Chapter V

SPECIFIC CATEGORIES OF UNFAIR TRADE PRACTICES
FALSE OR MISLEADING ADVERTISEMENTS

Various forms of the false and misleading representations mentioned in the definition are not now exhaustive enumeration of the Unfair Trade Practices\(^1\) in view of the amendments made in the MRTP and CP Acts. The language is couched in the words of widest amplitude. The scope of the definition is not only confined to the advertisements made through mass media but will equally apply to a single false or misleading statement made in the course of promotional activity of a trade. The statement made whether orally or in writing or by visible representation will be covered. This includes assertions whether made by words written or spoken or by conduct. Thus a situation like in Given v. C.Holland (Holdings) Pty Ltd\(^2\) will be well covered in which the

1. The Supreme Court's opinion expressed in Lakhanpal National Ltd. v. MRTP Commission AIR 1989 Sc 1698 that the definition of unfair trade practice is not inclusive or flexible but specific and limited in its contents, is now no more valid after the amendments made in the Act.

2. In Given v. C. Holland (Holdings) Pty Ltd. it was held that the representation involves an assertion whether made by words or conduct whereas statement is confined to only words spoken or written (1977) 15 ALR 439. See also Pryon v. Given (1980) 30 ALR 189.


4. R. K. Hayak, it appears, is of the same opinion. He has given two separate headings in his Book, one for false representation under which clauses (i) to (iv) have been discussed and another for misleading representations under which clauses (vii), to (ix), (ix) and (x) have been discussed, see R. K. Hayak, Consumer Protection in India: An Ecological Treatise On Consumer Justice (1991) P.313-333. However, it seems from the cases decided by the MRTP Commission that it has read the word "false" as including the misleading representation. See for instance DG (I & II) v. Medical Hair Centre (1988) 2 Comp LJ 176; Godfrey Phillips India Ltd. and Another, UYFR No.260 of 1988 and IA No.740 of 1988; In the matter of; Tvs Suzuki Ltd, Bangalore (1992) 2 Comp LJ 251; In the matter of Hindustan CIBA Geigy Ltd. Bombay, (1993) 2 Comp LJ 361. The word "misleading" is expressly incorporated in section 3(a) of the Trade Descriptions Act, 1960 of England in addition to word "false" in section 3(1).
dealer was held liable for false representation when it was found that mileage shown on the meter of a used car was false. Similarly undisclosed mockups in television commercial to represent product which are distorted in normal transmission will also be covered. The pictures or cartoons promoting sale, supply or use of goods or services will also fall in the ambit of definition.

However, various sub-clauses of section 36 A and 2(r) of the MRTP and CP Acts respectively in which different forms of false and misleading representations have been incorporated are not properly worded. Sub-clauses (i), (ii), (iii) talk of representations which are false. Does it mean that if a representation is of the nature mentioned in these clauses which is not false but misleading, will be outside the purview of these clauses. For example, a statement which is literally accurate but because of its ambiguity is likely to mislead will not be a false representation. Although it may well be argued that (1)false representation encompasses misleading representations as well (2)the words "unfair or deceptive acts" used in the main body of the definition are wide enough to include misleading statements also, then what was the need of retaining the word "misleading" in sub-clauses (vi), (ix) and (x)? It is therefore, suggested that in order to remove any doubt, sub-clause(i) be amended on the following lines:

"The practice of making any statement, whether orally or in writing or by visible representation which is false or misleading that"....
The word "falsely" used in clauses (i), (ii), (iii) and the words "falsely or misleading" used in clauses (vi), (ix), (xi) be omitted.

Clause (i) says that it is "the practice of making any statement", the word practice means repeated action; habitual performance or succession of acts of similar kind\(^5\). In short it must be more than one act. If this interpretation is given to the word "practice" then single act of representation will not constitute unfair trade practice. It is suggested that clause (i) be read with section (v)(ii) of the MRTP Act so that a single or isolated act of any person in relation to any trade is enough to stamp any trade practice as unfair, provided of course other characteristics are also found\(^6\).

The various forms of false or misleading representations enumerated in sub-clause (i) to (x) are discussed hereunder:

**Sub Clause (i)**

*False representation regarding the particular standard, quality, grade, composition, style or model of goods.*

This sub-clause (i) is based on section 53 of the Trade Practices Act, 1974 of Australia\(^7\). The word "particular" caused

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6. MRTP Commission also expressed similar views in re Godfrey and Boyce Mfg, Corp Ltd. (1990) Comp. Cas at 229; see also CERC v. T.T.K Pharma Ltd (1990) 68 comp. cas 89; In the matter of TVS Suzuki Ltd and Anr (1994) 3 comp LJ 595.

7. Section 53 (a) runs as follows; falsely represents that the goods are of a particular standard, quality, grade, composition, style or model or has a particular history or particular previous use. Section 13-301(7) of the Maryland Consumer Protection is also similarly worded which says represents that goods or services are of a particular standard quality or grade or that goods are of a particular style or model, if they are of another.
some doubt to Australian Courts about its scope. So suggestions were made to Swanson Committee\(^8\) for its deletion. However, the Committee rejected the suggestions on the ground that such deletion might widen the scope of the clause so as to encompass general standard etc., which may create uncertainty as to its real import.

Suggestively speaking the word "particular" should be read as opposed to general. "Particular" connotes here a special attribute or feature of the represented goods. However, it cannot be interpreted independently but with reference to the context in which it will come into question. For instance a statement about the number of miles traveled by an used car describes a particular attribute of the vehicle and therefore, describes its particular quality\(^9\) or where a car is labelled as Maruti car it will be false representation if the car is not of the particular quality maintained by the Maruti udyog or if a car dealer represents the superceded model as the latest it will be a false representation as to a particular model\(^10\).

8. Swanson Committee Report, para 968.
9. Supra note 3.
10. In Dr. B.W. Roshan Kumar v. M/s Sipani Automobiles Ltd. 1992 1 CPR 326; Dr. Madan Roa v. M/s Sipani Automobiles Ltd. (1992) 1 CPR 357; Dr. S.C. Bembalgi v. M/s Sipani Automobiles Ltd. (1992) CPR 479; Dr. P. Soundarparidhan v. M/s Sipani Automobiles Ltd. and Anr. 111(1992) CPJ 393 cars were represented as having quality engine built with Japanese technology when in fact they were fitted with locally made defective engine. It was held in all the four cases that it is false representation as to standard, quality and performance. Similarly in CERC v. Karnavati Auto Ltd., UTPE 23/85 order dated 19.2.1987, the claim that consumption of moped is 90 Km per litre was found possible only in ideal conditions which are almost impossible to obtain. Hence a false representation as to particular quality of moped.
The components of sub-clause (i) are not mutually exclusive but overlap in many situations\textsuperscript{11}. The MRTP Commission in a number of cases quite rightly held a representation false on more than one grounds\textsuperscript{12}. For example if the composition of a product is not as represented it will naturally affect its particular quality and also standard. The word grade also denotes quality or value. Thus describing ice-lolly as 100% ice cream when it is manufactured from a material which is neither milk nor cream\textsuperscript{13}, it is a false representation as to composition and to a particular quality which an ice cream is possessing. Similarly Dentobac Creamy Snuff when instead of refreshing as claimed, causes giddiness and other harmful effects because of its 35% to 45% tobacco contents which fact was suppressed, is an unfair trade practice both of composition and quality\textsuperscript{14}.

The word "quality" is a subjective connotation. Therefore, those facts which may be taken into reckoning to determine the quality should not be false\textsuperscript{15} for example to call old stocks as

\begin{itemize}
\item \textbf{12.} For instance see DG v. P. Parasmel & Co and ors UTPE No.50 of 1988 decided on 7.9.89; In re Hind watch WD (1993) 1 Comp LJ 323; Atual Dua v. Helvette Watch House, Comp cas, 1990 Vol.69 357.
\item \textbf{15.} In re Jindal Aluminium Ltd, (1990) 1 Comp LJ 425.
\end{itemize}
seasons best sale\textsuperscript{16}. The word quality is linked with the standard in the sense that the latter means general recognition or a type, model or combination of elements accepted as correct or perfect\textsuperscript{17}. So it is the quality which sets the standard. To sell spurious watch as HMT quartz is a false representation as to quality as well standard because HMT watches are known for their standard which has been set by its quality\textsuperscript{18}. Not only this alone, using falsely ISI mark\textsuperscript{19}. or "R Brand" which has not been registered under Indian Trade Marks and Merchandise Act\textsuperscript{20} or using brand name of a company which has earned fame for its quality and standard\textsuperscript{21} or using brand name similar to the one of a reputed company e.g. Vamal instead of Vimal, Relinage instead of Reliance, are all false representations as to quality and standard\textsuperscript{22}.

Model is almost synonymous with style and denotes also design. The plain illustration based on model or style will be

\begin{enumerate}
\item In the matter of Singhal & Bros New Delhi UTPE No. 211 of 1987 decided on 15.1.1988.
\item Black's Law Dictionary, (5th Ed.).
\item In the matter of Sagar Electronics (1993) 1 Comp LJ 325.
\item Usha International Ltd. UTPE No. 62 187 decided on 18.11.87.
\item Vinod Vithaldas v. India Shaving Products Ltd. and ors; UTPE No.85 of 1985 CIA No.148/85 decided on 29.9.1987.
\item Godfrey India Ltd. and anr UTPE No.260 of 1988 and IA No. 40 of 1988.
\item DG v. Paresmal Co and ors. UTPE No. 50 of 1988 decided on 7.7.1989. However in an earlier case of re Manohar Cut Pieces Fancy Cloth Merchants UTPE No.30/1985 order dated 10.7.85 held that any infringement of Trade mark cannot be looked into by the commission as it falls under Trade & Merchandise Marks Act 1958.
\end{enumerate}
a representation that a car is of a particular years model when in fact it is a model of an earlier year\textsuperscript{22a} or to describe a watch HMT Kartik model when in fact it is not or is HMT but not of Kartik model. It will also cover representation based on subjective test e.g. ready made garments of English or Japanese style\textsuperscript{23}.

The word "quality" was incorporated in clause (i) through (Amendment) Act, 1991. Before this amendment the MRTP Commission had held in \textit{DG (I&R) v. Food Specialists Ltd}\textsuperscript{24} and \textit{in re Food Specialities Ltd}\textsuperscript{25}, that sale of a package containing contents of quality less than what is mentioned on the container may amount to a contravention of the Standard of Weights and Measures (Packaged commodities) Act or the rules framed thereunder, but the implementation of the said Act or the rules is not within the Jurisdiction of the Commission unless there is an unfair Trade Practice within the meaning of section 36-A of the MRTP Act. Now both MRTP and CP Acts have been armed with the power to stamp a representation as unfair trade practice if it falsely states particular quantity of the product. The word quantity will in-

\textsuperscript{22a}Ransley v Spare Parts & re condition Co Pty Ltd. (1975) ITPC 219.

\textsuperscript{23} Hind Watch Co. New Delhi UTPE No.87 of 1990 decided on 18.9.90 See also re Export India UTPE No.34/1984 order dated 19.5.86.

\textsuperscript{24} (1987) 62 Comp Cas. 122 (MRTPC).

\textsuperscript{25} (1991) 70 Comp Cas. 569.
clude length, width, height, area, volume, capacity and number. Since both, MRTP Act and CP Act are in addition to and not in derogation of any other law, so there will be no conflict between these two Acts and the Standard of Weights and Measures (Packaged Commodities) Act.

In all cases mentioned under section 36-A(i) of the MRTP Act and section 2-r(i) of CP Act, the burden of proof is on the representator and not on representee in view of section 106 of the Indian Evidence Act, 1872 which makes it clear that if a fact is specially within the knowledge of a person, the burden of proving that fact is upon him. Thus where a person is claiming that his treatment is world famous, he has to prove it.

Sub-Clause (ii)

False representation regarding the particular standard, quality or grade of services:

For sub-clause (ii) there must be a false representation regarding the particular standard, quality or grade and such representation must be relating to services. So what is relevant for the interpretation of clause (i) holds true for clause

27. See section 4 of the MRTP Act and 3 of the CP Act.
29. This clause is similar to section 53(9a) of the Trade Practices Act, 1974 which is as follows: falsely represents that services are of a particular standard, quality or grade.
30. Section 2(r).
The word service has been defined under the MRTP Act\(^\text{30}\) as well as under the CP Act\(^\text{31}\) as follows:

Service means service of any description which is made available to potential users and includes the provision of facilities in connection with the banking, financing, insurance, transport processing, supply of electrical or other energy, boarding, lodging or both, housing construction, entertainment, but does not include the rendering of any service free of charge or under a contract of personal service.

There was a controversy whether the term service should apply to goods only or immovable property also\(^\text{32}\). The Indian Express quoted the then Law Minister as saying that the housing is not covered but if housing activities amounted to rendering service, then it is covered\(^\text{33}\). The MRTP Commission also made it clear in \textit{DG (I&R) v. Mano Builders}\(^\text{34}\), that the word service defined in the MRTP Act is confined to not only business relating to goods but also includes the provisions of any service relating to immovable property.

\(\text{31. Section 2(o).}\)

\(\text{32. I C Sexena is of the opinion that services relating to immovable properties are outside the purview of CP Act. See The Consumer Protection Act, 1986, A viewpoint, 30 JILI 321. 324 for contrary opinion see S.H.Azmi, sale of Goods and Consumer Protection in India 1992 at 240.}\)

\(\text{33. The Indian Express; July, 1987 New Delhi.}\)

Although, in order to remove any doubt, service relating to housing construction was inserted in the definition through MRTP (Amendment) Act, 1991, and real estate in the definition of service through CP (Amendment) Act, 1993, there are still innumerable services which may fall within the ambit of the definition but have not been expressly mentioned. In this connection the opinion of the Supreme Court in *Lucknow Development Authority v. M K Gupta*\(^{35}\) deserves mention:

The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objectives of the amendment.

The MRTP commission passed cease and desist orders not only against those whose services found express mention in the definition but also against the provider of those services which can be read as implied in the definition by virtue of the word "any description" mentioned in the definition of service. Thus the cease and desist orders were passed against the teaching shops\(^{36}\) for

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35. SCJ 1994 Vol.1, 103 at 110.

making false claims. False claims of increase of height\textsuperscript{37}, preventing baldness\textsuperscript{38} or determining sex of an unborn child\textsuperscript{39}, for removing white patches\textsuperscript{40} and sex problems\textsuperscript{41}, travel agency\textsuperscript{42} and carrier of courier service\textsuperscript{43} were also prohibited by the MRTP Commission.

\textbf{Sub Clause (iii):}

\begin{quote}
False representation regarding any rebuilt, second hand, renovated, reconditioned or old goods as new goods;
\end{quote}

The object of this sub-clause is to prohibit any representation that the goods are new when in fact they are rebuilt, second hand, renovated reconditioned or old\textsuperscript{44}. The word "new" does not have any fixed and rigid meaning\textsuperscript{45}. The Molony Committee recommended that the "Trade description" formerly contained in the

\begin{itemize}
\item \textsuperscript{37} In \textit{re M/s New Height} UTPE No.14/1985 order dated 1.4.1986.
\item \textsuperscript{38} In \textit{re Manne Qunis} UTPE No.167/1986 order dated 20.7.89.
\item \textsuperscript{39} In \textit{re Mrs Kamalesh Thaper}(1988) 64 Com. Cas. 109. See also \textit{In re Ravi Foundation} UTPE Enquiry No.93/1986, order dated 4.7.1986.
\item \textsuperscript{41} In \textit{re Dr.N.D.Singh}, UTPE No.256/87 order dated 21.12.1990; \textit{DG(I & R) v. Prakash Clinic} (1988) 63 Comp. Cas. 171.
\item \textsuperscript{42} In \textit{re Pratap Travel} UTPE No.135/87 order dated 26.5.88.
\item \textsuperscript{43} In \textit{re Overnite Express} UTPE No.120/88 order dated 6.10.88.
\item \textsuperscript{44} Sec.53(b) of \textit{Trade Practices Act, 1974} Correspond to clause (iii) of MRTP and CP Act. Sec.13-301(6) of Maryland Consumer Protection Act, 1973 provides; represents that the goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or second-hand.
\item \textsuperscript{45} In \textit{re ABC Copiers Pty Ltd}. ATPC Annual Report, 1978-79.
\end{itemize}
Merchandise Marks Act (Now replaced by Trade Descriptions Act, 1968) should include descriptions as to any goods being new in the sense of being "Unused". However, sub-clause (iii) is wide enough to include representation to claim unused but old goods as new ones, similarly representation like the one in *R v. Ford Motor Co. Ltd.* where a car was described as new but in fact had been damaged in the process of delivery and thereafter repaired and was as good as new, will be false.

