Chapter 4

INTRODUCTION
The twentieth century economists have invented sophisticated ways of mapping consumer behaviour and choice. The initiative lies with the skilled technostructure inside the corporation who can manipulate prices and demand. The technological developments changed the needs and tastes of the consumers. The simple kind of goods and services which were well suited to them in the past, have been replaced by the complex and complicated products. They differ so widely from each other, in terms of use, benefit, efficacy, durability, purity and potency that it becomes very difficult to make their comparative analysis for assessing the suitability of price which the consumer has to pay. The expert knowledge to the consumer is necessary to appreciate the features of these products. But the pace of modern innovations has rendered obsolete, the experience and knowledge of the consumers. So the present day consumer is placed in a precarious position. On the one hand, non expert knowledge will not reveal many important characteristics of modern products, on the other hand, it is not possible for the consumer to have experience and knowledge about the each product which he is going to purchase.

In absence of any Governmental and non Governmental agency to provide the relevant information about the product, consumers have to rely on the information provided by the trader. This information is disseminated through the electronic or print media or through hand bills, drum beats, samples, stickers, sales talks or door to door salesmen etc. Advertisements and other sales promotion schemes have become well established modes of modern
business. The sponsor of this information is manufacturer or seller himself. His prime motive is the more and more sale of his own product and not to provide consumer, correct information for right purchasing decision. The advertisement to the consumer should not be deceptive has always been one of the points of conflict between business and consumer.

The traders in order to ensure smooth sailing of their products, resort to unfair business practices. Their advertisements often fail to inform consumers about the utility, characteristic, grade, quality, durability, purity etc of the product and in addition raise expectations beyond that which can be fulfilled by a product or service. Instead of making blatantly false or misleading statements, the traders dexteritly make the half truth or ambiguous statements. They omit factors which would be unfavourable to them but would influence consumers attitude and undue emphasis is given to the insignificant or irrelevant information. The advertisements are composed or purposefully printed in such a way as to mislead. The goods or services of rival competitors are being disparaged in order to bring their own goods into lime-light. The false comparative analysis about the different products is being highlighted in order to project own product. The false warranties and guaranties relating to the length of the life of product, durability, potency and like are being announced without any reasonable basis. Fictitious bargain offers are made to deceive consumers. Many devices are used to lure buyers into believing that they are getting something for nothing or at a nominal value. The advertisement of goods at
discount rates or along with gifts or prizes are being made without any intention to fulfil the promise. The contests and lotteries are being conducted for promoting business interests.

These unfair business practices are diverse in nature as is human ingenuity. Since man has not stopped thinking, so he continues to contribute to the development of techniques and designs of salesmanship. In India false and misleading advertisements are rampant. The consumer complaints council CCC, a wing of the advertising standard council of India ASCI, received more than 1,200 complaints against advertisements since its inception in 1985 and around 95 per cent of these were misleading.

Today the marketing of goods and services is being made through the trained business executive. Untrained consumer is no match for the businessman. The balance of power is weighted in favour of traders who employ expert advisers for marketing, research to know consumer preferences and to represent their viewpoint before government. In fact they work round the clock on their business and they put every effort to ensure smooth sailing of their goods and services. In contrast, consumers are not organised, they suffer in silence. They therefore, need protection against the unfair business practices of the traders.

The MRTP (Amendment) Act, 1984 and Consumer protection Act, 1986 have been passed to deal with the unfair business practices. The legal provisions curbing these practices were originally borrowed from the Trade Practices Act, 1974 of Australia. However, with the passage of time this law was found inadequate to
cope up with the new unfair practices floated by the traders. So it was thought necessary to have flexible provisions which will embrace not only existing unfair trade practices but also those to be invented in future. To achieve this goal, the MRTP (Amendment) Act, 1991 and Consumer protection (Amendment) Act, 1993 were passed. The language of section 5 of the Federal Trade Commission Act, 1914 of USA as amended by the Wheeler-Lea Amendment Act 1938 has been adopted in the definition of the unfair trade practice. Since much time has not elapsed when new concepts have been incorporated, the Regulatory Agencies under the MRTP and CP Acts have not found occasion to dwell deep on the issues which have rocked the courts in America and Australia. Till date, these Regulatory Agencies have laid down mechanical judgments and no plausible jurisprudence has been evolved. The ambit and scope of the expressions, "unfair method, unfair or deceptive act" used in the definition of the Unfair Trade Practice is yet to be delineated. No thought has been given to the question as to under what circumstances an advertisement may be called as false or misleading? What should be the standard of proof for such advertisement? The application of puff and Mens rea to commercial advertisements is still unexplained. The new dimensions of consumer deception added by the television commercials have not been addressed. The nebulous issues relating to Bargain offers, offering of gifts, prizes, and holding of contest, lottery or goods involving risk are unresolved.

The powers of the MRTP Commission vis-a-vis unfair trade practices differ from the powers of the Redressal Agencies. Neith-
er the MRTP Commission nor Redressal Agencies have made any plausible evaluation of the ambit and scope of their powers. These are some of the core issues which the researcher aims to address in the present thesis.

