The expression Unfair Trade Practice incorporated in the MRTP Act, 1969 and Consumer Protection Act, 1986, circumscribes many facets of commercial advertising. This advertising has come to be recognised as the most effective tool of modern marketing and essential for the sales promotion. It can convert consumer’s "Wish" to purchase, into "Will" to purchase. So long as the trader fairly projects the qualities and other attributes of his wares, he is safe. His campaign can be proscribed only when he makes false or misleading claims. When an advertisement is false or misleading, it is declared as unfair trade practice. The definition of unfair trade practice provided under the two Acts applies to goods and services. However, it is not clear as to whether it applies to goods already in existence or to future goods also. The application of the definition to shares and debentures has not yet come out of the judicial controversy. The scope of the expressions, unfair method, unfair or deceptive acts, has not been delineated.

The varieties of commercial advertising are diverse as is human ingenuity. These advertisements have raised many questions for researchers to ponder. Should commercial advertisement be accorded constitutional protection? Since advertisements are addressed to general public which include; persons of reasonable intelligence, average intelligence and credulous and gullible, the question arises as to whose intelligence should courts consider as a standard to determine whether an advertisement is false, misleading or not? Can advertiser plead defence of mens
rea? Traditionally courts have been lenient to advertiser where his advertisement is found mere puff, for the reason a reasonable person will not take such claim seriously. If consumer will not be allured by such advertisement, then it is difficult to understand why such advertisement is made? Television advertisements have posed new problems for researchers to answer. Sometimes it is not possible to demonstrate the product with its natural colour as it is lost in the television lights. So in order to show the viewers the qualities of the product, it becomes necessary to use artificial product instead of real one. Then the question arises; should demonstration be in comport with the express claim made in the advertisement, or demonstration be treated simply as a warranty and it is only express claim which should be true or both, express claim and demonstration should be true. The line between permissible and non-permissible comparative advertising is not clear. The issues attendant to the comparative advertising are yet to be judicially addressed. There are no rules framed or judicially evolved for the interpretation of the commercial advertisements.

The status of the specific categories of unfair trade practice mentioned in the two Acts, is not clear. Are they unfair per se or rule of reason has to be applied. The scope of these unfair trade practices has not been outlined. The evaluation of the powers of the MRTP and CP Acts dealing with the unfair trade practice, has not been made.
Objectives Of The Study

The main objectives of the study are:

1. A systematic study and evaluation of the conceptual development of the principles relating to unfair trade practices.

2. To examine the specific legal provisions in the MRTP and CP Acts, aiming to curb unfair trade practices and to point out their jurisprudential justiciability to achieve the desired result.

3. To make a comparative analysis (wherever possible) of our law, with the transborder legislations on the subject so as to come out with the suggestions in order to strengthen the existing law.

4. To evaluate the approach adopted by the quasi judicial and judicial authorities to eliminate unfair business practices.

5. To present a comparative account (wherever possible) of the approach of the transnational courts on the subject in order to provide the solution to the issues which have hither to remained unaddressed.

6. To analyse the powers of the MRTP commission and Redressal agencies and their suitability to curb the menace of unfair trade practices.

Research Methodology

The Study relating to the legal control of unfair trade practice with reference to the MRTP and CP Acts, is a doctrinal research. The statutory material of India, America, Australia, Canada and England relevant to study has been analysed. The case law laid down by the courts and quasi judicial bodies in India and transborder countries on the subject has been examined. The Reports, Journals and Surveys both Indian and foreign have been consulted. The proceedings of the Seminars, Conferences and Symposia have been utilized. The Reports submitted by the various
commissions/committees relevant to the thesis have been studied and referred wherever necessary.

Design of Study

For the culmination of the objectives set to be achieved, the present study has been divided into the following chapters. Chapter I gives a sketch of research problem, objectives of the study, research Methodology and design of study.

Chapter II details the historical development of the law relating to unfair trade practices and drives home the point that the catch words of the past, i.e. Caveat Emptor, freedom and sanctity of contract and privity of contract, have out lived their utility due to change in market structure. That there is an urgent need to provide legal mechanism free from these doctrines as is also evinced from the developments which have taken place in the transnational countries.