Since the word "new" has many meanings, it is not possible to determine its meaning unless read in the context in which it was used. To say goods are "as good as new" possibly suggests that goods are not new or to say goods have been "sparingly used" means that goods are second hand.

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47. (1974) 3 All ER 489.

48. In this case it was held that it is not a false indication as defined under section 3 of the Trade Descriptions Act, 1968. However, this decision has been criticised on the ground that there are obvious difficulties if this decision is taken too far. Buyers can surely assume in the normal way that "new" goods travel from production line to retail outlet in pristine condition. Any repair, however, skillful can affect the durability of goods. Brain W. Harvey et.al. The Law of Consumer Protection and Fair Trading (1992) at 365.

49. This was the observation of Trial Judge in *R v. Ford Motor company Ltd.* Supra note 203, but was rejected by Court of appeal. However, in India it seems that trial judge's observation holds good.

50. However, Karnataka State Commission in *Dr. Vasan v. S.L. Goswamy* (1992) 11 CPJ 954 held that the advertisement in newspaper that the washing machine had been sparingly used suggests that brand is new.
similarly to advertise sale of "Fashion Foot Wear" suggests that the goods conform to the fashion currently in vogue in that area\textsuperscript{51} and will not be old. The word "new" some times even con­notes the meaning of "recent in design or model". Thus goods cannot be called as "new" where they have remained in the stock for such a period of time that their quality deteriorated or depreciated in value. Thus reduction sale of unused but old goods cannot be represented as reduction sale of new goods. However, what should be the maximum period after the expiry of which unused goods cannot be called as new, will vary from case to case. In Australia, the Trade Practices Commission was of the opinion that the maximum time limit may differ from case to case but as a general rule, provisions of the Trade Practices Act will not be infringed if claim of "newness" is made within six months\textsuperscript{52}. However, later on it seems that the Commission did not consider it rational to adhere strictly to this limit\textsuperscript{53}. There is a decision also in \textit{Anand and Jhonson Pty Ltd. v. Trade Practice Commission}\textsuperscript{54} which has indirectly disapproved the six months rule. In this case vehicle was assembled in Jan., 1975 and then sold in 1977 as "new". The use of word "new" was not consid­ered as false representation. It is submitted that in such

\textsuperscript{51} In the matter of M/S Heels, New Delhi UTPE No. 24 of 1984 decision on 4.2.1985.

\textsuperscript{52} Advertising Guidelines (Information Circular No.10) para 74.

\textsuperscript{53} Advertising and Selling (1981) para 342, 4.

\textsuperscript{54} (1979) 25 ALR 91.

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Situations, no hard and fast rule can be laid down. It will depend upon the facts whether the article is slow moving or fast moving and on the customs or usage of trade.

Since the phrase "false representation" has been used in Sub clause (iii), it is doubtful whether the failure to disclose that the goods are reconditioned, renovated or second hand would itself contravene the said Sub clause. Since the primary aim is to protect gullible and ignorant consumer, the MRTP Commission and redressal agencies in such cases may read an implied representation that they are new unless anything said contrary. This also can be inferred from the ruling of the MRTP Commission in re Bennett Coleman & Co Ltd.\(^55\) where the respondent in its publication series "Indrajal comics" brought out two comics, which were virtually copies of the one published earlier. This fact was not disclosed by the respondent and Commission held that it is an unfair Trade Practice of giving false impression that two comics are new which in fact they are not.

**Sub Clause : IV,**

False representation of Sponsorship, approval, performance, characteristics, accessories, uses or benefits of goods or services:

Like most acts false advertising, misrepresentations relating to sponsorship, approval, testimonials, endorsements, awards and prizes as such were not actionable at Common Law\(^56\). The


\(^56\)Hendler, False and Misleading Advertising (1929) 39 Yale LJ 22, 35.
maxim consensus facit legem, communis error facit jus (consent makes the law, common error repeated many times makes law) held the field and courts were reluctant in granting relief except when they were convinced that what the defendant is doing, is such an imitation of complainant's trademarks as is reasonably calculated to deceive the consumers.  

Consumer legislations ignored the common law principles which could not keep pace with the changing patterns of sales promotions. Relief is now granted to the consumers not only in those situations which have been expressly mentioned but also which can be legitimately called as falling within the four corners of misleading practices.  

In India false representation about the sponsorship approval, performance, characteristics, accessories, uses or benefits of goods or service is an unfair trade practice. The word sponsorship means and presumes certain degree of responsibility as is imposed on the person sponsoring the goods or services for  

57. Centaur Co v. Marshall 92 F 605, 612 (CCWD Mo 1899) affd 97 F 785 CCA 8th 1899); Hoover CO v. Sesquicentennial Exhibition Ass'n, 26 F 2d 821 (DCED Pa 1928).  

58. This provision is similar to section 53 (c) of the Trade Practices Act, 1974 of Australia which is as follows: represents that goods or services have sponsorship approval, performance characteristics, accessories, uses or benefits which they do not have. Maryland's Consumer Protection Act section 13-301(5) provides: represents that goods or services have sponsorship, approval, characteristic, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have. Section 14 of the Trade Descriptions Act, 1968 of England also deals with the same issue.
the quality and characteristics of the goods or services of other person. Thus a person who sponsors the goods or services of other person in fact makes a certain promise, guarantee, pledge with regard to the standards and characters of the goods or services\textsuperscript{58a}. The word approval provides an implied or express sanction, confirmation or commendation of the goods or services by the person who is claimed to have given his approval in respect of the goods or services\textsuperscript{59}. However, here it has been used in the sense that a person is making representation that he has sponsorship or approval of the other which in fact he does not have. Thus where the management committee is not making any representation about the recognition of the school, it will not be a misrepresentation and unfair trade practice under this sub-clause, even though the school is not recognised\textsuperscript{60}. It will be otherwise where a school is not recognised but is claimed to have been recognised\textsuperscript{61}.

The word "approval" is wide enough to include testimonials endorsements, awards and prizes. It may be claimed that leading

\textsuperscript{58a} R.K. Nayak; Consumer Protection Law in India, An Ecological Treatise on Consumer Justice; (1992) at 319.


\textsuperscript{60} DG(I&R) V. Greenfield Public School and Anr. (1991) 1 Comp LJ 163.


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academicians are in the Board of management of an Institution\textsuperscript{62} or well known institution e.g. ISI has approved the product\textsuperscript{63}. Similarly the so called third party technique, i.e. where a party-in-interest circulates propaganda allegedly attributed to independent groups, will be an unfair trade practice under this sub clause.

Place of origin if represented falsely will also be proscribed under this sub-clause. In India because of the substandard products in the market, there is a definite consumer preference for the imported goods over the domestic one's. Not only this alone, foreign goods have become status symbol. So there is a strong temptation for the trader to give these items a foreign flavour and to capitalize the weaknesses of the unwary consumers, so, the MRTP commission has come down heavily on such practices. Thus it has refused to accept technical guidance equivalent to "technical collaboration" and declared a representation false in which the word foreign technology" was used when in fact goods were assembled in India\textsuperscript{64}. The commission held that the technology would include the components and the technique of assemblage


\textsuperscript{63} Usha International Ltd; UTPE No. 62/87 decided on 18.11.1987; In re Godfrey Philips India Ltd, Comp Cas. (1988) Vol. 64 at 120.

\textsuperscript{64} In re Kelvinator of India Ltd., UTPE No.58/1984 order dated 3. 6. 1985.
also\(^\text{65}\). However, in re British physical Laboratories India Ltd\(^\text{66}\), the advertisement was as follows; "Sanyo of Japan joins with BPL India in an exclusive financial and technical arrangement to create BPL-Sanyo companies in India". The MRTP Commission held that the advertisement did not convey that already collaboration had come into existence or that respondent was going to manufacture electronic products under the brand name of BPL Sanyo. The word 'to create BPL Sanyo companies in India clearly indicated that there was a mere manifestation of an intention." It is submitted that the consumer laws are aimed at protecting gullible, fatuous, and unwary consumers who are not experts in grammar. Therefore, to say that the words 'to create' implies future intention will be beyond the comprehension of those to whom it is addressed. This fact is well known to the traders also. Otherwise there was no need to invest a handsome amount for advertising a product whose collaboration was simply a conceived idea which may or may not materialize. Even if the collaboration does not click, the lingering effects of the advertisement will coax the unwary consumers to purchase the product of the respondent on the assumption that it has the foreign collaboration. The better course was to order respondent to cease and desist from such advertisement and when collaboration becomes possible at that time he would be free to advertise. Where a trader is having collaboration

\(^{65}\) (1992) 2 Comp LJ 172.

with a foreign company which is known by its products, it will
not be an unfair trade practice to use the company’s brand name
instead of the name of the company itself. This rule was laid
down y the *Supreme Court in re Lakhanpal National Ltd. v. MRTP
Commission*\(^67\) in the following words:

> The Mitsushita limited is not a popular name in this
country while its products National and Panasonic are. An
advertisement mentioning merely Mitsushita limited
may therefore, fail to convey anything to an ordinary
buyer unless he is told that it is the same company
which manufactures products "National" and "Panasonic"
and there is no scope for any confusion on that score.

However, court added that it would be proper for the appell­
ant company to give the full facts by referring to Mitsushita
ltd. by its correct name and further stating that its Products
are known by the names "National" and "Panasonic"\(^68\).

The supreme court although was of the view that the adver­
tisement in question would not harm the consumer’s interest’ yet
better course in the opinion of the court was that true facts
must have been revealed to the general public. Thus the observa­
tion of the supreme court comes close to the opinion long back
expressed by judge Learned Hand that "in such matters we under­
stand that we are to insist on the most literal truthfulness. It
is certainly true that puffing of this type is not necessarily
trivial; businessman and advertising agencies spend a handsome

\(^67\) AIR 1989 Sc. 1698.

\(^68\) Ibid.
amount in connection with these misrepresentations and it can be presumed that they do so with the intention of misleading consumer\textsuperscript{69}. Keeping in view the observations of the Supreme Court and the opinion of the judge Learned Hand, advertisements propogating sponsorship or approval must be clearly worded and there should not be even an iota of doubt about such sponsorship or approval.

There will be a misrepresentation where a person claims that the goods are from a particular place when they infact are not. However, consumer must know the importance of the place of origin, e.g. to represent fruits of Himachal Pradesh as kashmiri fruits, shawl of any other state as a kashmiri shawl or a sari of any other place as a banarasi sari.

A representation as to performance or characteristics may be false in a wide variety of circumstances. Thus a false representation as to the durability of goods or as to the efficacy of the repair service will be caught\textsuperscript{70}. False representation regarding the benefit or usefulness of goods or services will also infringe this sub clause\textsuperscript{71}.

\textsuperscript{69} Movetoench Corp. v. FTC, 127 F 2d, 79(CCA 2nd, 1942).


\textsuperscript{71} DG v. National Egg Co-ordination Committee Pune (1989) 2 comp LJ 161. The advertisement that "Just two eggs contain more protein than 6.6 Kgs apples" is a false advertisement as to usefulness of the product. Damaged hair come back to life again with the use of the given formula was held also false representation as to usefulness of the product in DG (I&R) v. Manne Quins Bombay (1989) 3 Comp LJ 153.
The Australian Trade Practice Commission has issued Advertising Guidelines in which it has been made clear that no representation regarding the performance, characteristics, uses or benefits of goods or services should be made unless they could be demonstrated by tests based on recognised testing methods or by a survey of usage under normal conditions in a reasonable period\textsuperscript{72}.

It is suggested that the MRTP Commission and National Commission should be empowered to issue similar guidelines. Such guidelines will reduce the work load and will in practice act as a preventive measure so that the advertisers product claim do not violate sub clause (iv).

Regarding accessories, a claim for example that all models are accompanied with accessories when in fact they are not\textsuperscript{73} or to represent in the advertisement that the goods are accompanied with accessories which are in fact available only at an additional cost, will be a false representation unless that fact is clearly indicated\textsuperscript{74}.

\begin{itemize}
  \item 72. Advertising Guidelines (Information Circle) Para 85.
  \item 73. \textit{Evn v. Mazda Motors Sales Pty Ltd.} (1977) 2 TPC 37.
  \item 74. See TPC representation that goods have accessories which they in fact do not have (Information Circular No.4); Advertising and selling (1981) para 223, 309.
\end{itemize}
Sub clause (v)

Represents falsely that the seller or supplier has a sponsorship or approval or affiliation;

This sub clause overlaps to a certain extent with sub clause (iv). Unlike sub clause (iv), here, sponsorship or approval must be with reference to seller or supplier himself. The word 'affiliation' used in this clause is akin to sponsorship or approval and seems to require a positive link. It appears that affiliation can be distinguished from the approval in the sense that the former implies a continuous link whereas the latter is a one time affair.

Most cases in which the advertisement falsely identifies the enterprise from which the product allegedly originates involves passing off, mis-appropriation of a reputable trade name or misrepresentation of business status. The origin of the product is normally regarded as one of the indicis of quality and it

75. This clause is similar to clause (d) of the Trade Practices Act of Australia which runs as follows: represents that the corporation has a sponsorship, approval or affiliation which it does not have. See also Maryland's Consumer protection Act 1973 clause (5) of section 13-301, Supra note 3.

76. Mc Donald's System of Australi Pty Ltd.V. Mc William's Wine Pty Ltd. (1977) 28 ALR 236.

77. In India TV Manufactures Association V. pieco EElectronics and Electrical Limited UTPE No: 63/85 (IA No: 15/87; p.No:10/86 in IA No:47/85) decided on 4.10. 1987, MRTP Commission held that the respondents representation that he is an affiliate of the foreign company N V phillips Holland is not false as about 39.70 per cent of shares were held by the latter.

is the association between the two that often stimulates demand. Of course that entity with whom association is attributed must enjoy that kind of goodwill which will lure the consumer. In India this practice of showing false association particularly with the foreign enterprises is rampant. Not only traders falsely represent their association in one way or other with some foreign and well known enterprises but the most disturbing is that the fake educational institutions very rightly called as "teaching shops" resort to such practices and thus play with the career of the unemployed youth. The MRTP Commission has held


80. For instance see re Enfield Electronics Ltd. and Raghvendra Enterprise Trichy UTPE No. 312/1987 order dated 23.10.1989 representing falsely that his TV sets were made by the world famous Enfield company in collaboration with the Japanese Toshiba Company; In re Electrex India Pvt. Ltd. & Anr. UTPE No.357/1987 order dated 17.7.1989 respondent claimed falsely that it had foreign collaboration with Hitachi Company; In re National Radios and Electronics Co. Ltd. (1992) 2 Comp LJ 172 respondent made a false claim about the collaboration with Japan's Mitsubishi Company.

81. DG (I&R)v.National Institute of Technology, (1988) part III Comp LJ Rev. 1361 falsely claimed that it had entry level courses of American Universities under College credit programme and rated by University of Michigan, USA as being at par with those offered by American Universities;DG (I&R v. Inst. of Managerial Science & Technology UTPE264 of 1988 (IA No. 43 of 1988) decided on 26.4.1988, respondent claimed that it was conducting MBA programme, of Clayton University (USA) which was recognised by USA, Department of Education; DG (I&R) v. M P Association Comp. Cos (1988) Vol.63 at 673 falsely promised awarding of post graduate and ph.D degrees through Correspondance from New York and Staton Universities of USA.
Imparting education is a service to the students by charging fees and cannot be described as a contract of personal service and the practice of imparting education is a trade practice within the meaning of section 2(u)\(^2\). Thus any false representation relating to recognition, affiliation etc will be declared as an unfair trade practice.

