants which outweighed educational benefit derived thereby. It was found that there was no entry fee and no change in the price of Fevicol since 1985, and prize-winners were to get, in addition, free training in making toys and utility articles. (Re: Pidilite Industries Pvt. Ltd., Bombay, UTPE No.56/1987, Order dated 22.05.1987).

(4) Contest Creating Political Awareness
In the case of 'Blitz General Elections Now Contest' organised by Blitz Publications Pvt. Ltd., Bombay, the participants were required to fill-in a ballot paper which contained five questions to ascertain the political mood of the general public. The ballot paper was to appear in all the issues of the weekly and even though there was no entry fee, the participants had to buy the magazine to enter the contest.
It was alleged that there was increase in the price of the weekly with effect from the date of announcement of the contest giving the impression that the cost of the prize offered was fully or partially covered by the increase in the price. The Commission accepted the contention of the respondent that increase in the price was due to the increase in the number of pages in the weekly, and overruled the objection that additional pages provided more space for advertisements and, therefore, increase in the prices was not justified. It was held not an 'unfair trade practice' under clause (a) of sub-section (3) of section 36A.

Even though the contest fell within the scope of sub-section 3(b), the Commission held that it did not cause loss or injury to the consumers, and it was also not prejudicial to the public interest as it could be considered as an exercise in political education spreading awareness of political issues. (UTPE No.186/1987, Order dated 14.04.1988).

(5) Game of Chance with Gift for Everyone and Low Price
In the case of a gift scheme organised by M/s KMP Oil Industries Ltd., Calcutta, it was advertised as, "A Gift in Every Tin of KMP Pure Coconut Oil". Every tin contained an alphabet in green colour indicating a particular gift and particular alphabets indicated gifts of varying value; thus every purchaser was bound to get some gift according to the alphabet he found in the tin he purchased. It came to the notice in the course of investigation that during the operation of the gift scheme the prices were rather lower than the prices before the scheme. Also the gift scheme was meant only for consumers, not for wholesalers and retailers. The Commission held that although whether one gets gift of a high value or small value was a matter of chance, it was not a game of chance, or a contest. The element
of lottery was not there in the sense that even though lots were drawn, every tin carried with it some gift whether of high value or small value; it was not possible to ascribe prejudice to consumer interest dependent on loss or injury either in present or in future as everybody get something with the added benefit of reduction in price. Therefore, the Commission held that it was not an unfair trade practice under sub-section (3) of section 36A. (UTPE No.73/1985, Order dated 19.03.86).

(6) **Lottery on Golden Jubilee Celebrations**

In the case of M/s S.C. Sharma & Co. Pvt. Ltd., New Delhi, the company, on account of celebrations of its Golden Jubilee, offered heavy discounts for a limited period with an additional gift scheme. Those who purchased items worth Rs. 500.00 or more were entitled to a coupon to enable them to participate in the gift scheme. The ultimate gifts were however, based on draw of lots and the prizes included free trips to some foreign countries. In this case even though giving of prize constituted a lottery or a game of chance under clause (b) of sub-section (3) of section 36A, the Commission held that there was no loss or injury as the scheme was intended more towards celebrating the Golden Jubilee of the firm than to promote the sale and was part of the overall discount scheme. (UTPE No.8/1986, Order dated 02.05.1986)

**Contests Held Unfair**

Soon after the introduction of the provisions relating to unfair trade practices in the MRTP Act, in August 1984, the three prominent cases relating to contest that came up before the Commission were the famous ITC, BATA and COLGATE cases where temporary injunctions were issued.
(i) 'Made for Each Other' Contest

A contest titled 'Made for each other' was announced by ITC Ltd., in which only those couples could participate one of whom was a smoker. The eligible couples had to send their recent photograph together, which could be used by the company at its discretion for which no permission was to be required from the couples. The winners were to be given prizes as announced. The Commission observed that the language of sub-section (3)(b) of section 36A abundantly showed that the Parliament intended to prohibit the conduct of any contest, lottery or game of chance or even a game of skill if it was intended for the purpose of promoting directly or indirectly the sale, use, or supply of any product or for that matter any business interest. Prima facie, the contest was apprehended to enlarge the smokers' circle to the prejudice of the public interest and the Commission held it to be inherently unfair, and said that as to whether there was need for separate proof of loss or injury to the consumers on account of such practice would be decided by the Commission in the final inquiry. An interim injunction was issued restraining the company from continuing with the contest. (Voice & IFCO Ltd. Vs. ITC Ltd., UTPE No.54/1984, Order dated 27.11.1984).