Chapter III covers the first part of the definition of unfair trade practice. The unfair trade practice may be adopted in respect of goods and services. However, it is not made clear as to whether goods involve only existing goods or also future goods. It has been suggested that the future goods should also be brought within the confines of the definition. Otherwise, there will be two possible difficulties. (1) Where for example a company falsely advertises that his goods are of particular quality...
and discontinues the advertisement when goods are actually thrown open in the market, then a consumer who purchases goods in pursuance of the advertisement will get no compensation for any loss or injury as the goods were not in existence at the time when advertisement was made. (2) if the view that the goods must be in existence at the time when representation was made is upheld, then the same test should be applied to services also. Since service unlike goods have no permanent existence and may be regarded as being inchoate until they are actually supplied.

The application of the MRTP and CP Acts to shares and debentures is still unresolved. The present interpretation leaves the purchaser of shares and debentures out side the protection of the MRTP and CP Acts. It has been therefore suggested that the investor of money for the purchase of shares and debentures be treated as hirer of service. Since the word "finance" is expressly mentioned in the definition of service, so any false or misleading claim made in respect of shares or debentures be treated as unfair trade practice relating to service.

The term "unfair act" used in the definition has not been defined. The following definition has been suggested.

An unfair act in relation to a trade practice is one which causes substantial injury to consumers which is not outweighed by an offsetting consumer or competitive benefits that the practice produces.

Explanation: while determining as to whether the injury to the consumer is substantial, regard shall be had to the value of the goods or services in question.
Similarly the word deceptive act has not been explained. The following definition has been suggested.

A deceptive act in relation to a trade practice is one which has a potential to mislead consumers of ordinary intelligence with regard to material facts.

Chapter IV titled Commercial Advertising—legal Perspectives covers the issues like, constitutional protection, application of mens rea, standard of protection, defence of puffing, television commercials, comparative advertising and interpretation of advertisements.

The judicial recognition of the fact that the commercial advertising enjoy constitutional freedom is considered by the researcher a positive step as the profit motive alone should not be the determining factor for an advertisement to fall outside the freedom of speech. However, this doesn't mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of information necessary for subserving public good from that which is false or deceptive.

Although the words like falsely, knowingly, intentionally have been used in the definition of unfair trade practice which denote mens rea, it has been suggested that the compensation for loss caused due to false or misleading advertisement should not
be made dependent upon the presence of mens rea on the part of advertiser. Since the class of practices legislated in the two Acts are not criminal in any real sense but are practices prohibited under penalty, the efficacy of the two Acts cannot be attritioned by reading mens rea in the liability for compensation to the consumer who has suffered loss due to the false representation. The compensation is the only tangible remedy available under the two Acts to deter the unscrupulous trader.

Keeping in view the awareness level of consumer rights in India, it has been suggested that the quasi judicial and judicial bodies should take into account the intelligence of an average person while interpreting an advertisement. In other worlds, the test should be as to what would be the impression of a person with an average intelligence after listening or reading an advertisement. However, it should not be treated as a general standard. The context in which an advertisement is addressed should also be taken into account. For example, where an advertisement for a specialised equipment is directed at an expert group, such as engineers, the standard will be different as against the advertisement addressed to general consuming public or directed to children.

A considerable latituded has been given to a trader to extoll the qualities of his product. The underlying argument in its defence is that no reasonable man will believe such advertisement as true. But this defence cannot reconcile with the average man's intelligence test as advocated above. Furthermore,
if consumers will not take seriously the exaggerated claims of the trader, then it is difficult to understand why trader is resorting to such puffing. Thus it is suggested that the commercial puffery be made actionable.

Sometimes it is not possible to advertise a product with its natural colour. So some artificial substance has to be substituted to obtain a natural look. This involves the problem of interpretation of television commercials. One possible interpretation is to treat demonstration merely a dramatization of the express claims made in the advertisement. So express claim should be true without caring for the truthfulness of demonstration. Second approach is to treat television demonstration as a warranty without taking into account the express claim. The third approach is the combination of the first two, i.e. to interpret a television demonstration both a warranty that the result could be duplicated without trickery and a proof of the express claim made in the advertisement. A demonstration which failed in either of these tests would be considered deceptive and would not be permitted. It is suggested that the demonstration as well as the express claim made should be correct. In other words an advertisement should be accurate at both ends of the television camera.