**Sub Clause (VI)**

Makes a false or misleading representation concerning the need for, or the usefulness of any goods or services:

Sub Clause (VI) is based on clause (f) of section 53 of the Trade Practices Act, 1974 of Australia which runs as follows:

makes a false or misleading statement concerning the need for any goods or service.

Commenting on the scope of this provision, Australian Trade Practice Commission \(^3\) observed that the distinction must be drawn between a representation and a mere opinion. Where a statement though expressed in terms of need is in fact the advertisers opinion and consumers are normally able to judge the matter for themselves, this clause will not be violated. Although this is a correct approach and is applied in other cases of representations also, yet at times it will be difficult to draw a distinction. There are situations were a statement can be interpreted as a


statement of an objectively ascertainable need but where a person is possessing or is expected to possess, expertise in a matter in question, his advice as to whether goods or services are needed may be largely a matter of judgement or opinion. However, by simply saying that the representor made opinion will not absolve him from the responsibilities unless he gives convincing reasons as to why he formed such an opinion and if he fails to do so, he has made a misleading statement "concerning the need for the service" recommended.

The word "need" has to be broadly interpreted and will be established if goods or services are desirable or preferable and the word "need" does not imply any notion of an imperative question or necessity. A representation that in order to have child of one's choice (boy or girl), a pregnant women need the diet treatment offered by the respondent is a false representation as to need of the goods.

The usefulness of the goods or services can be claimed in a number of ways and different techniques can be employed for claiming this usefulness. For example, inviting deposits by

84. Supra note 70 para 1467 at 662.


offering interest at an astronomical rates, guaranteeing job placement after completing a particular course, or treatment for some diseases by administering the medicine offered.

**Sub Clause (VIII):**

Warranty or guarantee not based on adequate or proper test:

Guarantees perform promotional function for manufacturers, and are acting as a system of quality control where-by information can be obtained about the performance of the product. This Sub Clause does not prohibit the practice of giving warranty or guarantee but requires that whenever such warranty or guarantee is given relating to the performance, efficacy or length of the life of the product, it must be based on adequate or proper test. However, no inkling has been given about the authority which

87. DG(I&R) v. Oriental Finance and Exchange Co. and Ors. UTPE No. 54/87 decided on 15.7.1987. 30% to 38% interest was offered ranging between six months to 5 years; DG(I&R) v. Punjab Farms & Forests Pvt. Ltd. UTPE No. 240/86 (IA No. 51/87 decided on 8.8.1987, investment of Rs.31,000 would yield Rs.1,05,000 in cash or 65,000 in cash plus 1 acre of land after six years.


will determine whether the test is adequate or proper. What is adequate or proper test will vary according to the facts and circumstances of each case. Thus a statement that the moped has 90 kms per litre fuel consumption \(^91\) is true but under ideal road conditions. So keeping in view the road conditions on which moped has to run, it can be held that the supporting test of warranty is not based on proper test.

The word warranty or guarantee it seems has not been used in the sense as defined under section 126 of the Indian Contract Act, 1872 but has been used here in a colloquial sense and perhaps in the sense as used by Lord Denning MR in *Oscar Chess Ltd. v. Williams*\(^92\). Which runs as follows:

In saying that he must prove a warranty, I use the word in its ordinary English meaning to denote a binding promise. Every one knows what a man means, when he says 'I guarantee it' or 'I warrant it' or 'I give you my word on it'. He means that he binds himself to it.

This clause will apply only when a warranty or guarantee given by a trader is not based on adequate or proper test. So where it is supported by an adequate or proper test but trader declined to fulfil the warranty or guarantee or had no intention at all to perform it, the subsequent clause will apply.

\(^91\) *CERC v. Kamavati Auto Ltd. and Anr.* UTPE No.95 (1957) 1 All Ek 325 at 328.

\(^92\) (1957) 1 All ER 325.
It has been provided specifically that the onus of proof is on the person raising the defence that warranty or guarantee is based on adequate or proper test. This however, holds good for other representations also where a trader claims something which is specifically in his knowledge.

Sub Clause (VIII):

*Materially misleading the public about the warranty, guarantee or promise*

This sub-clause speaks of a warranty or guarantee about a product or of any goods or services or a promise to replace, maintain or repair an article or any part there of or to repeat or continue a service until it has achieved a specified result when it is either materially misleading. or there is no reasonable prospects that such warranty or guarantee will be carried out.

Unlike previous sub clauses, the words "materially misleading" have been incorporated in this clause. Commenting on the import of the word "materially" a Canadian court in *R v. Patton's place limited* observed:

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93. See also *DG v. Manne Quins* (1989) 3 Comp LJ 155.

94. Clause(g) of section 53 of Trade Practices Act, 1974 of Australia deals with the similar representations. However, Amendment Act, 1977 brought many changes in these provisions which now read as follows. Make a false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

95. (1968), 57 CPR 12.
It is a representation which is calculated to, and in effect does lead a person to act upon it because he believes that this would be advantageous to him. Thus the word "material" does not connote the value to the purchaser, but rather the degree to which the purchaser is affected by these words in coming to a conclusion as to whether or not he should make a purchase. Thus sub clause therefore will not be attracted where a representation is not material.

Since the doctrine of privity of contract rule which has roots in Common Law and also found place in the Indian Contract Act, 1872, was not incorporated in the CP Act, these warranties or guarantees under the Sale of Goods Act by virtue of the privity rule, remained ineffective and restricted, to ornamental lettering 'GUARANTEE', against the manufacturer vis-a-vis the consumer. Under the CP Act complaint can be filed against the trader who has been defined in section 2(1)(q) as follows:

trader in relation to any goods, means a person who sells or distributes any goods for sale and includes the manufacturer thereof and where such goods are sold or distributed in package form, includes the packer thereof.

96. Id. at 16.
99. This traditional rule in case of consumer sales was criticised. As one consumer body remarked: If the manufacturer relies on the consumer to be the final link in his quality control system, he must take the responsibility for ensuring that the customer does not suffer as a result: Editorial, 'Car Buyers warrant a New Deal', Focus, Vol.2, Sept. 1967, at 1.
The phrase "distributes any goods for sale" will include a manufacturer or wholesale dealer who although does not sell himself, employs somebody else, e.g. retailer or agent to get the goods sold. Therefore, he will be liable for any unfair trade practice including warranty or guarantee. And, under CP Act the plea of privity rule will not be available to him.

The word "Promise" used in the second part of this Sub Clause suggests more than a mere representation or statement. However, it seems that quasi judicial bodies under the MRTP and CP Acts will not demand any more standard of proof than is otherwise required case of representation.

It is not clear as to whether this clause applies to a statement made after the time when a contract for the supply of goods or services has been entered into. One view is that since a guarantee or warranty, being a contractual assumption of obligations in respect of the subject matter of a transaction, it cannot strictly be said to exist before that transaction has been entered into. However, keeping in view the general principles of law of contract i.e., the terms, in order to have a contractual binding shall be contemporaneous to the contract, a post contractual warranty or guarantee or promise may not have the binding effect. Also a trader is said to be liable for false warranty, guarantee or promise because his falsity had induced

100. Supra note 70 para 1472 at 66.
the consumer to enter into the transaction but when no such warranty, guarantee or promise was made at the time of bargain, how can it be said that consumer was induced?  

The warranty or guarantee may be given in a variety of ways in relation to goods and services and they are so broad as to be virtually meaningless unless qualified. For instance if a person makes a representation that he fully guarantees a refrigerator. It is not clear as to whether in case of defect, will he replace it or only repair it. Whether only accessories replaced will be charged or charge for services will have to be paid? The period of the length of the guarantee is also not known and does he himself reserve the right to decide whether or not a claim is justified. In order to circumvent the possible misuse of these warranties, the Magnuson - Moss Warranty Act, 1975 (U.S.A) requires that a businessman issuing a guarantee or warranty must clearly disclose certain basic information; i.e. name and


102. Supra note 70.
address; the identity of those to whom it extends; the parts covered; What the guarantor will do, at whose expense must do and what expenses he must bear and exception if any. The guarantee must be available to consumers prior to a transaction and it becomes legally binding on a businessman and cannot be disclaimed and modified. In addition to the disclosure problems, the Act requires that the guarantees be clearly labelled as either "full" or "limited". It is suggested that clause (VIII) be amended so as to make necessary for the advertiser of goods or service who gives guarantee or warranty to disclose the nature, scope, duration and the circumstances under which warranty or guarantee will be available to the consumer of his goods or services.

Sub Clause (IX)

False or misleading representations as to price

This sub clause aims at preventing false or misleading representation as to price and covers the practice of making any statement which materially misleads the public concerning the price at which a product or like products or goods or services have been or, are ordinarily sold or provided. The representation which is false or misleading must be relating to price.

103. Section 102
104. Section 102(b)(1)(A) and Rule 702.
105. Section 103, 104 and 105 and Rule 700.
106. Section 53 (e) of the Trade Practices Act, 1974 of Australia is similar to sub clause (ix) which runs as follows: Make a false or misleading statement with respect to the price of goods or services; see also Maryland, Consumer Protection Act, 1973 Section 13 - 301(1) : makes false or misleading statement of fact concerning the reasons for existence of, or amount of price reductions.
However the word "price" has not been defined either in the MRTP Act or in CP Act. Section 4 of the Sale of Goods Act, 1930 has defined it in terms of money consideration. The English Consumer protection Act, 1987 defines it as follows:

a. the aggregate of the sums required to be paid by a consumer for or otherwise in respect of the supply of the goods or the provisions of the services, accommodation or facilities\(^\text{107}\), and;

b. ............

The above two definitions are similar in so far as they define price in terms of money.

Sub section 4 (1) of the Trade Practices Act, 1974 (Australia) defines "price" as including a charge of any description. This definition is wider than the above two definitions and will cover the situations like the one in Guthrie v. Metaro Food ply Ltd\(^\text{108}\) were a false representation was made concerning the reduction in sales tax and not in price. Since in Australia, price includes a charge of any description, so there was no difficulty for the court to declare it as a prohibited practice. In India, it may be said that it is a representation concerning the sales tax and not the price. However, it may be argued here also that since sales tax is covered in the retail price of goods, a prospective consumer will consider it a reduction in the price which he has to pay and therefore, falls within the domain of sub clause (ix).

\(^{107}\) Section 20(6).

\(^{108}\) (1977) 2 TPC 192.
This sub clause is silent on the means and methods which may be employed for making false or misleading representation to the consumers as to price.

Section 21 of the English Consumer Protection Act, 1987 which has replaced section 11 of the Trade Description Act, 1968 provides that an indication as to price is misleading when;

1. the price is less than in fact it is. This covers all the common situations where prices purportedly reduced are charged at full price.

2. in effect, the price purports to be unconditional whereas in fact it is conditional.

3. the price covers matters in respect of which an extra charge is in fact made

4. the price is to be increased or reduced or maintained when the person giving the indication has no such expectation.

5. the price is linked to factual information by reference to which consumers might reasonably be expected to judge the validity of relevant comparison with the price indication, and these facts or circumstances are not in fact what they are.

An indication is misleading as to method of determining prices when;

a. the method is not what in fact it is

b. the applicability of the method does not depend on the fact or circumstances on which its applicability does in fact depend.

1. c. the method takes into account matters in respect of which an additional charge will in fact be made.

d. the person who in fact has no such expectation.

i) expects the method to be altered (whether or not at a particular time or in a particular respect); or
11) expects the method, or that method, as altered to remain unaltered (whether or not for a particular period); or

e. the facts or circumstances by which the consumers may judge the validity of any relevant comparison are not what in fact they are.

Since sub clause (ix) is broadly worded without being clear as to its precise import, the above provision will prove a useful guide in interpreting this sub clause. As said, sub clause (ix) is wide in scope and will cover representations of different types. Thus it will cover not only comparative statements about one's own products e.g. previously for rupees 100 but now for rupees 75 but it will also cover a comparative statement about the price of his competitor e.g. our price 100 elsewhere. Similarly a situation where price comparison is correct but quality of the two products is different, will also be caught by this sub clause. The statement about the price reduction may not be false but nevertheless, misleading when the price reduced is so insignificant that had it been disclosed to customer he ought not to have purchased the product. Similarly a statement made by a trader with out any plausible reason for example prices now reduced by 10%, buy before the prices return to normal will be a misleading representation under this sub clause. Making a plain

109. Achal Kumar Galhotra v. Byford Motors Ltd. and Anr. (1991) 72 Comp. Cas at 702, representation was Padmini car at Rs.28,000 less than Maruti, although two cars were of different descriptions, the price of Maruti car stated was also false.
representation that the transaction will be advantageous\textsuperscript{110} when in fact it is not or an ambiguous representation will although, be not false, nevertheless misleading under this sub clause. Giving impression that the price advertised is the net price but in practice charging extra for installation or for extra accessories will be covered by this sub clause.

A special offer impliedly promises more favourable terms than the offerers' usual terms. It will be misleading if the seller's usual price is falsely represented as a specially reduced price. The making of false claim of special terms, equipments or other privileges or advantages\textsuperscript{111} will also be covered under this sub clause. Pre-ticketing which involves a representation usually on the package or the article itself about the retail price substantially higher than the actual price to the consumer will be caught by the sub clause\textsuperscript{112}. Other practices which are in vogue in India are festival discounts\textsuperscript{113}. Off season discounts\textsuperscript{114},

\textsuperscript{110}. In re Communications net work Ltd. (1986) 1 Comp LJ 185, goods falsely offered at irresistible price inclusive of duties and taxes was held to be covered under this sub clause.

\textsuperscript{111}. No.16 in the list of unfair methods of competition; Annual Report of the Federal Trade Commission (1938) at 70.

\textsuperscript{112}. Helbros Watch Co. v. Federal Trade Commission, 310 F 2d (CADC 1962).

\textsuperscript{113}. Sarvodaya Khadi Bhawan UTPE No.289 of 1987, decided on 17.10.1988 falsely announced special rebate of 35% during Kali Pooja and Deepawali.

clearance sales, manufacturer or wholesale prices and reduction sales etc. These practices for the purposes of the MRTP Act and CP Act can be classified into two types. One, where no discount at all in fact is offered or offered but for a limited duration e.g. for two days or on an unimportant or insignificant items. Such practices will fall under section 36A (2) or section 2 (v) of the MRTP and CP Acts respectively. Another practice is to offer discount but on outdated or worn out products or impliedly promising that prices will be favourable when in fact they are not. Such practices are within the ambit of sub clause (ix).

In order to remove any possible misleading impression which may be caused by such statements, the MRTP commission has laid down the following rule:

Where the discount is offered on such goods of standard quality just for the sake of publicity towards establishing one's goodwill, the mention of the quality, etc. may not be necessary; but, in other cases, where discount sale is necessitated by reason of off season, deterioration in quality, so on and so forth, non mentioning of that reason for the discount sale would be misleading in nature, and would have the effect of occasioning loss or injury to the consumer.

Not only the mention of reasons for given discount are necessary but omission of other information may also attract this

115.In re Petal Boutique UTPE No.129 of 1986 decided on 1st. Feb., 1988, without mentioning so, it was found that respondents offer of discount was to clear off the old and out of fashion garments.


117.Supra note 115.
clause e.g. the value and quantity of discount offered; the original price, discount offered on the net price and duration of discount offer etc. 118.

Thus a representation will not fall under this sub clause if it projects purely comparative price statement about his own goods or services or about the goods or services of his competitor in objectively measurable attributes or price 119 (provided quality is same) in the relevant market 120. The relevant market for the purposes of this clause will be the market in which goods of same description and quality are sold 121.