(ii) Bata Bubblegummers Contest

Bata India Ltd., Calcutta, announced a contest and the availability of special shoes for children in a wide range of prices whereby only the purchaser of such shoes could participate in the contest. It was held to be an unfair trade practice prejudicial to public interest, as, in fact, when the consumers visited the various shops of the company, they could get only the high priced shoes and not the cheaper varieties as advertised. The contest was found to promote the sale of only expensive shoes in which prejudice to public interest was found implicit. (UTPE No.44/1984 & 52/1984, Order dt. 12.11.84).
(iii) In the 'Trigard Tooth Brush Contest' price of the tooth brush was increased by 0.10 paise and unjustified restrictions were imposed by requiring consumers to buy two brushes as a precondition for entering the contest. It was held an unfair trade practice prejudicial to public interest followed by an interim injunction. [Society for Civic Rights Vs. Colgate Palmolive (India) Ltd., UTPE No.41/1984, Order dated 25.10.1984].

WRITS AGAINST INJUNCTIONS

In the case of (1) above, the ITC Ltd. filed a writ petition in the Delhi High Court under Articles 226 and 227 of the Constitution challenging the vires of sections 12A and 36A(3) of the MRTP Act and the jurisdiction of the MRTP Commission to pass such injunction orders, and prayed for a stay against the operation of injunction orders as well as stay of further proceedings by the Commission, which was granted. Nevertheless, the MRTP Commission, made an application to the High Court for vacation of such stay order which was granted subject to the conditions that after investigation, etc., the Commission shall pass orders subject to the directions/approval of the High Court. Meanwhile, the High Court allowed the ITC Ltd., to advertise its contest at its (company's) own risk. The Commission is understood to have made a special leave petition under article 136 of the Constitution to the Supreme Court against the orders of the High Court raising inter alia, the following issues:

(i) Power of the High Court under Article 226 of the Constitution and its competence to vacate the interim injunction orders passed by the Commission in due exercise of its powers under section 12A of the MRTP Act;

(ii) Whether the High Court was right in permitting the company to continue with its advertisements and to promote its contest pending final disposal of the writ petition?
In the case of Colgate Palmolive (India) Ltd. also, which had obtained a stay against the operation of the temporary injunction from the Delhi High Court, the Commission's special leave petition is pending in the Supreme Court.

In the case of Bata (India) Ltd., the company's writ petition challenging the jurisdiction of the Commission and the vires of section 36A(3) of the Act was allowed and stay was granted by Calcutta High Court against the injunction as well as further proceedings by the Commission.

(iv) Pan Parag Contest - Loss or Injury under Clause (b)
As against the above cases relating to contest, the Commission did not issue a temporary injunction in the Pan Parag case, even though the advertisement stated, "The more you buy, the better your chances of winning", as the scheme had already come to a close and the Commission did not want to obstruct the distribution of prizes at such a stage. On a detailed enquiry, ultimately, the Commission did not pass any orders and disposed off the case for want of sufficient information to come to a conclusion. While disposing off the case finally, the Commission observed as follows:

"So far there has not been any fruitful discussion before this Commission as to the concept of loss or injury in relation to clause (b) of sub-section (3) of section 36A. Until such time as there is an authoritative decision on this aspect of the matter, we may say that this element of loss or injury to the consumer as per preamble to section 36A should be kept in mind in the matter of deciding whether the trade practice of conducting any contest, lottery, game of chance, or skill for the purpose of promoting business interest is prejudicial to the public interest of the consumers."

It is to be noted that these observations have been made after the landmark case of Avon Cycles. (UTPE No. 1/1985, Order dated 11.01.1985 and 12.06.1987).
Avon Cycle Contest - Principles Laid

This is a landmark case as regards contests in as much as the Commission analysed in principle the pros and cons of holding contests, lotteries, etc., by any company and its impact on competition and consumer interest. Even though it was found that the company had actually distributed prizes and increase in the prices were attributed to increase in the price of steel, the Commission brought the contest within the scope of clause (b) of sub-section (3) and held that it was prejudicial to the public interest on broader considerations of the impact of such contest on consumer interest. It held that such contests, lotteries etc., were inconsistent with the principles of sound market development as:

i. they affected the consumer preferences by luring them with attraction of prizes rather than the quality and price of the product;

ii. thereby, interfered with healthy competition resulting in loss to consumers;

iii. encouraged the gambling instinct in consumers; and

iv. conferred discriminatory benefits on a small section of consumers.