Regarding comparing advertising, it is suggested that the insignificant comparisons should be declared as misleading. Otherwise an advertiser will focus more on insignificant comparisons and will derive benefit out of all proportions. Following
are the suggestions which should be incorporated for regulating comparative advertising.

1. The aspects of the advertisers product which are being compared with the competitors product should be made clear.

2. The comparisons should be factual, accurate and capable of substantiation.

3. There is no likelihood of the consumer being misled as a result of comparison, whether about the product advertised or that with which it is compared.

4. The advertisement should not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implications.

5. The subject matter is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

Chapter V covers specific categories of false or misleading advertisements. Various sub-clauses of the definition laying down different forms of false or misleading representations are not properly worded. In order to remove ambiguity, it is suggested that sub-clause (1) be amended on the following lines:

The practice of making any statement, whether orally or in writing or by visible representations which is false or misleading that ....

The word "falsely" used in clauses (i) (ii) (iii) and the word "false or misleading" used in clauses (vi) (ix) (xi) should be dropped.
Clause (i) says that it is the practice of making any statement and the word "practice" means a series of acts. 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 of unfair trade practice are found.

A question arises; are the labels on the goods as offers? There are two possible interpretations. One is not to use the term in technical sense and not to insist on the dichotomy of the offer and invitation to treat. The other interpretation is to give offer narrow meaning in the sense as is understood in the contract law. It is suggested that the former view should be preferred over the later as it will widened the reach of the provision.

The question as to whether the offering of gifts, prizes or conducting of contests, lotteries, game of a chance or skill are per se unfair has been debated before the MRTP Commission and the controversy is still alive. In order to maintain balance between the legitimate interest of the traders and the consumers, it is suggested:

1. Offering of gifts or prizes genuinely should not be prohibited;
2. Lotteries are against public policy and therefore should be prohibited;
3. Lotteries which do not directly or indirectly demand public subscription should be 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, so it should not be proscribed.

The provision controlling sale or supply of goods hazardous to life is ambiguously worded. It does not make clear as to whether manufacturer or seller is responsible to consumer in case loss or injury is caused to the consumer. It has been suggested that the proper course is to see who is responsible for loss or who is in a position to control the danger.

This provision makes liability dependent on the negligence. The liability under the law of torts is strict and transborder laws also provide no fault liability in such cases. It is suggested that the principle of no fault liability be incorporated in the provision dealing with the sale or supply of hazardous goods.

Chapter (V) deals with the powers of the MRTP commission vis-a-vis unfair trade practices which include (1) Power to issue injunction (2) Power to grant compensation (3) Power to review orders (4) Power to punish for contempt (5) Power to pass cease and desist order and consent order (6) Power to order corrective advertisement.

At present injunction cannot be passed against those aiding, abetting or conspiring the actual wrong doer. So a clause be attached to section 12A so as to encompass the above persons also. Whether the interim injunction order is appealable or not
is yet to be resolved. However, examples are in galore where the High Courts or the Supreme Court was called in aid to stay the operation of the injunction order. It is, therefore, suggested that the injunction order be made appealable before the Supreme Court with a clause stating that an injunction order passed by the MRTP commission shall not be called in question in any High Court.

The provision dealing with the compensation provides that in case of loss or injury, compensation will be given to consumer. But the word consumer has not been defined in the MRTP Act. So it is not clear as to whether the term consumer includes user of the goods who is not the actual buyer. It is suggested that the definition of consumer as provided under section 2(d) of the CP Act be incorporated in the MRTP Act also.

There is no guidance in the MRTP Act and the Rules and Regulations framed there under regarding the principle for measuring damages. The MRTP Commission expressed conflicting opinions on this point. It is suggested that the principles of law of torts be applied for measuring damages.

The MRTP (Amendment) Act, 1991 provides provision for class action suits. However, the MRTP Commission held that a voluntary registered consumer organisation cannot file suit in the representative capacity as it cannot be said to have the "same interest" as the class has. It is therefore suggested that an Explanation be provided either in the MRTP Regulations or MRTP Act that
"a recognised consumer association shall be deemed to have the same interest as other consumers on whose behalf the consumer association has filed the complaint.