When a person is raising the price for some period in order to advertise later on the price reduction, should such price reduction be called genuine or misleading?

118. In fact this kind of information was sought by the MRTP Commission from the respondent for reaching to conclusion in DG v. Intererat South (Exports) (P) Ltd. UTPE No.119 of 1987 decided on 26.2.1988.

119. F.T.C statement of Policy Regarding Comparative Advertising has approved comparative advertising which compares alternative brands on objectively measurable attributes or price and identifies the other alternative brand by name, illustration or other distinctive information. 16 CPR 14.15(1980) CF Chester Field oppenheim et.al, Unfair Trade Practice and Consumer Protection cases and comments American Case Book Series at 602.

120. Sub clause (ix) says that a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market...

121. MRTP Commission in one case held that it is to be ascertained whether sales are regularly conducted by it at pre-discount prices at other time. However, it is submitted that this proposition in no way takes into account the phrase "relevant market". Supra note 118.
In order to ascertain the genuineness of such representations, the American Federal Trade Commission issued guidelines wherein it was stated that such practices are deceptive unless it is shown that the further price was the actual bonafide price at which the advertiser had offered the article to the public on a regular basis for a reasonably substantial period of time\textsuperscript{122}. However, later on the phrase "reasonable period of time" was replaced by the phrase "in recent past"\textsuperscript{123}. The Trade Practice Commission of Australia has adopted the former view\textsuperscript{124}, and in order to determine whether the period in question is a "reasonable period of time" various factors are taken into account including the frequency of price charged, the method of distribution and rate of turn over of goods and frequency at which the person acquired the services.

More objective test has been laid down in England. There the previous price should be the last price at which the product was available to consumers in the previous six months and goods must be available for at least 28 consecutive days in the previous six months\textsuperscript{125}.


\textsuperscript{124} TPC Advertising and selling (1981) Paras 318 to 319.

\textsuperscript{125} 1.2.2 The Consumer Protection (code of Practice for Trade on price Indications) Approval order 1988 (S.I. 1988/2078).
Neither the MRTP Commission nor National commission or its subordinate commissions have found opportunity to dwell on this issue. There seems no reason not to adopted the English rule which is more objective and will ensure certainty in predicting about the representation in question.

**Sub Clause(x)**

**Disparaging Goods or Services of Another**

Sub Clause(x) provides that it is an unfair trade practice to disparage the goods or services of another person by false or misleading facts. The aim of advertising is to bring goods or services in the lime-light. This can be achieved either by extolling the attributes of the product or by manipulating the weaknesses of the product of the competitor. Both types of advertisements can be adopted so long as they are not false or misleading. If they are false or misleading then they will be proscribed.

126. This provision is identical with section 13-301 (8) of Maryland's Consumer Protection Act, 1973 which runs as follows: Disparaging the goods, services or business of another by false or misleading representation of fact;

127. In re Ace Marketing Pvt. Ltd. (1987) Tax LR 1792(30) MRTPC. However, there are two views about the comparative advertising; one view is that it is unethical and unfair because of its tendency to degenerate into name calling and unprovable assertions which damage the entire industries' reputation or because an underdog may use it unfairly to capitalize on the goodwill of a well established brand product to which it is not truly comparable, see N Y Times, Jan.21, 1973 at 15, col.1-5. The other view is that the comparative advertising is a desirable practice that enables the business concerns to challenge and deflate excessive advertising claims of their competitors. See Wall St. Jour, Nov.17, 1965, P.16, Col.1-2, Federal Trade Commission of USA is also of the view that comparative advertising is beneficial. (BNA, Anti-trust and Trad Reg. Rep. No.555, A-20 (1970).
and in such situation sub clause(X) will cover the advertisements of the latter category.

This sub clause censurs disparaging of goods or services of another person. Does it mean that the false statements like "only air conditioner in India with Japanese compressor", will not be covered as the statement has been used without referring the name of any other company? It is suggested that the word "person" used in the sub clause should be dropped to avoid any doubt. However, it will not be incongruous to mention that the MRTP commission has not found himself fettered by the word "person" and has issued cease and desist orders even in such situations where advertisement does not refer to any person.\(^{128}\)

Sub clause (X) is wider in scope than sub clause (IX) in one respect i.e., under sub clause(IX) comparative advertising relating to only price is covered. Thus a false statement that only TV with foreign picture tube" will be covered under sub clause (X) but not under sub clause (IX). But on the other hand statement showing previous and present position of the price of the trader's own brand will be covered under sub clause(IX) but not under sub clause (X).

\(^{128}\) See In re Pieco Electronic & Electricals Ltd. UTPE No.71/1987 order dated 8.11.1988, statement claiming only Philips gives the full bulbs whereas other bulbs were half; In re Novapan India Ltd. UTPE No.9/86 order dated 24.6.1988 claimed that Novapan was the only pre-liminated particle board in the country; In re Competent Motors UTPE No.168/1988 order dated 11.12.1986 statement was that the facilities provided by the respondent, dealer of Maruti Udyog Ltd. were provided only and only by him. In all these cases it was held that the respondents have violated sub clause(x).
The MRTP commission has taken almost a consistent stand that the advertisements of self praise e.g. calling the product as only real product, or also or only best cannot itself lead to the conclusion that the impugned advertisement is disparaging the products of other unless it is shown that the facts are false or misleading which disparage the goods of other.

The MRTP commission in *D G(I&R) v. DCM Toyota Ltd* held that it is essential to prove that the false or misleading facts are intended to disparage, denigrate or condemn the goods of any other person.

It is submitted that the liability under both the MRTP Act and CP Act, is irrespective of good or bad faith of the advertiser. The requirement of mens rea has been dispensed with even in the legislations imposing punishment in terms of imprisonment. The liability under the MRTP and CP Acts is strict. Furthermore, throughout the definition of unfair trade Practice, the test is

129. In *Satinder Singh v. Zandu Pharmaceutical Works Ltd. UTPE No.491/1987* order dated 7.12.1987, the commission held that a statement that my product is real does not amount to stating that the products of other companies are not real, so long there is no specific effort to run down other products.

130 In M/s Zandu Pharmaceutical Works Ltd. UTPE No.491/87 claim was that the respondent's product Zandu Chyawan Prash is "alsi" and it was held that the statement does not fall within the purview of sub-clause(x)

The use of superlative terms such as "best", "perfect", "purest", "sturdiest" cannot disparage the goods of the competitor.


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not only to ascertain whether the actual loss or injury has been caused to the consumer but has the trade practice in question potential to cause loss or injury or is there any likelihood of loss or injury. So there is no question of reading mens rea in clause (X).

In DG(I&R) v. Milk food ltd., Patiala133 the impugned advertisement claimed that the respondent's Ice cream was disparaging the ice cream of the competitor's who do not claim that their ice is 100% pure. The commission recorded the following reasons:

1.100% is now being used to project or symbolise the quantity, standard or excellence of the product sought to be marketed. The term should not, therefore, be construed literally or commercially. Indeed it is similar to such terms as "best", "perfect" "purest", sturdiest, etc. Fortunately, however, such superlatives even though high sounding have ceased to impress the average customers who are now all too familiar with such hyperbols. At any rate these superlatives do not necessarily mean any disparagement to the product of the competitors.

2. It is not article of one time purchase, in matters of food and eatables, the average customer does not go so much by the labels, logo or slogans but the taste and the price of the item. He is guided mainly by the quality or standard, and of course, the cost of the eatables rather than any other things. As the adage goes, the test of the pudding lies in the eating.

It is submitted that the ruling of the MRTP Commission cannot be said as laying down any general rule which will form binding precedent for future.

133. Supra note 133 at 374.
It cannot be said that the traders representing falsely their product as 100% in any respect, can go scot free. For example in ice cream cases, Food Adulteration Rules, 1955 prescribe following standard of its contents:

<table>
<thead>
<tr>
<th>Component</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milk fat</td>
<td>10.00%</td>
</tr>
<tr>
<td>Protein</td>
<td>3.05%</td>
</tr>
<tr>
<td>Total solids</td>
<td>36.00%</td>
</tr>
</tbody>
</table>

(Except that when any of the aforesaid preparations contain fruit or nuts or both then the content of milk fat shall be less than 8.00%).

Starch 5.00%

It is only after conforming to the aforesaid standard, the manufacturer of ice cream can legitimately call his ice cream as 100% and not otherwise. Now if suppose without complying with the said standard, the manufacturer is calling his ice cream as 100%, is it not an unfair trade practice? Is in such situation also, commission right in saying that the word 100% is merely a "superlative hyperbol which cannot impress an average consumer"? Therefore, it is submitted that without dwelling on the issue of hyperbols and superlatives commission ought to have addressed on a precise question, i.e., whether the ice cream conforms to the prescribed standard or not.

It will be quite apposite to mention here that the commission in *re Eid parry Co. Ltd., Madras*[^133a] did take the serious

note of the words "excellent quality" when the goods were found sub-standard.

The argument of the commission it is submitted is fraught with the tendency of taking back to the era of Caveat Emptor. It shifts burden from the advertiser to the consumer. According to the commission's opinion it is now the job of the consumer to see whether the product is up to the standard which he expected from the advertiser's advertisement and not the job of the advertiser to advertise the goods.

Like other advertisements, the advertisement alleged to have disparaged the goods or services of the other, should be read as a whole, the mosaic has to be read in entirety and not each tile separately, such statement cannot be read out of contexts134.

Where an opinion is expressed by some one not directly or indirectly involved with the product, the mere fact that his opinion has a tendency to disparage the goods of one competitor, will not be sufficient to attract sub clause (ix) and it will make no difference if that opinion is false as the requirement under sub clause (x) is that the disparaging statement must be adopted for the purpose

134. Supra note 132.
of promoting sale, supply or use of goods or provisions of services. Explanation to Clause (1):

The Explanation appended to clause (1) runs as follows:

For the purposes of clause (1), a statement that is
a) expressed on an article offered or displayed for
sale, or on its wrapper, or container; or
b) 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;
c) 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, 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.

The explanation cannot be construed as laying down the
exhaustive list of the various forms in which the representation
can be made. But this explanation has to be read with clause (1)
itself which includes statement of all types whether made orally

135. In re invest well publishers (P) Ltd. UTP No.146/1987 order
dated 5.10.88. Regarding the third "party opinion which has
no link with the product directly or indirectly, it was laid
down by justice Holmes in Scientific Manufacturer Co v. FTC
3rd Cir, 1941 124 F 2d 640 that "certitude" is not the test
of certainty. We have been cock sure of many things that
were not so... But while one's experience thus makes certain
preferences dogmatic for oneself, recognition of how they
came to be so leaves one able to see that other, poor souls
may be equally dogmatic about something else."
or in writing or by visible representation. So advertisement by means of banner, cards, cinema slides, handouts, hoardings, broadcast on radio, etc., would very much amount to statement although not mentioned in the explanation.

This explanation it seems has cleared the doubt about the possible application of principle of invitation to treat in such representations. Mere mention of price on the article may not be an offer under the Indian Contract Act but by virtue of this explanation it will be a representation and representator will be amenable under the MRTP Act and CP Act for any false or misleading representation.

Exceptions:

At present, there is no exception provided under the MRTP Act or CP Act. The Sachar Committee had recommended following exceptions:

1. The afore said provision shall not apply if a person establishes --
   a) that the act or omission giving rise to the offence was a result of a bonafide error; or
   b) that he took reasonable precaution and exercised due diligence to prevent the occurrence of such error and that he took reasonable measures forthwith, after the representation was made, to bring the error to the attention of the class of persons likely to have been reached by the representation.


c) in a proceeding for contravention of any of the aforesaid provisions committed by the publication of an advertisement, it would be a defence for a person who establishes that he is a person whose business it is to publish or arrange for the publication of advertisement and that he received it in ordinary course of business and did not know and had no reason to suspect that its publication would amount to contravention of any such provision.

These exception are analysed hereunder;

1. The first exception brings from backdoor the element of mens rea. As said already the liability under the MRTP Act and CP Act does not depend on the good or bad intention. Intention is totally irrelevant under the provisions of these Acts. He cannot be allowed to reap the benefits of the bonafide error. The Commission under the MRTP Act be well within the right to ask such representative to issue corrective advertisement so that any false impression created through such error will be erased. Again it will be appropriate to pass desist order against such persons so that similar error is not repeated and if injury is caused to consumer, he is compensated.

2. Where impugned advertisement was ceased prior to the launching of proceedings or where an advertiser gave an undertaking that he will not only discontinue it but will in future desist from causing it to publish, the MRTP Commission dropped proceedings against such respondents and thus recognized this exception without expressly saying so.

3. So far as third exception goes, till date MRTP Commission has not in a single case held an advertising agent liable even though this point has been raised in a number of cases138. There seems every reason for it. The definition of unfair trade practice provides that it is trade practice which for the purpose of promoting sale, supply or use of goods or provisions of any services". So advertising agent cannot be held answerable under the present scheme of things139. He cannot be said to have


139. However, D. N. Saraf is of the opinion that there is no need of providing any statutory provision for holding advertiser liable. The advertising agent will be liable even under the present Acts. Ibid.
promoted the sale, use or supply of goods. He is definitely doing that but for someone else and that person who has caused the publication of the representation, is liable under these Acts. However, it is suggested that an express provision be made for holding the advertiser also liable but at present since the advertiser is not liable under these Acts, the question of providing an exception does not arise.

BARGAIN OFFERS

In the not too distant past it was said that the two certainties in this life were death and Taxes. Today the old saw could be broadened to include advertising, taxes and death. In order to survive in a competitive market, traders have to take help of the advertising. There is nothing wrong in it so long it is not false or misleading. When going becomes tough for the trader, he resorts to false or misleading advertisements. The varieties of such advertisements are innumerable as there is no end to ingenious techniques which businesses can invent. Without gain-say, figures are often more eloquent than words and an attractive price is sometimes more effective in inducing a sale than the quality of the article. Thus the chances of duping a consumer by giving false or misleading figures, are more than by any other forms of false or misleading advertisement. This is the reason that one of the most intractable trading abuses of recent times has been the use of bait advertising. Such advertisements


offer goods at attractive bargain prices, being goods which the advertiser does not in fact intend to sell in more than minimal quantities, if at all.\textsuperscript{142}

The bargain offers are elsewhere in the world more popularly called as bait and switch sales. In America unlike other countries there is no specific provision dealing with the bargain offers, such practices are covered by the flexible section 5(1)(Q) of the Federal Trade Commission Act, 1914 as amended by the wheeler - lea Amendment Act, 1938 which runs as follows:

\begin{quote}
Unfair method of competition in Commerce, and Unfair or deceptive acts or practices in Commerce, are hereby declared unlawful.
\end{quote}

In America, bargain offer or bait advertisement is not taken in isolation but clubbed with switch sale as is evidenced by the decision in \textit{Household Sewing Machine Co. Inc.},\textsuperscript{143} The court said that our decisions relating to bait and switch are grounded on a factual determination that the

\textsuperscript{142}Supra note 70 at 690-99.

\textsuperscript{143}76 F.T.C 207, 239 (1969). The Guides Against Bait Advertising defines "Bait and Switch" as an offer which is made not in order to sell the advertised product at the advertised price, but rather to draw a customer to the store to sell him another similar product which is more profitable to the advertiser. 16. C. F. R, See 238 (1970).
advertised product is not an offer which the seller seriously intends the buyer to accept, but a "Come on" which will lead to the sale of a higher priced product. The seller in order to woo the consumer to their establishment, offer the products at an extremely low price which does not intend to sell. When the consumer responds to the advertisement, the seller discourages him from purchasing the bait and instead tries to switch him to a higher price and more profitable item. To attract the consumers, advertiser creates false impression about the quality, quantity, model, style, durability etc of the goods and when the consumer turns up, the seller either refuses to demonstrate the advertised product or disparages it through words or acts, or by discrediting its guarantee, its credit terms, and the availability of service, repairs etc. It is a common experience that the consumer believes in what sales man says more than what his own eyes see. The sales man by virtue of his professional skill convinces the consumer that the product shown is far better than the advertised one. Since customers are psychologically prepared to spend their money once they are inside the store, they easily come in the grips of the sales man.