Applying these principles, the Commission stated that the company had incurred substantial expenditure of over Rs. 1,00,000.00 in organising the prize scheme and in the distribution of prizes whereby only a handful of consumers (numbering 42) could get the prizes as against 9000 cycles sold to consumers. The purpose of promoting sales during the sluggish rainy season could have been better achieved by reducing the cost of each cycle and benefiting all the consumers who bought the cycles during that period. The Commission passed a cease and desist order and reaffirmed it on a review, after analysing the decided cases on the subject. (M/s Avon Cycles Pvt. Ltd., UTPE No.43/1984, Order dated 10.09.1986 and 24.12.1986).
(vi) **MECO Murphy Bumper Prize Contest - Invisible loss or injury under clause (b)**

In a contest organised by M/s MECO-Tronics Pvt. Ltd., Madras, 200 prizes worth Rs. 2,00,000.00 were offered to purchasers of Murphy Two-in-One Tape Recorder and Transistor during a particular period - October 1984 to January 1985. It was found that prices had been increased 14 days after the commencement of the prize-contest scheme and the respondent-company partially recovered the cost of the prizes in the overall price charged for each item, a trade practice which came within the mischief of clause (a) of sub-section (3) of section 36A. The Bench further noticed that in as much as the contestant was required to write a slogan in ten words that "how he preferred murphy products", the winning of a prize of particular value depended on the worth of the slogan from the standpoint of promoting the business interest of the respondent company, it was as such as a business strategy influenced by purely commercial considerations and attracted the accusing finger of clause (b) as well. The Commission held, we may also add that there is a strong element of what may be described as invisible, loss or injury in any scheme which benefits a few and disappoints many. Here is a scheme where only 200 contestants would have got a gift and to that extent would have benefited from participation in the scheme but such beneficiaries constitute an insignificant minority of consumers and the bulk of them would have been left high and dry, troubled by shattered hopes.

(vii) **Man of the Year Contest - Blatant Unfairness**

In the case of M/s India Book House, Bombay, the company organised a "Man of the Year" contest during September-December 1985, which was open to the purchasers of the magazine "Time" available only at the News stand. The regular subscribers of the magazine were denied the
opportunity to participate unless they bought it from the News stand as only in such copies the entry coupon was available. Further, such news stand copies were also priced higher by Rs. 6.00. One could send as many entries as one wanted and attractive prizes were offered for the winners of all correct entries to be drawn on a fixed day.

The contest was held inherently unfair as, (a) fair competition was stifled and the participants had to pay Rs. 22.00 to obtain one copy from the News stand instead of the normal price of Rs. 16.00; (b) the average monthly sale during the contest period was substantially more and; (c) the respondent had incurred heavy expenditure on publicity, etc., during the contest period which when worked out, in terms of the copies of the magazine sold during the period, amounted to Rs. 3.00 per copy. The Commission felt that the same amount could have been diverted for the benefit of all the News stand purchasers of the magazine by selling it at Rs. 3.00 per copy less during that period. The Commission passed a cease and desist order directing the company to pay costs of Rs. 2,000.00 and also granted compensation to the complainant who had spent Rs. 132.00 for purchasing six copies of the magazine in order to send six entries to participate in the contest attracted by the high value prizes. As there was no evidence to show that the complainant had not purchased the magazine and since the contest was hold unfair and prejudicial to the public interest, the Commission granted compensation amounting to Rs. 120.00 after reducing an estimated amount which the applicant could obtain by selling the magazine at a later date to a junk dealer.

Gift Schemes/contests involving considerable expenditure to organise and implement them have been held to hear the character of unfair trade practice under both clauses (a) and (b) of sub-section (3) of section 36A of the MRTP Act.
(viii) **Diabetes Awareness Contest - Against Medical Ethics**
This contest was organised by a company manufacturing and marketing pharmaceutical products for all registered medical practitioners whereby they had to answer questions and write a slogan about the role of the company in diabetes. The contest offered attractive prizes of tour to select countries. Commission held that the contest was not only against the medical ethics and rules of the Medical Council of India but also contrary to the public interest due to the following reasons:

i. The contest had the effect of tempting a doctor to prescribe medicines on extraneous considerations when it may not be essential for a patient; and

ii. Medical practitioners were prohibited from accepting gifts by joining such contests according to the rules framed by the Medical Council of India.