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 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 trans-national 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:

Research Methodology is the means through which desired objectives are sought to achieve. It involves a systematic planning and comprehensive methods. The type of steps to be taken in research depends upon the purpose for which the research is under-taken. The study relating to the legal control of unfair trade practices with reference to MRTP and CP Acts, is a doctrinal research, so statutory material of India, America, Australia, Canada and England relevant to the study has been analyzed. 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/Committee s relevant to the thesis have been studied and reflected where-ever 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 is introductory in nature. It highlights the need for the present research and projects some of the issues which have been addressed in the thesis. The objectives for the thesis and research methodology have been given along with the design of the
thesis.

Chapter-II gives a historical retrospect of the unfair trade practices. The time honoured doctrines of past have been analysed and their in-efficacy in changing market structure has been highlighted. The legislative developments in relation to unfair trade practices and the reasons which led to the enactment of the MRTP (Amendment) Act, 1984 and consumer protection Act, 1986 have been presented along with the up to date amendments in these Acts.

Chapter-III analyses the first part of the definition of unfair trade practice. This definition is silent on the issue as to whether it applies to existing goods only or to future goods also. The application of the two Acts to shares and debentures has not been yet resolved. The parameters of the expression, unfair or deceptive acts or practices, have not been outlined in the definition and the MRTP Commission or the Redressal Agencies have not found opportunity to deliberate upon. This expression has been borrowed from section 5 (a) (1) of the Federal Trade Commission Act 1914 as amended by the wheeler lea Amendment Act, 1938 of United States. So the Judicial interpretation put by the American Courts and the limitations of that interpretation have been examined. The approach which the MRTP Commission and the Redressal Agencies should adopt, has been suggested.

Chapter-IV covers commercial advertising in legal perspective. Since unfair trade practices under the MRTP and CP Acts involve
Commercial advertisements of diverse nature, so separate treatment has been given to commercial advertising and issues like opinion of the consumers in Britain, Europe (including Britain) and India about the advertisements, constitutional protection, application of mens rea, standard of protection, defence of puffing, television commercials, comparative advertising and interpretation have been discussed.

The surveys conducted in Britain, Europe (including Britain) and in India have been presented to project the opinion of the consumers who believe that most of the commercial advertisements are false or misleading. Through statistical data it has been shown that the traders throughout the world have steadily increased advertising expenditure. Thus there is every reason to regulate these advertisements to ensure that they are not false or misleading. Nevertheless, it has been argued that the importance of information to the operation of efficient markets is by now fairly well accepted, the trader should have constitutionally protected right to highlight the merits of his goods or services. Advertising should be treated as speech and thus falling under the fundamental right of freedom of speech. The element of trade, commerce or profit motive should not distinguish the commercial advertisements from the speech.

The application of mens rea to commercial advertisements has not yet received judicial attention. The words like falsely, intentionally and knowingly have been used in these two Acts and they denote mens rea. Then should mens rea be imported
in the definition and in its absence trader be not held liable to compensate for any loss ?.

The aim of the law controlling unfair business practices is to protect consumers. The consumers are vast multitude of public including, persons of average intelligence, credulous and fatuous and reasonably intelligent persons. The question arises as to whose intelligence should MRTP Commission and redressal agencies treat as a standard to determine the nature of the advertisement. This issue has not been authoritatively resolved yet. The defence of puffing in the advertisements has provided an escape route for the traders to cheat the innocent consumers. It is said about the puffing that reasonable consumers cannot be misled by it, but if it creates no impression on consumers, it is difficult to see why it is used? The commercial advertisements on television have posed new questions for the researchers to answer. The natural colour of the products is lost in transmission on the television screen, so in order to give a natural look in the advertised product, artificial substances have to be substituted in order to give natural look. Then if the demonstration made on the TV screen is false but the express claim made with the demonstration is correct, can such advertisement be treated as false and what will be the position where demonstration is true but the express claim made is false? The use of celebrity to advertise goods or services has now become common. The non expert knowledge of the celebrity about the advertised goods or service is yet another thought provoking issue relating to false or misleading advertisements.
The comparative advertising is a species of commercial advertising and like its genus is double edged. It has been now judicially recognised that the truthful comparative advertising shall not be prohibited but to determine whether the particular comparative advertisement is false or misleading or not, is not free from difficulty for the reasons (a) there is no clear line between comparative and non comparative (b) a considerable amount of puffery has been traditionally been allowed in advertising, the same is true in case of comparative advertising. The limits of permissible puffery are far from being clear. No guidelines have been framed to determine the correctness of a comparative advertisement. Although it has been argued in the thesis that there is no reason to extend this common law principle of puffing in the present day consumer protection law, there is no decision of the judicial or quasi judicial bodies on this point.

Although there is a consensus that the false and misleading advertisements are bad, few however, agree about how best to tell whether an advertisement is misleading. In the light of the judicial decisions, various rules for the interpretation of the advertisements have been suggested.