The show of actual switching is not necessary but can be inferred from the surrounding circumstances. This will naturally include bait advertising as without that switching is not possible. Hence, the commonly used phrase "bait and switch". Unlike America, in India the MRTP and CP Acts contain a provision on bargain offers. The provision is similar to the one

145. See Tashof v. F T C 437 2d 707. The F T C Guides in 16 C. P. R. See 238.3 (1988) do not demand show of actual switching. Nevertheless, the bait advertisement is a condition precedent for prescribing an advertisement as a bait and switch. Section 238.3 of the Guides reads as follows:

No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise. Among acts or practices which will be considered in determining if an advertisement is a bonafide offer are:

a) The refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer,

b) The disparagement by acts or words of the advertised product or the disparagement of the guarantee credit terms, availability of service, repairs or parts, or in any other respect, in connection with it,

c) The failure to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the merchandise is available only at designated outlet,

d) The refusal to take orders for the advertised merchandise to be delivered within a reasonable period of time,

e) The showing or demonstrating of a product which is defective, unusable or impractical for the purpose represented or implied in the advertisement,

f) Use of a sales plan or method of compensation for salesmen or penalizing salesmen, designed to prevent or discourage them from the advertised product. (However, these guides are only interpretive rules which do not carry the force and effect of Law).
incorporated in section 56(1) of the Australian Trade Practices Act, 1974 and in substance similar to section 37(2) of the Combines Investigation Act, 1923 of Canada. The provision is as under:

Permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain, or for a period that is and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

A bare reading of the above provision makes it clear that it has a limited scope as compared to the American law on the subject. In India even if the trader disparages his own goods and thereby induces the buyer to switch over other item available at higher price and more profitable to the trader, he will not be covered under the above mentioned provision which will be violated only when the bargain offer is not so or is not available for a reasonable period or in reasonable quantities.

146. This section provides: A corporation shall not, in trade or commerce, advertise for supply at a special price goods or services that the corporation does not intend to offer for supply at the price for a period that is and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

147. This section reads as: No person shall advertise on a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

148. Section 36 A(2) of the MRTP Act and Section 2(r)(2) of the CP Act.
In order to bring a trade practice within the proscription, it is necessary to show that the trader permitted the publication of the advertisement of such trade practice. The term advertisement has not be defined in the Act. It may be defined as a notice given in a manner designed to attract public attention as by newspapers, hand bills, television, bill boards and radio. Thus the word advertisement is one of wide amplitude. Nevertheless, it will exclude representations made in sales talk at the point of sale. Thus for example, a door to door salesman who gains entry to a home by offering for sale a bargain priced appliance which in fact proves to be unsatisfactory in operation, but who just happens to have a better model in his car, would not be covered under the above mentioned provision.

Since the word "advertisement" is wide enough to include labels on the goods or catalogues, then the question arises; are these labels on the goods or catalogues as "offers"? under the Indian Contract Act, such offers are merely an invitation to treat. Thus there are two possible interpretations. One is not to use the term offer here in a technical sense and not to insist on the dichotomy of the offer and invitation to treat. This will bring all that in the ambit of the term advertisement which might otherwise be excluded if the offer is given a restricted meaning. The other interpretation is to give offer narrow meaning in the sense as understood in the contract law. In an Australian case of

151. Supra note 142 at 693 para 14105.
Reardon v. Morley Food Pty Ltd.\textsuperscript{152} Smithers J held that the advertiser must take some positive action which constitutes the making of an offer on the terms specified in the advertisement and that he should at least during the advertised period of the offer publicise it to all and sundry at his chief place of business\textsuperscript{153}. However, in England the price mentioned in the catalogues or in mail orders is considered as a price indication. If such price indication is false or misleading, the trader will be liable for penal consequences under the Consumer Protection Act, 1987\textsuperscript{154}.

Once it is proved that the trader permitted the publication of an advertisement through newspaper or otherwise, the next enquiry relates to his intention, it must be proved that the trader had no intention to sell the advertised goods. Although intention is an essential ingredient, yet it is not easy to ascertain. Furthermore, trader may escape responsibility by merely showing that the non-availability of goods for sale was due to reasons beyond his control. Since Indian Law is replica of section 56(1) of the Trade Practices Act, 1974 of Australia, dealing with the bargain offers, the difficulty of proving the requisite intention was encountered there also. In order to

\begin{itemize}
\item \textsuperscript{152} (1980) 33 ALR 417.
\item \textsuperscript{153} For criticism to this judgment see Supra note 151.
\end{itemize}
overcome this loophole, Swanson Committee in its report\textsuperscript{155} recommended that section 56 should apply to cases where advertiser in fact did not supply goods or services in accordance with his offer, irrespective of what his intention may have been at the time of advertising.

Keeping in view the recommendations, in addition to what was laid down in section 56, Sub-clause(2) was inserted in section 56 by the Trade Practices (Amendment) Act, 1977 which reads:

A corporation that has, in trade or commerce, advertised goods or services for supply at a special price shall offer such goods or services for supply at that price for a period that is, and in quantities that are reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

Thus in Australia a trader cannot escape from the liability by mere show of absence of required intention. Failure of supply of advertised goods is itself sufficient for penal consequences. Since in India the chapter on unfair trade practice was introduced in the MRTP Act in the year, 1984 and CP Act was passed in the year, 1986, there is no plausible explanation for not incorporating section 56(2) of the Federal Trade Practices Act, 1974 of Australia in place of present section 36(A)(2) of the MRTP Act and section 2(r)(2) of the CP Act in order to dispense with the requirement of intention.

For the applicability of provisions dealing with the bargain offers, it is necessary to prove that the advertiser offered

\textsuperscript{155} Swanson Committee Report paras 9.84 - 9.87.
goods at the bargain price. The term bargain price has been defined through the Explanation appended to respective sections. The Explanation has two clauses. Clause(a) says that the bargain price means a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise. This clause is ambiguous. It does not make clear as to whether the ordinary price is the price of the trader who has made a bargain offer, or any other trader. This explanation will not help also where a retailer who owns two or more outlets may, indicate in a shop A that an article was previously sold at a higher price when it was so sold only at shop B. This problem will be more acute if shop B is at a considerable distance away and possibly in an area where retail margins are normally higher than those in the area of shop A\textsuperscript{156}. Clause (a) of the Explanation is also silent about the time during which the ordinary price should be in vogue. Thus runs the danger of unscrupulous traders raising prices today, lowering them tomorrow and then claiming price reduction. In England it has been made mandatory that the previous price should be the last price at which the product was available to consumers in the previous 6 months. The product should have been available to consumers at that price for at least 28 consecutive days in the previous months, and the previous price should have been in force for that period at the same shop where the reduced price is being offered\textsuperscript{157}.

\textsuperscript{156} See R. G. Lawson, Advertising Law (1978) at 165.

\textsuperscript{157} Part 1, para 1.2.2, Supra note 154.
Clause (2) of the Explanation provides that the bargain price means a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

This clause is widely worded and unlike clause (1), even where there is no mention of actual reduced price, a trade practice will attract the provision when the advertisement is couched in such a way as to create an impression to consumers that the advertiser offers goods at bargain price. Thus the phrases like special prices, clearance sales, lower than other prices, whole sale prices will be covered under this sub-clause. However neither clause (1) nor (2) covers the advertisements like buy today for Rs.100 and not tomorrow for Rs.200 or buy now before price rise. These advertisements relate to future.

The bargain offer will not invite proscription if it is true and lasts for a reasonable period and is available in reasonable quantities. In order to determine the reasonableness of the period and quantities, regard must be had to nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

158. However a conflicting opinion was expressed by the MRTP Commission in re polar Industries Ltd and Ors UTPE No.120/86 decided on 22.1.1987. In this case off season discount of Rs.45/- offered on the sale of polar ceiling fans in 1986 was measured not on the basis of current price but with reference to the prices which were expected to rule in April, 1987. The Commission held the advertisement as unfair.
Till date the cases decided by the MRTP Commission involving bargain offers show that the Commission has invariably determined the validity of the bargain offers on the touch-stone of reasonableness of the period and the nature of the quality and in this process several rules have been evolved.

About the mention of the period during which the bargain offer shall last, the MRTP Commission came with the divergent opinions. In *re citylook New Delhi*\(^{159}\) and in *re Heels*\(^{160}\), it was observed that the period during which the sale should be continued and hours fixed for sale should be reasonable. It cannot, however, be said to mean that the period during which the sale is to last should also be mentioned. There are no words in the aforesaid provision which lead to the conclusion that it is obligatory to mention reasonable period in the advertisement. As it appears, the only thing required is that the sale should be for a reasonable period and the hours of the sale should be reasonable having regard to the nature and size of the business, the nature of the market in which the business is carried on and the nature of the advertisement. However, on the other hand in *re Kailash Stores*\(^{161}\); *re Dayal Novelties and others*\(^{162}\); *re Smt Bharti Devi and Anr*\(^{163}\); *re Unique Department Stores*\(^{164}\); *re Roop Milan*\(^{165}\) and *Deepak Agencies*\(^ {166}\); the Commission

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161. UTPE No. 36/84 decided on 19.8.1986.
162. UTPE No. 33/85 decided on 24.2.1986.
163. UTPE No. 80/85 decided on 18.11.1986
164. UTPE No. 96/86 decided on 9.2.1987.

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declared bargain offer as unfair and one of the grounds was non-mentioning of the period during which the offer would remain valid.

Although the provision dealing with the bargain offer talks about the reasonableness of the period which can be determined keeping in view the nature of the market in which the business is carried on and the size and nature of business, yet the Commission attempted to prescribe the period with exactitude and in this process conflicting opinions were expressed. In *re vasud Bros*\(^\text{167}\) the bargain offer was relating to the sale of textile goods, reasonable period was held not to be less than 15 days. But in *re Panama Traders*\(^\text{168}\) where again bargain offer was for textile goods, not less than 7 days were considered as a reasonable period. About the bargain offer involving readymade garments, the Commission in *re Unique Department Store*\(^\text{169}\) and *re Snow white clothiers*\(^\text{170}\) held that the offer should not be less than 10 days. It is submitted that the above opinions regarding the period during which the bargain offer should run, are not in conformity with the provision controlling the unfair bargain offer, for the following reasons:

1. The period may vary from case to case depending upon the nature and size of the business, quantity at sale and nature of the market in which business is carried on;

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168. UTPE No. 35/86 decided on 17.9.1986.
169. UTPE No. 96/86 decided on 9.3.1987. See also *re Boutique*
170. UTPE No. 13/84 decided on 2.5.1986.
2. No hard and fast rule can be laid down regarding the reasonableness of the period, what may be reasonable period for a particular item may not be reasonable for another;

3. If the rigid rule about the reasonableness of the period is upheld, then even the bonafide bargain offers will fall within the proscription. For example, where there was a bargain offer for a limited sale which did not last for a prescribed period, the trader will be hauled up for not providing the goods in accordance with the offer.

4. Where for example bargain offer relates to the sale of 10 radio sets or 20 refrigerators, the question of prescribing a period does not arise and the offer shall remain valid till the last set is disposed of.

The MRTP Commission realising the impracticability and the resultant consequences of imposing any rigid "reasonable period", held in *re Roop Milan*\(^1\) that a reasonable period of discount sale, having regard 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 driblets. Even where the period is prescribed, it cannot be expected that a trader would undertake that the stock would last for that period because they may be cleared in a fraction of that period\(^2\). Naturally it would be a good defence for the trader that the stock did not last for the period mentioned in the advertisement as the demand generated by the advertisement was more than the goods in stock which was not in the contemplation of the trader\(^3\).

\(^1\) Supra note 165.
\(^2\) Supra note 160.
\(^3\) Emphasis supplied.
Akin to the question of mentioning of the reasonable period, the MRTP Commission confronted with the question whether the reasonable period should be mentioned in the bargain offer itself or it will suffice that the bargain offer remained standing for a reasonable period although the same was not mentioned in the advertisement? The MRTP Commission, it appears, had no clear idea about the answer with the result opposite views were expressed at two different occasions. In DG v. Nalli Silk Press and Ors\textsuperscript{174} the Commission opined that where the bargain sale announced was for a period from 3rd April to 6th April; but the same had been carried on till 20th April, 1987, the taint of unfair trade practice had been removed. But in \textit{re Petals Boutique}\textsuperscript{175} where bargain offer was made only for 3 days at the fag end of the July, 1986 but continued for subsequent month, the commission declared the bargain offer as unfair. It is submitted that it is the latter opinion which is in comport with the legal provisions. As the requirement of law is that the bargain offer should remain current for a reasonable period. What is reasonable period, depend upon the circumstances of the each case, the bargain offer and such period shall have to be mentioned in the advertisement itself.

Along with reasonableness of the period, the legal requirement is that the quantities put to bargain sale must also be reasonable. However, this does not mean that the seller must

\textsuperscript{174} UTPE No. 107/87 decided on 5.6.19879.  
\textsuperscript{175} UTPE No. 129/86 decided on 1.2.1988.
undertake to sell goods in a stated quantity but it simply implies that the seller must sell the goods at the bargain price in the quantities as reflected through the advertisement. It has been suggested by an Australian writer that the reasonableness must be determined from the point of view of the advertiser. However, it is submitted that before reaching any conclusion, the advertisement itself should be scanned, obviously consumer and the seller will be holding two extreme views. The test therefore, should be to ascertain whether the supply was equal to one reflected by the advertisement.

The MRTP Commission however, has not decided cases on the test of reasonableness of the quantities, instead the Commission has given much weight to the insertion of the nature of qualities in the advertisement relating to bargain offer. It has in a number of cases laid down that if the bargain offer is for old goods, used goods, out of fashion goods or new goods, the same must be mentioned in the advertisement, otherwise it will be misleading. Thus the Commission insisted on mentioning the reasons for the bargain sale in the advertisement itself. It did not endorse the point that where ever the discount offered is upto


50%, it shall be presumed that the goods on which the discount is offered shall not be fresh goods. The Commission observed:

The claim of the respondent that the customer was to be believed to be well-aware that the maximum discount of 50% could not be expected on fresh and quality goods, was not correct. This sort of awareness on the part of the customer as the respondent wanted to impute to him could not be treated as true. This rate discount might vary not only by reason of age of the unsold goods, it might also depend upon demand, off season, defects or otherwise owing to the necessity to clear the accumulated stock.

GIFTS, PRIZES, LOTTERIES, CONTESTS ETC.

Market strategies know no end as there is no end to the human ingenuity. Since man has not stopped thinking, so he continues to contribute to the development of designs and devices which promote the objective of manufacturer, producer, wholesale dealer, retailer and supplier i.e. sale. The strategy makers are always in a hunt for new techniques and methods which are not only in tune with the tastes and needs of the consuming public but which have a potential to harbinger "wish" to purchase of the consumer to "will" to purchase. Since it is not so easy, so field studies have been undertaken to know the susceptibilities and behavior of the consumer. His urge resulting in his fickling has been studied at micro level. Nevertheless, since vagaries of consumer idio-syncrasy cannot be put into a strait jacket so it is not easy to predict consumer behavior at a particular point of time.

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178. re Skipper UTPE No. 80/86 decided on 3.3.1989.
Whether it is the case of introducing new product in the market or ensuring steady egress of the goods from the market, advertising has played an important and effective role. The most difficult task of placing a consumer in a mood to buy has been accomplished by advertising price cuttings, as the statistical figures have more potential to woo the consumer than the "words". Relatively recent in origin is the advertising of free gifts or prizes or conducting of contest, lottery, game of a chance or skill which are connected with the goods or services in such a way as to compel the consumer, in order to try his luck and be successful on the wheel of fortune, to purchase such goods or services. The hope of getting something for nothing is the most powerful bait. This attracts the customers, children, and adults alike. This is the lure that draws the credulous and unsuspecting into the deceptive scheme.\(^{179}\)

In order to eliminate possible misuse through these sales promotion schemes, consumer protection laws are in force throughout the globe including India.