The power of MRTP Commission to amend or revoke its earlier order raises many problems of interpretation (1) Is this power unlimited or, is it subject to limitations? What is the extension of the Commission's power? Does the expression "in the manner in which it was made", imply that the Commission by invoking this provision can order fresh hearing? It is suggested that this is a discretionary power but it cannot be arbitrary, vague or fanciful. It must be guided by the relevant considerations. Although there are no apparent limitations on this power, it cannot be construed so wide as to permit rehearing on the same material. It has to be kept in mind that basically this is a corrective or rectificatory power, "so it cannot be exercised to order fresh hearing. The expression in the manner in which it was made" cannot be construed as giving power to the commission to make fresh order in the same way as previous order was made, i.e. by hearing parties and witnesses. But it merely indicates a procedure to be followed by the commission in amending or revoking an order.

Section 36-D which gives power to the MRTP Commission to pass cease and desist order is not in consonance with section 36-B which gives inter alia power to the Commission to file complaint suo motu either upon its own knowledge or information. Section 36-D provides that the "Commission may inquire into any unfair trade practice which may come before it for inquiry". This
expression does not embrass within its import the suo motu in-
quiry which the Commission is competent to institute by virtue of
section 36-B. It is suggested that the words "come before it"
should not be interpreted to mean that it should come before the
Commission from other sources than its own knowledge and informa-
tion. However, in order to avoid any possible controversy, it is
suggested that the words "which may come before it for inquiry"
be omitted from section 36-D.

A single trader or a class of traders cannot file a com-
plaint. Naturally no cease and desist order can be passed even if
the practice is injurious to competing trader or class of trad-
ers. Since under section 12-A injunction can be granted on the
application of a trader or class of traders and under section 12-
B compensation can be granted to a trader or class of traders, so
there is need for harmonious construction of sections 12-A, 12-B,
36-B and 36-D. This can be possible only by interpreting the
words "Public interest" under section 36-D as to cover both,
class of traders as well as a single trader. However, it is
suggested that like consumer, trader may be accorded locus standi
under section 36-B and Commission be empowered to pass cease and
desist order, where a trade practice is prejudicial to competing
trader. Since traders as compared to consumers are more alert and
conscious of the tricks Which their competing traders emply,
arming them with the power to file complaint will help in con-
trolling unfair trade practices.
Chapter VI covers powers of the consumer fora vis-a-vis unfair trade practice. At present consumer fora do not possess power to order return of excess price charged. Section 14 be amended in order to incorporate a clause which will run as follows.

To return the consumer the price charged in excess of the price fixed by or under the law for the time being in force or displayed on the goods or in package.

The powers of the consumer fora are restricted to section 14. It is suggested that a residuary clause be incorporated in section 14 which should run on the following lines:

To grant such reliefs as the District forum deems fit in the interest of justice.

The powers to enforce orders are laid down in sections 25 and 27. Section 25 provides that the orders may be enforced in the same manner as if it were a decree or an order made by a court in a pending suit but in case of the inability of the CDRAs to execute their orders, it shall be lawful for them to send such orders for execution to the court. Section 27 provides punishment for defaulter.

The question which has been debated before the Consumer fora is; whether it is necessary that the decree holder must satisfy first section 25 and only then he can invoke section 27 or it entirely depends upon the decree holder whether to take help of section 25 or 27. Basically in sections 25 and 27 two independent remedies have been incorporated by the legislature for executing
the orders of the forum. If the decree holder approaches the consumer forum under section 27, the forum will not be right to ask him to exhaust first section 25 and only then come under section 27. Sections 25 and 27 therefore give two optional remedies to the decree holder and it lies entirely in his discretion what option he is going to exercise.

Section 27 arms the consumer fora with the power to inflict punishment or impose fine on the judgment debtor in case of his default. However, rules have not been framed for the exercise of this power by the consumer fora. It is necessary that an express provision be incorporated in section 27 for the said purpose.

Consumer fora do not possess express powers to issue interim injunction. However, consumer fora have inherent powers to issue the same like that of civil courts. In order to avoid any controversy, it has been suggested to amend sections 14, 17 and 21 to provide express power to grant stay or interim relief by the District forum, State Commission and National Commission.