Chapter V deals with the specific categories of unfair business practices as incorporated in the definition. A detailed discussion on sub clauses (1) to (x) and clauses (2), (3) and (4) covering bargain offers, offering of gifts, prizes, holding of contests and lotteries and goods involving risk of injury, has been made. Sub clauses (1) to (x) are not properly worded. Some
sub clauses use the term "falsely" and some "misleading", thus giving an impression that where a representation is misleading and not blatantly false, will not be covered by the clause using the expression "falsely". This is not correct. However in order to remove any doubt an amendment has been suggested. Various expressions used in these sub clauses have been discussed in the light of the transborder Judicial pronouncements in order to outline their scope.

The provisions dealing with the Bargain offers do not cover a situation where trader disparages his own goods to a consumer who has visited his establishment in response to the bargain offer made in the advertisement and then switches the consumer to another profitable item. It is not clear as to whether the labels on the goods or catalogues making offers be construed as offers or mere invitation to treat. The provision expressly states that the intention of the traders not to supply goods at the bargain offer must be proved. The proof of intention is not easy and consumer cannot get compensation where he fails to establish the intention of trader, not to provide goods at bargain offer. Whether the trader making a bargain offer should mention the period, during which said bargain will last, in the advertisement itself or without mentioning period, the bargain offer should remain valid for a reasonable period is not clear. The Explanation attached to the provision is also ambiguous.

The status of sales promotion devices, e.g. offering of gifts, prizes, holding of contests and lotteries has not been authoritatively resolved. The MRTP Commission has expressed
conflicting opinions on the question as to whether these devices are perse unfair trade practices or capacity to cause loss or injury to the consumer, has to be proved.

The traders do not hesitate in marketing the goods which are hazardous to life and property. The provisions which prohibit such trade practices do not make clear as to whether in case of injury to the consumer, against whom should he file complaint? should he file complaint against manufacturer or seller? The conflicting opinions have been expressed on the question as to whether loss or injury covers only physical loss or loss of any sort.

Chapter VI outlines the powers of the MRTP Commissions vis-a-vis unfair trade practices. This chapter is having six sub chapters titled as (1) power to issue injunction (2) power to grant compensation (3) power to amend or revoke orders (4) power to punish for contempt of commission (5) power to order corrective advertisement (6) power to pass cease and desist order.

The power to grant compensation has raised the issues like, locus standi to voluntary organisations, application of the limitation Act and mens rea, the principles applicable for measuring damages and the consumer's duty to mitigate. The right of consumers to file class action suit has many attendant legal queries yet to be resolved.

The issues relating to the power to grant injunction have been subject to many conflicting observations of the MRTP Commission and at present injunction cannot be issued against those who
are aiding or abetting the trader who has resorted to unfair trade practices.

The power to order corrective advertisement has been provided in the MRTP (Amendment) Act, 1991. It is yet to be seen as to how it reconciles with the commercial advertisements as these advertisements fall within the Freedom of Speech and Expression guaranteed under Art, 19 (1) of the Constitution.

The scope and ambit of the power to amend or revoke the earlier order has been called in question before the apex court. It has also raised many questions of procedural nature. Can one Bench hear the review application of the case decided by another Bench? Can larger Bench be constituted to hear the review application?

The power to issue cease and desist order involves questions relating to locus standi of trader, practices which have been discontinued before passing cease and desist order, and implications of this order. Another pertinent issue is the status of the consent order.

Chapter VII deals with the powers of the consumer fora vis-a-vis unfair trade practices. This chapter has been divided into five sub chapters namely; power to remove defects and deficiencies; power to award compensation; power to enforce orders; power to issue Interim orders and who can file complaint against whom?

At present consumer fora have no power to order refund of price or charges which the trader or provider of service has
received from the consumer. Similarly non supply of goods or services does not fall either in "defect" or "deficiency" as defined in the CP Act.

The power to award compensation is still subject to negligence of the respondent despite the fact that all the consumer legislations throughout the globe provide for strict liability.

The power to enforce orders has generated debate among the various fora about the true scope of sections 25 and 27. No rules have been framed for the exercise of the powers by the consumer fora under section 27 and the application of criminal procedure code to section 27 is also not free from doubt. It is also not clear as to whether order made under section 27 is appealable or not.

The consumer fora do not have express power to pass interim order. There is a controversy as to whether power to pass final order includes an inherent power to pass interim order.

The question germane to the present study is who can file complaint and against whom? The CP Act provides that besides consumer, state and central governments and voluntary consumer organisations can file complaint. It is also provided in the Act that a purchaser of goods for resale or for commercial purpose is not a consumer and therefore cannot file complaint under the CP Act. Before Amendment Act, 1993, the expression commercial purpose came up for deliberation before various consumer fora and they expressed conflicting opinions. In order to resolve this issue an explanation was attached to the definition of consumer through the Amendment Act, 1993. However, this explana-
tion is also not in concord with the overall scheme of the CP Act. So several principles have been suggested to determine as to whether goods are for commercial purpose or not.

It is not clear as to whether consumer can also file complaint against the actual manufacturer when he has purchased goods from a vendor who is not the actual manufacturer.

Chapter VII titled conclusions and suggestions covers the research findings and suggestions to strengthen the existing law and to resolve the present controversies which have come on the fore due to conflicting interpretations of various provisions given by the MRTP Commission and consumer redressal agencies.