In India, both MRTP\(^{180}\) and CP Acts\(^{181}\) contain provisions to deal with the practice of offering of gifts, prizes or conducting of contest, lottery, game of chance or skill etc. This provision runs as follows:

\(^{179}\) State V. Lipkin 169 NC 265 1936.

\(^{180}\) Section 36 (A) (3)

\(^{181}\) Section 2 (r) (3)
Permits:

a) the offering of the gifts, prizes or other items with the intention of not providing them as offered or creating an impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.

b) the conduct of any contest, lottery game of chance or skill for the purposes of promoting, directly or indirectly, the sale, use or supply of any product or any business interest.

Gifts And Prizes:

A gift may be defined in a general way as an offer, or giving of something for nothing, contingent upon the purchase of the goods or services at a price\textsuperscript{182}. The provision proscribes offering of gifts and prizes or other items when there is either no intention to provide them as offered or when they are either partly or wholly covered in the price charged but impression is created that something is being given free of charge.

In classical law of contract a distinction has been maintained between offer and invitation to treat. Latter is simply a request to other party to float offer which can ripen into contract only when accepted by the other. This distinction was

\textsuperscript{182} Lyon, The Economic of Free Deals (1933) at 2.
approved in England in a number of cases \(^{183}\) and was followed in India \(^{184}\) also. Criticizing this approach Treitel observes:

customer may be induced by a window display to believe that they will be able to buy goods at exceptionally low prices and to wait out side the shop for many hours in such statement and the shopkeeper may turn him out at the very moment when the customer demands the goods \(^ {185}\).

There is no clear cut inkling whether the word "offered" includes invitation to treat also. In Australia \(^ {186}\), the stand taken by the courts is that offer for sale be read in an ordinary sense unless context otherwise requires and made clear that offer when used in a particular legislation does not necessarily have the meaning it does under general law of contract. Commenting on the import of

\(^{183}\) See for instance: Timothy V. Simpson (1834) 6c and P 499 P 500, "If a man advertises goods at a certain prices, I have a right to go into his shop and demand the article at the price marked" Parke J said "No if you do, he has a right to turn you out. Similarly In Fisher v. Bell (1961) 1 Q B 394 it was laid down that the offence of offering a flick knife sale was not committed merely by displaying it in a shop window at a state price; In partridge v. Crittenden (1968) 2 All E R 421 it was stated that the offence of unlawfully offering for sale a live wild bird was not committed by inserting an advertisement in a news paper; similar views were expressed in pharmaceutical society of Great Britain v. Boots cash chemists ltd(1953) 1 Q B 401; British car Auctions ltd v. Wright (1972) 3 All E R. 462.

\(^{184}\) State Aided bank of Travancore v. Dhirt Ram, AIR 1942 pc 66 wherein bankers catalogue was not held to be offer see also state of UP v. Vijay Bahadur Singh, (1982) 2 Scc 365.


Section 54 of the Trade practices Act 1974 (Australia)\textsuperscript{187} which is similar to section 36 (A) (3) and 2 (r) (3) of the MRTP and CP Acts respectively, the learned authors Taprell et al observe\textsuperscript{188}:

The courts in Australia have been prepared ... to read such phrases as "offer for sale" in their ordinary sense unless technical sense is clearly required. It is therefore, unlikely that the English cases ... would be followed in the context of section 54, even though the common drafting practice of avoiding the problem by enacting an extended definition of offer has not been adopted in Trade practices Act. Moreover, regard must be paid to the context in which the word "offer" appears in section 54. An offer of gifts etc. may be made when no immediate offer for sale is in contemplation. An offer within section 54 may be made not only in connection with the supply or possible supply of goods or services, but also in connection with the promotion by any means of such supply.

It is suggested that there is no reason to deviate from the approach adopted by the Australian courts. Moreover, in India the liability of the trader for false or misleading advertisement goes only to the extent of discontinuing the advertisement. It is only when he repeats that, the penal consequences ensue. So it is not possible to imagine a different interpretation than the one propounded by the Australian courts in the similar context.

The provision incorporates the words "prizes, gifts and other, items". These words have attracted the attention of the

\textsuperscript{187} Section 54 b provides: A corporation shall not, in trade or commerce in connection with supply or possible supply of goods or services or in connection with the promotion by any means of supply or use of goods or services, offer gifts or other free item with the intention of not providing them or of not providing them as offered.

\textsuperscript{188} Supra note 153.
authors in Australia\textsuperscript{189} and it has been argued that since the word "items" when read ejusdem generis with prizes and gifts, means some tangible items and will naturally exclude the offers like sale of a car with the free after sale service. So to avoid it, "items" may be construed as a thing or an object in the list. Otherwise the scope of the section will be restricted which will not be supported by any plausible consideration. In India this will hardly cause any difficulty in view of the amendments carried in the MRTF & CP Acts in 1991 & 1993 respectively as the main definition of unfair trade practice contains the broad words "unfair method or unfair and deceptive practice". So in India even if the word "item" is read ejusdem generis with the words "prizes and gifts", the words in the main definition of unfair trade practice are wide enough to cover non tangible items also.

The intention of the trader to provide free gifts or prizes is necessary to determine the infringement of provision. However, it is not easy to ascertain the intention as it is said that even devil does not know human mind. So suggestively speaking, the Regulatory Agencies should overlook the intention of the trader, instead he may be allowed to raise the defences like there was an unexpected demand or supplier failed to supply goods etc.

A ticklish question arises when a trader makes an advertisement which seems an offer of free gifts or prizes but contains some onerous terms in fine print which are not easily

\textsuperscript{189} See Donald & Heydon Trade Practices Law vol.2 (1976) at 621.
descernible as compared to the main advertisement. In Australia the Trade practice commission first held that by such advertisement section 54 is infringed\(^\text{190}\) but later on deviated from this approach\(^\text{191}\). Authors have expressed conflicting opinions on it. One view is that in such situation it cannot be said that trader has not supplied goods "as offered". In other words there is literal compliance with the terms of the section\(^\text{192}\). Other view is\(^\text{193}\)

It may be straining section 54 to read "offer" as meaning "offer" so far as the offer understands it. "offer" in the general law must be determined objectively; the last is whether a reasonable person in the offeror's position would think an offer has been made. The offeror, in not drawing attention to the fine print, excludes it from the offer .... Hence in our view failure to make full disclosure of the terms, in close proximity to the words suggesting "freeness" will lead to infringement of section 54.

**Lottery, Contest, Game of chance, or skill:**

The provision dealing with the holding of lottery, contest game of chance or skill has not defined the term lottery. The Bombay lotteries (control and tax) and prize competition (Tax) Act, 1958 states that the term lottery does not include a prize competition. This definition also does not give an idea as to what should be considered as lottery. In England Lotteries And Amusements Act, 1976 simply without providing any definition of lottery, provides all lotteries are unlawful. The term has been

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190. Advertising Guidelines, information circular No 10 (1975), TPRS 403,42 para 12.1 (c).
192. Supra note at 688.
193. Supra note 11 at 624.
put to judicial gloss. Hawkins J in *Taylor v. Smetten*\(^{194}\) observed that in Webester's Dictionary, a lottery is defined as distribution of prizes by lot or chance and Atkin J in *Scot v. D.P.P*\(^{195}\) held that any kind of skill or dexterity, whether bodily or mental, in which persons can compete, would prevent a scheme from being a lottery if the result depends partly upon such skill or dexterity. However, a qualification was added by Parker C. J. in *D. P. P v. Bradfute and Associates Ltd*\(^{196}\) that the skill other than a mere colourable skill will prevent a scheme from being a lottery.

The essential requirements of the practice to be called as 'lottery' has been outlined by Madras H C in *Sesha Ayyar v. Krishna Ayyar*\(^{197}\), which are (1) A prize or some advantage in the nature of a prize; (2) distribution by chance (3) consideration paid or promised; and (4) risk of loss.

The elements of consideration and the risk of loss considered by the courts as essential requirements, provided an escape

\[^{194}\text{194. (1883) 11 Q. B. D. 207 see also The News of the world Ltd v. Friend (1973) All ER 422 at 424; Hall V. Cox (1899) 1 Q.B.148 at 200. A lottery for the distribution of prizes by lot or chance. Emperor v. Gurbaksh AIR 1934 Lah 840. A lottery is a scheme for the distribution of the prizes by lot or chance. It usually, if not always, takes the form of creation of a fund by the participation in the lottery. Who buy tickets or pay consideration of an offer by the promoters to award them a prize on some contingency, the happening where of depends on chance. In the matter of K. Karrakatee gala Enterprises UPTE No 7/86 decided on 5th March, 1988.}\]

\[^{195}\text{195. (1914) All ER Rep. 825}\]

\[^{196}\text{196. (1967) 1 All E. R. 112.}\]

\[^{197}\text{197. AIR 1936 Mad 225 (FB).}\]
route for the trader who did not demand separate consideration for holding lottery, instead participation in the lottery was made contingent upon the purchase of some goods or services. When such practice was called in question, the trader pleaded that the consumer got his money's worth and he participated in the lottery free of any consideration, similarly the risk of loss was evaded when lottery offered prizes of different denominations and whosoever participated in the lottery, got something of value and without any risk of loss.

In order to clog the loophole of consideration requirement the Gujarat Higher court in *state of Gujarat V. Mohandas Manumal* held:

cases have arisen in England where purchaser paying the real worth of goods also gets a chance of a prize while purchasing the goods, in that case, the contention that the purchaser got the real worth of goods and therefore lost nothing and the chance of prize was wholly gratuitous stood negatived, *In Taylor v. Smethen* (1883) 11 QBD 207.

In the above case the appellant sold tea packets each containing a pound of tea at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize and this was publically stated by the appellant before the sale, but the purchaser did not know until after the sale what prizes they where entitled to: and the prizes varied in character and value. It was found that the tea was good and worth the money paid for it. Still it was

held that what the appellant did, constituted a lottery within the meaning of the statute.

The element of the "risk of loss" considered essential by the Madras HC in *Sesha Ayyar v. Krishna Iyer* 199 and followed in a *State v. Jayantilal Bhimjibhi* 200 was disputed in *State of Gujarat v. Mohandas Manumal* 201, and was made clear that the risk of loss is not necessary and its absence cannot tilt scales in favour of the defendant. This was reiterated in *Wim Co ltd v. Liberty Match Co and others* 202.

**Common issues**

A common question relating to offering of gifts, prizes or other items, and conducting of lottery, contest, game of chance or skill agitated before the various benches of the MRTP Commission is, what should be the criterion to determine the nature of such practices. Before amendments to the MRTP and CP Acts, the main definition of unfair trade practices in the concluding words provided........ ' adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise". Furthermore, section 36D of the MRTP Act 203

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199. Supra note 197.
200. (1968) 9 GLR 603.
201. Supra note 198.
203. There is no provision similar to section 36-D under CP Act.
provides that the commission shall pass any order under that section only when such practice is prejudicial to the public interest or to the interest of any consumer or consumers generally. This brought a vertical cleavage in the opinions expressed by various benches of the commission as they gave different reasoning in order to reach a particular decision.

In *DG(I&R) v. M/S Indian Sewing Machine*\(^{204}\) *M/S ME Co Tronics Pvt Ltd*\(^{205}\); *Gujarat State Consumer Protection Centre v. M/S Food Specialities of India Ltd*\(^{206}\), it was held that the gifts or prizes offered were in fact covered wholly or partly in the price charged, which is prohibited under the MRTP Act. and in the latter case business practice was assailed also on the ground that the respondent had failed to provide the free cold coffee shaker as offered by it\(^{207}\). In *parle products pvt.ltd*\(^{208}\) it was stated that the contest requiring purchase of parle poppin packets to the contestants is prejudicial to the public interest and to the interest of consumers generally as the contest promotes excessive use of sweets which create dental problems for consumers who are generally children and the most vulnerable section of

207. Id at 68.
the society. Similarly in *M/S Ethnor limited*\(^{209}\), it was laid that the gift scheme devised by the respondent company for alluring the doctors to prescribe its child patients is apart from being highly unethical, an unfair trade practice, as it causes loss to the consumers as well as injury to the health of consuming public as the doctors while prescribing this product will take into consideration extraneous factors and not merely the quality and efficiency of the product.

An extreme view was propounded by a two member bench of M/S D.C. Aggarwal and M. Satyapal in *M/S Avon cycle pvt. ltd*\(^{210}\)

It was laid down:

1. The question of loss or injury to the consumers by reason of impairment of competition or otherwise to be determined not from a narrow or limited point of view but from broader considerations governing our economic policy.

2. It is not merely a matter as to how the prize scheme was actually financed by cutting into the profits of the company or through an increase in the prices of bicycles. While this question is undoubtedly relevant, a more fundamental issue is, whether the trade practice of resorting to the contests, lotteries and similar methods which are increasingly being adopted by industry and trade, is in the right direction from the point of view of the healthy marketing techniques in this country, particularly in relation to promoting consumer and public interest.

3. India being a poor country, the endeavour of the manufacturers should constantly be to make available products of consistently high quality at low prices. Any practice which detracts from this basic consideration should be regarded as prejudicial to consumer interest.

209. *UPTE No.4 of 1986 Decided on 5.3 1987.*

4. The practice of offering prizes by lottery tends to encourage the gambling instinct leading to unnecessary, avoidable and excessive purchases by consumers for the purposes of gaining entry in to the lottery. Such avoidable and excessive purchases are real loss to the consumer. As only a few ultimately win prizes. The bulk of the consumers end up, as in every gamble, suffering losses. The gain of the few is therefore at the expense of many. Instead of protecting consumer interest, lotteries and contests, therefore, clearly act in a prejudicial manner in regard to consumer and public interest;

5. The resources deployed for the prizes (which only a few can get) can be more optimally utilized for maximising consumer satisfaction through general reduction of prizes or better services.

6. Assuming loss or injury is an ingredient of unfair trade practice under section 36 A (3) (b) in the matter of giving away prizes by contests, lottery or game of chance or skill, it is to be noted that consumer interest is integral to any socio economic order especially under the MRTP Act and therefore, what deprives the consumer as a body or fairly large number of them, of the benefits from market influence and competition, must be regarded injurious to the consumer.

The effect of the judgment is that all contests, lotteries and games of chance or skill, conducted for the purpose of promoting of the sale of any product as enumerated in clause 3 (b) of section 36A of the MRTP Act, 1969 are unfair trade practices. The ingredient of loss or injury to the consumers (whether by eliminating competition or otherwise) as envisaged in the definition of unfair trade practice in the opening paragraph

211. S.S Kumar; Contest lotteries and Games of Chance; Banned By one stroke; Not By law But By MRTP Commissions pronouncement. Comp.L. Digest (1986) sept. Vol xvi at 19.
of the said section 36-A are, according to the findings of the commission inherent in such lotteries, contests etc.

However, it appears that one of the members of the Bench which handed down the judgment in Avon cycle case supra changed his opinion later on. In M/s British Airways, M Satyapal observed that as a result of the contest there does not appear to have been any injury or loss to the consumers ..... Director General (R) has therefore concluded that the advertisement did not amount to an unfair trade practice and recommended that the matter may be dropped. We agree with this recommendation. Similarly S D Manchand in M/s MECO Tronics pvt. ltd laid down:

The contests and prizes are sale promotion gimmicks luring consumers to purchase a particular brand by promises of illusory free gifts. These gimmicks are unrelated to any improvement in quality or in lowering of prices, the two considerations which alone could be of benefit to the consumers. A Country where a large majority of the consumers are poor, hapless or disorganised and where the market is generally a sellers market, the gift scheme covered under sub clause (a) and or (b) of sub section 3 of section 36 A, is a positive diservice to the consumers who may sacrifice the considerations of price and quality for illusory gains.