(ix) **"Spot a Magic Bulb Scheme" - A Lottery**
The scheme organised by M/s Bengal Lamps Ltd., Calcutta, required a buyer of bulbs made by the company to switch on the bulb for 15 minutes and watch for the colour change to brown patch in which case it was a magic bulb. In exchange for such a bulb, the buyer could get five bulbs free of cost. Even though there was no increase in the price of the bulbs, the Commission held that it was a lottery under section 36(3)(b) and directed the company not to repeat such a scheme in future. (UTPE No.85/1986)

(x) **Discriminatory Lottery Scheme**
M/s Bombay Dyeing & Manufacturing Company Ltd., Bombay launched a gift oriented lucky draw scheme called "Bombay Dyeing Fortune Smiles" whereby a free gift coupon was given to every purchaser of fabrics worth Rs. 300.00.
There was daily draw for prizes and the lucky ones got the prizes. The scheme was an exercise for promotion of sales and the sales also increased substantially during the scheme period. Even though the scheme was properly conducted and the prices of the fabrics were not increased before, during or after the scheme, it was in the form of a lottery attracting clause (b) of sub-section (3) of section 36A. The Commission held that as the scheme was only for customers who bought material worth Rs. 300.00, there was loss or injury to those consumers who could not take part in the draw. The Commission accepted the unconditional undertaking given by the company that it will not organise such schemes in future. (UTPE No.195/1986).

(xi) Grant of Loans on Draw of Lots

M/s Kanakatee Gale Enterprises, Hyderabad, launched a scheme offering interest-free loans for purchase of cars, scooters and mopeds, to persons who enrolled themselves as member and paid a specified monthly subscription over a period of 40 months. A noticeable feature of the scheme was that interest-free loan was to be given to members selected on the basis of a monthly draw (three members in one draw) and those members who were not lucky enough to figure in the draws got at the end of the scheme the full amount subscribed by them besides a modest additional amount.

The Commission held that the scheme fell within the scope of section 36(3)(b) as it was to promote business interest and it was found prejudicial to public interest due to certain objectionable features of the scheme like the creation of vacant numbers, the inclusion of such vacant numbers and numbers allotted to defaulting members in lucky draws which denied the genuine member the chance of getting interest-free loan from the respondent.

The scheme was also prejudicial to subscribers who were
not fortunate enough to be picked up for grant of interest-free loans.

The Commission passed an order directing the respondent not to repeat it in future, but allowed the existing scheme to continue till its expiry subject to certain modifications. (UTPE No.7/1986).

(xii) Invitation of Deposits on Draw of Lots

An investment company issued an advertisement inviting deposits from the general public and offering attractive prizes like house, jewellery, car, etc. According to the brochure issued by the company to the investors at the time of purchase of deposit certificates, there were two kinds of draws. In the case of monthly draw, there were ordinary prizes and the draw for costly prizes like the house, jewellery and car, was to be held on certain specific dates spread over eight years. The Commission found that the scheme had this objectionable feature which played upon the temptation of the general public to get the costly prizes. Further,

(1) The advertisement stated that "offer was open for a limited period and limited number of certificates on first-come, first-serve basis", whereas the company had a target of issuing 50000 certificates and it had issued only 10 per cent of the target. That being so, there was no necessity for the company to create panic by stating that the offer was for a limited period and that the public should hurry to get the certificate. Such a statement by itself revealed the unfairness on the part of the Company in organising the scheme.

(ii) The scheme was to operate on the basis of a lottery which was covered under sub-section (3)(b). While analysing the applicability of sub-section (3)(b), the Commission considered the scope and meaning of "unfair trade practices" under section 36A observing that certain viewpoints and nuances on the true scope and meaning of unfair trade practices
under section 36A, deserved thoughtful considerations particularly in the background of loss or injury to the consumer in its variegated facets. (D.G. Vs. New Life General Finance & Investment Co. Ltd., UTPE No.251 of 1987)

VIEWS AND ISSUES RELATING TO CONTESTS UNDER SECTION 36A(3)(b)

Initially, in the leading ITC case of November 1984, the Commission observed that the language of clause (b) of sub-section (3) of section 36A abundantly showed that the Parliament intended to prohibit the conduct of any contest, lottery or game of chance or even a game of skill if it was intended for the purpose of promoting directly or indirectly, the sale, use or supply of any product or for that matter any business interest. Further, it stated that as to whether there was need for separate proof of loss or injury to the consumers because of the contest would be decided in the final enquiry. This could not be enquired into as the case is still pending before the Supreme Court.

Thereafter, in some cases, the Commission has made a departure from the view that loss or injury is inherent in contests, and has declared some contests as not unfair and not prejudicial to public interest.