212. The Same Bench of Colgate case in M/s Oswal Mills ltd. held that the conduct of any contest for the purpose of promoting directly or indirectly the sale, use or supply of any product or any business interest amounts to an unfair trade practice under section 36 A (3) (6) of the MRTP Act. UTPE No 25 of 1985. Decided on 27-3-1987.; In M/s Kids Kemp, UTPE No 419 of 1987, decided on 24-4-1989 it was held that the picking up of the red ball amongst white or yellow balls from inside the bag was a matter of chance. It was therefore, just a lottery or a game of chance. This is the trade practice which is injurious to the customers. See also D G (I&R) v. H M M limited UTPE No 94 of 1986 decided by D C Aggarwal and H C Gupta on 11th May,1989.


This Member also changed his opinion in *The Blitz publication and private ltd*\(^{215}\) and *Miss Santosh Kalra V. Indian Book House pvt. ltd*\(^{216}\) and tried to find actual loss, if any, is caused to consumers by offering such gifts or prizes. Since they did not, so the Member declared that the practices in question are not hit by the section.

D C Aggarwal, the member of the MRTCP commission who without any wavering maintained from *Avon cycle case* (supra) to *Society for civic Rights v. Palmolive India ltd*\(^{217}\) that contest lottery game of chance or skill are per se unfair, outlined the reason for this approach in *DG V. New life General Finance and investment Co ltd*\(^{218}\). It was observed:

1. A remedial statute like the MRTCP Act is not to be equated with a penal statute in the matter of constructing its provisions relating to "the conduct of any


\(^{216}\) UTPE No 35 of 1988, decided on 22nd Nov. 1989. In mid day publications private ltd. U E No 50 of 1985 decided on 12.3.1986 and Competition Success Review pvt. ltd UTPE No 7 of 1985, there was no loss or injury to the consumers. So the practices were held not hit by the section In Society for Civic Rights v. General Electric Company of India ltd. UTPE No 389 of 1988, 19th Annual Report of MRTCP commission at 83 it was stated that neither there is any loss of injury to the consumers or public at large nor there is any loss or restriction of competition. The holding of the contest has not at all increased the sale of the respondent and as such the contest had no effect upon the sales of the respondent and though the contest was organised to promote sale, it appears that it squarely failed in its purpose.


\(^{218}\) Comp. L. Digest (1987-88) Vol 17 at 71.
contest lottery, game of chance or skill. Herein, what is sought to be prohibited in the conduct of any contest, lottery, game of chance or skill for the purpose of promoting directly or indirectly the sale, use or supply of any product or any business interest. It is an object which has no relation or approximation to the underlying object of section 294 A of IPC.

2. The various ingredients provided in the preamble of section 36A are subject to dominant essential "unless the context otherwise requires". It is to be noticed that clause (b) of subsection (3) of section 36 A has been introduced in contradiction to clause (a) of this sub section.

3. It is, idle to invoke or lay emphasis on the language of clause (a) of 36 A and contend that it has never been the intention of the respondent company not to distribute prizes or gifts as advertised.

4. Clause (b) of sub section (3) which deals with the conduct of contest, lottery or game of chance or skill, takes its sweep any business interest besides the sale, use or supply of any product. The phrase, business interest is of wider amplitude and may include services and other activities of a commercial nature which don't relate to the sale, use or supply of any product.

5. Clause (b) of sub section (3) is an independent provision in section 36 A enacted for different context, the inkling of which is given by the caution "unless the context otherwise requires".

6. If there is anything as the rule of reason in applying the provisions of the statute to a particular situation, it will be travesty of fairness in business or commercial enterprise to dazzle the customer or consumer by promoting many fold costlier items than the value of item of sale and purchase itself so that the small cost of the item pales into insignificance and gets obscured by the glamour of chancing upon winning a fortune.

The opinion of D C Aggarwal Member MRTP commission expressed in various decisions was affirmed by the Gujarat High Court in *Wimco Ltd V. Liberty Match Co & ors*219. Although Gujarat High did not negate "the loss or injury" as an essential element to call a

219. Supra note 2.
trade practice unfair one, yet the court not only approved the opinion expressed in Ayon cycle case (supra) but also held that the elimination or restriction on competition cause loss to the consumer and contest, lottery, game of chance or skill have a potential to eliminate or restrict the competition. Thus it can reasonably be inferred that Gujarat HC also viewed section 36 (3) (b) as per se unfair. After these decisions, came landmark judgment of the MRTP commission in *Society for Civic Rights V. Colgate Palmolive India Ltd*220. This case was first heard by a two Member Bench. D C Aggarwal being one among them, He did not change his view point already expressed by him in a good number of cases. However, another Member H C Gupta came with an opposite observation. He stated:

> A plain reading of the provisions clearly brings out the intention of the law makers to the effect that loss or injury is neither inherent nor incidental to such contests and such loss or injury has got to be proved by legal evidence221.

In order to resolve the conflict, Full Bench was constituted which made the following observations:

1. In some cases, it has been mentioned that the amount spent on advertising should be utilized in reducing the price of the product so that the consumer may benefit. This is a wrong approach to the problem of advertising. When to advertise, whereto advertise and how much to advertise --- These are questions properly within the management of every company. It cannot be the subject matter of a judgment by the commission as to where and as to how much a particular company should advertise222.

220. Supra note 217.


222. Supra note 220. at 386.

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2. Sub section (3) (a) (4) and (5) show that the practices mentioned in the said paragraphs are capable of or have got the innate quality of causing loss or injury to the consumer. These practices do not need to cause actually loss or injury in order to become an unfair trade practice. If this is the meaning in respect of the provisions which have been examined, why the same meaning cannot be attributed to clause (b) of paragraph 3 of section 36 A. The key phase must mean the same thing for different paragraphs. It cannot mean one thing for one paragraph and different thing for another paragraph223.

3. In trade practices enumerated in section 36-A, loss or injury is implicit.

On the question why the key phrase "and thereby causes loss or injury "is in the preamble of the definition, the commission held, "our answer to this argument is that the insertion of the key phrase is the legislative style or device of making it know why it regards a trade practice which adopts any of the practices as an unfair trade practice. The legislature intended to convey that a trade practice which adopts one or more of the following practices has got the innate capacity or inherent quality of causing loss or injury to the consumers of goods and services224. On the point that even the innocent contests may be hit by this opinion, the commission argued:

The contest ceases to be innocent, if it is held for the purposes of promoting the sale for the business interest of the organiser of that contest225.

223. Id at 388
224. Ibid.
225. Id at 389.
After this judgment in Colgate case, the MRTP commission took a consistent stand in line with the Full Bench decision, that all enumerated practices are per se unfair. The shortcomings of this ruling were exposed by the findings of the commission in *re Dalmia Diary Industries Ltd* when it was held:

The DG has not produced any positive oral evidence to prove the loss and injury to the consumers, but there is no denial by the respondent of the impugned contest. It has already been held by the Full Branch of the commission vide order dated 19th June, 1991 in *society for civic Rights v. Colgate India Ltd*, that the words "and thereby causes loss or injury to the consumers" are words of description which indicate that the trade practice described in section 36 A of the Act are vehicles of loss or injury. Therefore, the contest for the purpose of promoting the sale is an unfair trade practice within the meaning of section 36 A (3) (b) of the MRTP Act 1969.

Authors, while commenting on the judgment of the MRTP commission in Colgate case came with divergent opinions.


227. Ibid.

228. Rosy Kumar opines: All in all, the judgment of the full Bench has come as a rude shock which has the effect of perpetuating the wrong and the effect of putting a blanket ban on the promotional scheme while the legislature has never so contemplated. See Rosy Kumar Promotional Schemes Banned By The MRTP Commission; Law Permits But The Commission Does Not, Comp. L Digest, (1991) sept (xxi) at 17. On the other hand S. S H Azmi concludes: The decision of MRTP Commission in society for civic Rights is fair so far as it affirms that such practices are unfair per se. These practices have been declared void or illegal by industrialised and Civilised countries of the world because they are neither fair to business community nor are in public interest See S. S H Azmi, *A Critique On Society For Civic Rights v. Colgate Palmolive (India) Ltd* 34 JILI (1992) 137.
It is submitted that the opinion of the commission needs rethinking for the following reasons.

The Sachar Committee\textsuperscript{229} on whose recommendations, the chapter on unfair trade practices was incorporated did not suggest the key phrase "and thereby cause loss or injury" in the preamble of the definition. Instead, following exceptions were suggested which were borrowed from section 37.2 of the Combines Investigation Act of Canada.

(a) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chance of winning.

(b) distribution of prizes is not unduly delayed; and

(c) selection of participants or distribution of prizes is made on the basis of skill or on random basis in any area to which prizes have been allocated.

These exceptions did not find favour with parliament when MRTP Act was amended in order to incorporate a chapter on unfair trade practices in the Act. Instead, key phrase "and thereby cause loss or injury to the consumer" was inserted so as to make it a criterion to determine the nature of all trade practices. Not only this alone, even if the key phrase is dismissed simply by saying that it is a legislative style or device of making it known why it regards a trade practice unfair, section 36 D of the MRTP Act enjoins the commission to pass any of the orders under

\textsuperscript{229} The Report of the High Powered Expert Committee on, Companies And MRTP Acts (popularly known as sachar committees Report) at 272.
that section only when it is of the opinion that the practice in question is "prejudicial to the public interest or to the interest of any consumer or consumers generally". This phrase is wider than "thereby causes loss or injury to the consumers". Thus section 36 D also requires the rule of reason and not per se approach.

With respect to restrictive trade practices enumerated in section 33 of the MRTP Act, the MRTP commission adopted per se approach which was overruled by the supreme court in *TAA Engineering & Locomotive Co Ltd. v. R R T A*\(^2\) and reaffirmed in *Mahindra & Mahindra Ltd v. Union of India*\(^3\). In order to obviate the effect of the supreme court's rulings and to restore per se restrictive character of the trade practices, parliament amended MRTP Act in the same year in which a chapter on unfair trade practices was incorporated in the Act. Had legislature intended to adopt per se approach in case of the unfair trade practices also "the phrase thereby causes loss or injury to the consumer" would not have found place\(^4\).

The then Minister of Law, justice And Company Affairs Shri Jagan Nath Kaushal, while introducing MRTP (Amendment) Act, 1984 in the parliament made clear that the High powered expert

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231. AIR 1979 SC 798.

committee had even suggested that these practices should be straightaway declared as illegal and any person taking recourse to these practices should be prosecuted. Considering the fact that these are comparatively new provisions and proper administrative machinery has to be geared up to track down the violations throughout the length and breadth of this vast country, it is felt it would be enough if, at least for the time being, they are regulated by issuing of prohibitory orders and orders for payment of compensation for loss or damage suffered by the consumer and punishment by way of imprisonment enjoined upon only if those prohibitory orders are violated233.

It is submitted that the correct proposition of law is in the dissenting opinion of H C Gupta (Member) when he says that it is well nigh impossible to contemplate and conceive all type of situations which may fall under any of the enumerated categories. It is for this purpose that the legislature seems to have taken care to include the ingredient of the actual inherent harm to the consumers as an essential element of an unfair trade practice. It is indisputable that the consideration which would apply to a contest in the nature of lottery are necessarily different from those which will apply to a pure game of skill. Even though the latter is also organised for promoting directly or indirectly the sale, use or supply of any product without much element of chance

233. Lok Sabh Debates, Vol. 48 (7.5.84) : 412.
or gambling instinct. Normally no business house or manufacturer/seller of a product would conduct even a game of skill without the intention of promoting at least indirectly, the sale or supply of his product. While the inherent loss or injury by eliminating or restricting competition to the consumer of the product is present in a case of lottery or game of chance, it cannot be said to be so in a pure game of skill. Therefore, a game of pure skill organised by the manufacturer of a product will not be per se unfair trade practice in terms of section 36(A) unless on the facts of the case it is held that the loss or injury to the consumers is inherent in it.  

To say that the contest ceases to be innocent if it is held for the purpose of promoting the sale or the business interest of the organizer of that contest is not, it is submitted, the correct proposition of the law. The objective of section 36 A is not to prevent promotion of sale, use or supply of goods by organizing contest but to prevent such contests which cause or have potential to cause loss or injury to the consumers or where loss outweighs the gain. Thus for example if tooth paste dealer through advertisement invites essays from the consumers of close-up and it is mentioned in the advertisement that the author of an essay rated number one will be given one lakh. Is such contest prohibited under section 36-A? Is loss or injury inherent in such

234. Supra note 220 at 391.
practice? It is submitted that the enumerated practices in section 36 A may be classified into two general categories. The representations where plaintiff consumer has to establish only falsity. Such practices can conveniently be called as per se unfair. They do not require separate proof of loss or injury. Untruth is inherently deceptive. But in addition to these, there are representations which require proof of actual or potential loss or injury to the consumer and mere fact that they resemble with the one enumerated in section 36 A will not be sufficient. Despite the Full Bench decision of the MRTP Commission in Colgate case and then a good number of the decisions toeing the same line, this controversy did not die down. In M/s Aroza contractors and Builders private ltd\textsuperscript{235}, the respondent an agent of the Ansal properties and Industries pvt. ltd. had announced prizes such as Maruti car, Vijay scooter and Refrigerator to be given to those persons who booked the plots through the respondent. Every person whosoever booked the plot was given a coupon enabling him to participate in the prizes which were drawn through random basis technique. Since the present case was heard by a Division Bench so it was not possible for them to overrule the decision of the Colgate case, handed down by the Full Bench. So without overruling Colgate case, the commission in the present judgment tried to distinguish it from the former case. It was observed:

\begin{quote}
We have carefully examined the above decision (of the Full Bench in Colgate case) and its implications. It must, however, be remembered that before a cease and desist order may be passed under
\end{quote}

\textsuperscript{235}. (1994) C T J 64 (MRTP).
section 36 D (1), it has to be affirmatively proved that the impugned trade practice is prejudicial to the public interest of any consumer or consumers generally. This, in our opinion, is an independent requirement of Law. It is noteworthy that while in regard to restrictive trade practices there is a presumption under section 38 of the MRTP Act that such a trade practice is prejudicial to public interest, there is no such corresponding presumption available in respect to the unfair trade practice. Further in Colgate Palmolive the Full Bench was concerned solely with the interpretation of section 36 A (1), more particularly the connotation of the words "and thereby, cause(s) loss or injury". The implication of section 36 D (1) was neither considered nor even argued. That being so, conditions necessary for the application of section 36 D (1) must be present and satisfied before a cease and desist order be passed.

It needs mention here that the amendments were made in the MRTP and CP Acts in the year 1991 and 1993 respectively. The preamble of the unfair trade practice definition reads now:

In this part, unless context otherwise requires, unfair trade practice is a trade practice which for the purpose of the sale, use or supply of goods adopted any unfair method or unfair or deceptive practice including any of the following practices.

In the opinion of the MRTP commission expressed through DG v. Cement corporation of Gujarat the only change brought by the amendments is that the Colgate case got statutory recognition that is, show of loss or injury to the consumer is now no more required. It is submitted that this is not correct. New definition is based on section 5 of the Federal Trade Commission Act, 1914 of America as amended by Wheeler Lea Amendment Act. The courts in United States while interpreting section 5 made it clear that to determine whether a trade practice is or is not

unfair one, loss or injury to consumer is a real test. However, courts made it clear that it is not necessary that consumer must have suffered actual loss but potential of a trade practice to cause loss to consumer is sufficient to declare such trade practice as unfair\textsuperscript{236a}.

In America the accepted policy with respect to the gifts as a methods of pricing, merchandising and advertising is dictated by the following propositions. (1) There should not be any general prohibition of gifts. (2) The offeror should, however, be required to make full disclosure of the details of his offer, by fulfilling all terms and conditions of sale including premiums or free deals\textsuperscript{237}. A New York court while commenting on a statute design to prevent price cutting in the sale of food stuff by prohibiting the giving of premiums or gifts in connection with the sale, said, "a person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case, and that, while his profits on the same amount of the coffee sold would be smaller than if he gave no present yet, by the growth of his trade his income at the end of the year would be more than by the old method\textsuperscript{238}.

\begin{flushleft}
\textsuperscript{237} Radolf Callmann, The law of Unfair competition, Trade Marks and Monopolies (3rd ed 1971) vol at 1045.
\textsuperscript{238} People v. Gilson, 109 NY 389 (1988).
\end{flushleft}
Commenting on the approach of the Federal Trade Commission of America on the gift scheme as a sales promotion device, Rudolf Callmann observes:

In fact a genuine gift can be a legitimate method of advertising. It differs from other advertisements in the sense that the consumer is the beneficiary who really gets something for nothing. We concluded that a gift is lawful if it is a real gift, not given with an illegal intent to "injure a competitor out of business. Indeed, this would rarely be one purpose of a gift; one who offers a gift or premium is more interested in increasing his own business than injuring his competitor.

On the other hand in case of lotteries United States supreme court has in *Federal Trade Commission v. K. F. Keppel & Bros.* through Justice Holmes, held that the public policy requires the condemnation of devices which appeal to the gambling instinct, and induce people to buy what they do not want by a promise of gift or price, the nature of which is not known at the moment of making purchase. However, courts have carefully distinguished between cases in which the customer has and those in which he has

239. 291 US 304, 1934. For critical assessment see 32. Mich D Rev. 1142, in post Pub Co v. Murray, 230 F773 CCA 1st, 1916 a newspaper advertised that its photographers would take pictures of 50 women shoppers. The faces would be blacked out in the publication, and any woman who could identify here picture would receive a $5 gold pieces. This was not held an illegal advertisement but one that sought to catch the eye and increase the circulation of newspaper.

240. Rudolf callmann opines that a lottery which induces prospective customers to view the display of its sponsor and which attracts attention to his product does immediate injury to his competitors. From a competitor point of view, therefore, consideration in a lottery is not only an insignificant element, but its absence even renders the game device much more effective in attracting attention.
not paid a consideration. The gratuitous distribution of property
by lot or chance if no consideration is derived directly or
indirectly from the party receiving the chance, does not consti-
tute a lottery.  

In England as already pointed out that the Lotteries and
Amusements Act, 1976 declares all lotteries as unlawful. Since
there is no definition of the term "lottery", in the Act, the
courts have made it clear that where a person is asked to "hit
blind shots on the hidden target" or to guess what would be the
guess of others, such practices are lotteries. But any kind of
skill or dexterity whether bodily or mental in which persons can
compete would prevent a scheme from being a lottery if the result
depended party upon such skill or dexterity. Section 14(b) of
the lotteries and Amusement Act prohibits any competition in
which success does not depend to a substantial degree on the
exercise of skill. On the other hand where no payment or contri-
bution is made by the participants, although the result depends
upon the chance, yet such lottery is not prohibited.

241. Affiliated Enterprises v. Gruber, 86 F 2d 958 (CCA 1st, 1936)
quoting from 17 RCL 1222.

Hewart CJ.

243. Supra note 195 and 196.

244. White Bread and Co Ltd. v. Bell, (1970)2 All ER 64.
In Canada there is general censure to offering of prizes or gifts or holding of the contest, lottery, game of a chance or skill but this is subject to some exceptions appended to section 3.7 of the Combines Investigation Act. These exception are the same as suggested by the Sachar Committee\textsuperscript{245} but were not incorporated in MRTP Act.

Thus from the above discussion on transboder laws following points emerge.

1. Offering of gifts or prizes genuinely, are not prohibited.

2. Lotteries are against public policy and, therefore proscribed.

3. Lotteries which do not directly or indirectly demand public subscription are permitted.

4. Lotteries which run on the finance raised by the public subscription and which involve skill to a substantial degree are not in fact lotteries but game of skill, hence permitted.

It is suggested that the above tests should be applied by the MRTP Commission and consumer Redressal Agencies to determine the real nature of the advertisement. These tests naturally do not admit the per se approach but rule of reason.

\textsuperscript{245} Supra note 292.
GOODS INVOLVING RISK OF INJURY

The practice of marketing shoddy goods is rampant in India. The censure in such practice lies in the fact that the consumer is duped sometimes to the tune of his payment and he does not get even money's worth. The present day consumer is also exposed to risks by purchasing goods which endanger his life and property. Increasing affluence and range of complex consumer products combine to produce the all too prevalent situation in which unsafe products can produce death or serious injury. Sometimes the danger arises from defective design, at others, from the use of defective materials or poor workmanship. At other times hazards are created simply because inadequate instructions (or none at all) are given for the operation of complex appliances. So the fleecing of consumer by taking his money in lieu of the substandard product is a lesser evil. The greater evil which needs immediate attention is to prevent the market from being flooded by the goods which involve risk of injury as these goods are double edged. They claim not only money but life or property as well. The MRTP and CP Acts have a provision to deal with such goods. This provision runs as under:

Permits the sale or supply of goods intended to be used, or are of kind likely to be used by consumers, knowing, or having reasons to believe that the goods do not comply with the standards prescribed

246. Supra note at 718.
247. Section 36 A(4).
248. Section 2 (r)(4).
by competent authority relating to performance, compositions, contents, design, construction finishing or packaging as are necessary to prevent or reduce the risk of injury to the persons using the goods.

This provision is ambiguously worded. It is not made clear as to who is answerable to the consumer in case he is injured by using those goods. The words "permits the sale or supply of goods", if construed narrowly make the seller responsible to the consumer but the words "knowing or having reason to believe" absolves him from any responsibility in cases where goods have been supplied by the manufacturer which do not call for any examination or which are sold in the same package in which manufacturer had supplied\(^\text{249}\). As elaborated by Clerk J in a Scottish case of \textit{Gordon v. M Hardy}\(^\text{250}\) wherein the plaintiff's son died due to eating tinned salmon: the grocer could not be held liable for the defects in the goods because he was not expected to examine the contents of the tin without destroying the very condition which the manufacturer had imposed, in order to preserve the contents "the tin not being intended to be opened until immediately before use".

\(^{249}\) S. S. H. Azmi opines: The modern mode of packaging of the goods is so complicated that the manufacturer intends and insists that the goods be opened only at the time of consumption and the packaging should not be disturbed unless the goods are required for actual use. This is done partly to avoid adulteration of the standard products and partly due to the reasons that certain packages are airtight. In otherwords, the possibility of intermediate examination is excluded. \textit{Sale of Goods And Consumer Protection in India} (1st ed. 1992) at 77.

\(^{250}\) 1903 6f (Cf. of cess), 210.
On the other hand it may be argued that it is the manufacturer who basically permitted sale or supply of the goods and therefore, it is he who should bear the brunt. In his defence it may be put that since he was not a party to the deal with consumer so his liability does not arise.

It needs mention here that at the global level there has been a shift in the legal policy and now manufacturer is considered the right person to foot the bill. He is in a position to distribute the loss equitably and to cover the risk through insurance. As laid down in *Henning Sen v. Bloomfield Motors Inc*\(^251\):

> The burden of losses consequent upon use of defective article is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.

Need to hold manufacturer liable is well highlighted by the Law Reform Commission of New South Wales\(^252\) that it has come to be recognised that in the modern world where brand images and sales promotion by gimmickry or direct advertising on a nationwide scale are an accepted feature of every day life. It is the manufacturer who plays the vital role in persuading the consumer

\(^251\) 32 NJ 358. 161 A 2d 69; In Escola v. Cola Bottling Co. 24 Cal. 2d 453. Traynor J says that the manufacturer is in the best position to distribute the loss equitably arising due to preparation of faulty product. He can take out risk insurance and include it in the cost.

to purchase his product. Many consumer goods are today sold in sealed containers which defy inspection or if available for examination, are so complex and of such intricate design that an inspection would convey nothing about their quality to the average purchaser ... the consumer is therefore driven to rely on the advice of traders and the accuracy of advertisement extolling the product he seeks. He relies more and more heavily on the manufacturer (on the brand name promoted by extensive advertising) and yet the sale is not normally made through him, but through some retail firm. The manufacturer can make what extravagant claims he likes for his product but he will be under no contractual liability to the purchaser for these promises, unless he can be brought within the *Carlil v. carbolic Smoke Ball Co.* principle\(^253\).

In England, the Consumer Protection Act, 1987, replacing the Consumer Safety Act, 1978 has incorporated a wide definition of "producer" which gives the injured consumer a visible and accessible target\(^254\). This definition runs as follows:

\(^{253}\) In the same vein Ontoria Law Commission observed. In modern marketing milieu, the manufacturer is responsible for putting his product in the stream of commerce in most cases for creating demand for them by continuous advertising. The retailer is a little more than a way station. He determines the material and components and controls the quality of the goods. He determines the guarantee for his customers and is responsible for the spare parts and service facilities. Almost all the consumer's knowledge about the goods is delivered from the labels or markings attached to the goods or sales. Literature that accompanies them -- and these two originate from the manufacturer. report of Consumer Warranties and Guarantees In the sale of Goods, Toronto, June 1972 Chapter V. Para 19.

Producer of a product means:

a. the person who manufactured it;

b. in case of a substance which has not been manufactured but has been won or abstracted; the person who won or abstracted it;

c. In case of a product which has not been manufactured, won or attributable to an industrial or other process having been carried out (for example in relation to agricultural) the person who carried out that process.

Although the definition of producer is not free from ambiguities, yet it has made manufacturer directly liable. Another salient feature of the Act is the incorporation of strict rather than fault based liability in respect of the loss caused by defective products. Existing tort and contract remedies remain available, but are now supplemented by a new conceptual structure which focuses primarily on the condition of a product rather than the conduct of a producer.

In India the tortious liability, like that of section 402 of American (Second) Restatement of Tort, 1965 is based on strict liability. This rule was followed in a different context in *M C Mehta v. Union of India*, but the MRTP and CP Acts have not mentioned it.  

255. Section 1(2).


257. The Supreme Court held: We are of the view that an enterprise which is engaged in the hazardous or inherently dangerous industry which has a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non delegable duty to community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of activity which it has undertaken. *A.I.R (1987) Sc. 1086.*
gone further. The compensation to consumer under these enactments can be awarded only when the opposite Party is found negligent.

The liability of the respondent arises only when his goods do not correspond with the standards prescribed by the competent authority and such goods involve risk of injury. The MRTP Act does not provide the constitution of any competent authority nor declares any authority competent for such purpose. The CP Act on the other hand gives Power\textsuperscript{258} to the district forum inter alia to remove the defect\textsuperscript{259} pointed out by the "appropriate laboratory" from the goods in question. The term appropriate laboratory\textsuperscript{260} has been defined in the Act itself and a list of appropriate laboratories has been circulated by the Government of India\textsuperscript{261}: However, neither in the MRTP Act nor in CP Act is prescribed any standard which the regulatory agencies have to follow. The bureau of Indian standards Act, 1986 gives power to the bureau to grant, renew, suspend or cancel licence for the use of the standard Mark\textsuperscript{262}. The issue of licence or its

\begin{flushleft}
\textsuperscript{258} Section 14.
\textsuperscript{259} The word defect has been defined in section 2(f) of the CP Act as any fault, imperfection or short comings in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or as is claimed by the trader in any manner whatsoever in relation to any goods.

\textsuperscript{260} The appropriate laboratory means a laboratory or organisation recognised by the Central Government and includes any such laboratory or organisation established by or under any law for the time being in force which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determine whether such goods suffer from any defect.


\textsuperscript{262} Section 10.
\end{flushleft}
renewal depends upon as to whether the manufacturer complies with the bureau of Indian Standards Certification Mark. However non compliance does not stamp the goods as perse hazardous nor is it compulsory that all the goods shall conform to the requirement of certification Mark\textsuperscript{263}.

In Australia the trade practices (Amendment) Act (No.2) 1977 through section 63 A A empowers the Minister for Business and Consumer Affairs to publish through notice in the Common wealth Gazette that in respect of goods of a kind specified in the notice, a particular standard prepared or approved by the standards Association of Australia is a consumer product standard for the purposes of sections 62 and 63. These standards have been classified in to safety standard and information standard. Section 62 (2) which is partly based on United States Consumer Products Safety Act, 1972, provides that the safety standards must relate to

\begin{itemize}
\item[a)] performance, composition, contents, design, construction, finish or packing of the goods; and
\item[b)] the form and content of markings, warnings or instructions to accompany the goods.
\end{itemize}

Which are reasonably necessary to prevent or reduce risk of injury to persons issuing the goods or to any other person.

\textsuperscript{263} The provisions of section 11 of the Bureau of Indian Standards Act, 1986 prohibits use in relation to any article or process, or in the title of any patent or in any trade mark of design, the standard mark or any colourable limitation except under a licence. The licence is necessary only for those manufacturers who wish to use standard mark.
Section 63(2) provides that the regulation may in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to --

a) the disclosure of information relating to the performance, composition, contents, design, construction finish or packaging of the goods; and

b) the form and manner in which that information is to be disclosed on or with the goods, as are reasonably necessary to give person using the goods accurate information as to the quality, quantity, nature or value of the goods.

The contravention of these regulations subject to the exceptions is punishable on conviction by a fine not exceeding $1000 and in case of defendant who is a body corporate, by a fine not exceeding $50,000.

It is suggested that in order to minimize the danger which the hazardous goods are likely to pose, an independent body be constituted with the powers to prescribe standards on the same lines as are prescribed in Australia. The MRTP Commission and Redressal Agencies be given power to enforce such standards and violation if any, be checked by imposing fine.

Since the "risk of injury" is the core test under the present provision to prohibit a trade practice, it is not clear as to whether it is confined to only physical injury or injury of any sort. The MRTP commission expressed conflicting opinions on this
point. In public *Interest issues research Academy v. KMP oil Industries pvt. Ltd*\(^{264}\), the respondent engaged in the business of marketing coconut oil, packed it in volumetric measures in terms of liters and milliliters, contrary to the Standards of Weights and Measures (packaged commodities) Rules, 1977 where under it had to be packed by weight in terms of grams and kilograms and therefore, caused wrongful loss to the consumer to the tune of 10 per cent quantity of oil. The commission held that it violated clause (4) of section 36 A of the Act.

On the other hand *In re food specialities ltd.*\(^{265}\), the commission held that if non compliance with the standards prescribed causes only financial loss and does not involve the risk of physical injury, it does not amount to an unfair trade practice within the meaning of section 36 A (4) of the MRTP Act, 1969. The sale of a package containing contents less than what is mentioned on the container may amount to contravention of the Standard of Weights and Measures (packaged commodities) Act or rules thereunder, but the implementation of the said Act or rules is not within the jurisdiction of the commission unless there is an unfair trade practice within the meaning of section 36 A of the MRTP Act.

It is submitted that it is the former and not the latter opinion of the commission which is the correct interpretation of


\(^{265}\) (1991) 70 Comp. Cas. 565.
the provision. The Bombay High court in *Abdul Kadar v. Kashi-nath*\(^\text{266}\) held that the word "injury" is a word of large import and cannot be restricted to mean monetary injury only any wrong or damage done to another, either in his person, right, reputation or property. The supreme court in a recent ruling of *Consumer Unity and Trust Society v. the CMD Bank of Baroda and Anr*\(^\text{267}\) held: loss is a generic term. It signifies some detriment or deprivation or damage. Injury too means any damage or wrong\(^\text{268}\). Thus the word injury cannot be confined to physical injury only but includes monetary loss as well\(^\text{269}\).

\(^{266}\) AIR 1968 Bom. 267 at 270.

\(^{267}\) (1995) 3 CTJ 97 (Supreme Court) CP

\(^{268}\) Id. at 99.

\(^{269}\) Section 44 of the Indian Penal Code defines injury as any harm whatever illegally caused to any person, in body, mind reputation or property.