In several cases in the last two years, as detailed, the Commission has viewed contests and lotteries as inherently unfair but still tested their effects in terms of loss or injury to consumers and prejudice to public interest. The Commission has also in some cases dwelt at some length with the concept of 'unfairness' or 'loss or injury' in the context or section 36A(3)(b) - in Avon Cycles' case, Meco-Tronics' case and New Life General Finance & Investment Co.'s case. (see pages 11,12,17-20). In fact, the Avon's case has clearly laid down the undesirable effects of contests and lotteries on public interest and inherent unfairness in such contests.
where only a handful of consumers benefit at the cost of the general public.

Nevertheless, it is felt that there ought to be a final and clear exposition, by the Commission (while deciding a case) on the unfairness of contests, lotteries etc., and the extent of loss or injury implicit in such contests and lotteries, with guidelines to be followed by companies before they embark on such sales promotion methods. In fact, the Commission has laid down guidelines in most of the cases relating to bargain sales.

Recently, contests have been announced by some companies which require a consumer to purchase the particular product in prescribed quantities, answer some general knowledge questions and write a slogan in praise of the product. It is time that the desirability or otherwise of such contests is debated and discussed on matters of principle, their effect on the public interest, and their commercial expediency.

(IV) **Violation of Prescribed Standards - Section 36A(4)**

If goods sold do not conform to prescribed standards and cause loss or injury - physical or financial - then action can be taken against the supplier or manufacturer of such goods under the Act.

A trade practice which permits the sale or supply of certain goods would be unfair if:

(i) standards have been prescribed by a competent authority for such goods;
(ii) the standards relate to performance, composition, contents, design, constructions, finishing, or packaging of such goods;
(iii) such standards are necessary to prevent or reduce the risk of injury to the person using the goods;
(iv) the goods sold/supplied do not comply with such standards;
(v) the goods sold/supplied are intended to be used or are of a kind likely to be used by consumers, and
(vi) the person permitting the sale/supply of such goods knows or has reason to believe that the goods do not comply with the prescribed standards.

(1) Non Compliance with Safety Standards
The MRTP Commission in a case passed orders against two companies, who manufactured and sold "Nutan" kerosene wick stoves designed by the Indian Oil Corporation (IOC/IBP) without the approved specifications and without the competent authority's inspection/clearance. (UTPE No.11/1984).

(2) Non-Compliance of Packaging Rules
The risk of injury to a person due a violation of standards is not necessarily a physical injury. Even financial injury is covered.
A company KMP Oil Industries (P) Ltd. engaged in the business of producing and marketing coconut oil, packet it in volumetric measure in terms of litres and millilitres contrary to the standards of Weights & Measures (Packaged Commodities) Rules, whereby it had to be packed by weight in terms of grams and kilograms. Many other well-known manufacturers and sellers were packing the oil correctly in grams and the prices of both kinds of packings were nearly equal. It was found that in case of packing by volume (as done by this company) wrongful loss of 10% quantity of oil was caused to a consumer as 1 litre of oil is 10% less than 1 kg. by weight. This was blatantly an unfair trade practice of violation of prescribed standards causing financial loss to consumers.
(3) **Non-Compliance of Advertisement Standards**

M/s Bengali Dawakhana, Faridabad and Delhi, advertised in the Hindi Edition of Blitz offering medicines and treatment with miraculous effects. Such as advertisement was prohibited by the provisions of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, for averting or reducing the risk of injury to the person using the medicine advertised. As the respondent did not comply with the standards prescribed by competent authority with a view to preventing or reducing the risk of injury to users, it was held an unfair trade practice followed by an order of temporary injunction; Subsequently an order under section 36D(2) accepting the undertaking of compliance given by the respondent was passed.

(V) **Hoarding of Goods and Refusal to Sell Goods or Provide Services - Section 36A(5)**

The unfair trade practice relating to hoarding or destruction of goods or refusal to sell the goods etc. is an extension of restrictive and monopolistic trade practices. The practice of hoarding or destruction of goods with a view to create artificial scarcity and thus to force up prices are quite common in our country. To control such practices, cause (5) of section 36A prohibits hoarding or destruction of goods or refused to sell the goods or to make these available for sale, or to provide any service if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

Some of the unfair trade practices under sub-section 5 of section 36A may also be held as restrictive trade practices under section 33 of the Act. These trade practices, though not visible easily, are very much in practice in the Indian circumstances. However, there are very little chances of such trade practices being brought to the notice of the Commission, because of their secret nature and character.