

TWO MINUTE EXPERIMENT GONE BAD: STARS TO BEAR LIABILITY?

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ABSTRACT

From hyperbolic claims of increased concentration to fairness or perfect shape in 5 days; advertisers today have resorted to desperate measures to outrun their competitors in this era of sensationalization. Further, celebrities have become the biggest grossers in this industry by capitalizing on the impressionable public perception. The Maggi controversy has progressively gained notoriety for opening up a can of worms and unsettling the insulated position which the celebrity endorsers previously donned. Despite having encountered several instances of potential liability for celebrity endorsers, Indian law has not yet explicitly recognized this concept.

This essay seeks to answer three fundamental questions: (a) whether celebrities can be held liable for their involvement in misleading advertisements under the current legal framework; (b) If not, whether such a liability should be imposed and the modalities of the determination of the extent of this liability and (c) how is the balance between publicity rights and social responsibility of the celebrities to be arrived at.

The authors have argued for a joint and several liability of the endorser and manufacturer/advertiser accruing on the proof of knowledge of the defect or lack of due diligence. Although it is true that introduction of

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endorser liability should not be viewed as a dilution of the restitutionary obligations of the manufacturer, the exact determination of the contours of these responsibilities remains to be seen.

I. INTRODUCTION

Being a country where Bollywood actors and cricketers are elevated to the status of gods, it is natural that India is a haven for celebrity endorsements. However, the recent Maggi controversy, wherein celebrities like Madhuri Dixit, Amitabh Bachchan and Preity Zinta are being subjected to legal scrutiny for promoting Maggi noodles,² demonstrates that celebrity association does not insulate a brand from its legal obligation of ensuring good quality. This essay aims at understanding the legal contours and ramifications of the liability that accrues to celebrity endorsers for their involvement in misleading advertisements.

The twenty-first century was the harbinger of a wave of consumerism which brought about a paradigm shift in the legal responsibilities of the buyer and the seller. Consequently, the rule of caveat emptor was replaced with a higher duty of disclosure on part of the seller with respect to the quality of the product. It was at this time that advertisements were conceived as an accessible medium for dissemination of product information. However, with increase in competition, the focus of advertisements came to be dictated by commercial success alone.

² *Court orders against Amitabh, Madhuri, Preity over Maggi row*, THE HINDU (Jun. 2, 2015).

One of the tools adopted by the advertisers in this regard was puffery. Right from instant glow in five minutes, to assured returns in real estate, advertisers have increasingly exaggerated the efficacy of their products in the bid to outrun their competitors. Initially, India followed the English position of permitting puffery.³ In 2008, the Madras High Court condemned this practice and held that: “*Recognizing such rights of the manufacturers would amount to de-recognizing the rights of the consumers.*”⁴ However, the consumers continue to be misled by this sensationalized advertising.

In order to lend credibility to their hyperbolic claims, advertisers often hire celebrities as endorsers. Cadbury’s Cocoa advertisement featuring Queen Victoria was the first to embrace this trend, which has today become a popular means of increasing viewership.⁵ Most consumers intuitively buy into the brand name associated with the celebrity.⁶ In fact, a study reveals that 50% of the advertisements in India feature a celebrity⁷ which lends credit to the conclusion that the presence of a celebrity has a substantial influence on consumer choice as well as the degradation of consumer rationality.

³ Mohammed Imranullah, ‘*Courts cannot permit puffery in advertising*’, THE HINDU (Sep. 29, 2008).

⁴ (2008) 7 MLJ 1119.

⁵ George Cheriyan, Deepak Saxena & Amarjeet Singh, *Study on the Status of Law Enforcement for Misleading Advertisements in India and its impact on consumers*, CONSUMER UNITY AND TRUST SOCIETY (2012).

⁶ Kertz, Consuelo Lauda and Ohanian, Roobina, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, HOFSTRA LAW REVIEW VOL. 19, ISS. 3, Article 3 (1991) [“Kertz”].

⁷ WARC, *Use of celebrities has mixed results in India* (Feb. 4, 2010) available at <http://www.warc.com/LatestNews/News/ArchiveNews.news?ID=26276> [last accessed on July 10, 2015].

II. LEGAL FRAMEWORK OF MISLEADING ADVERTISEMENTS

The general understanding that prevails with respect to misleading advertisements is that it is a representation which “*is false in substance and in fact*”.⁸ The representation is to be judged by ascertaining whether the discrepancy between the fact as represented and the actual fact, is such as would be considered material by a reasonable representee.⁹

Indian courts have applied this test in determining the fact of misrepresentation. For instance, in the case of *Lakhanpal National Ltd. v. M.R.T.P. Commission*¹⁰, Godrej was asked to remove the words “total safety” from its hair dye advertisement where the dye was known to cause breast cancer amongst women.

There is no codified legislation that exclusively monitors the veracity of advertisements in India. Hence, the regulation of this arena is extremely scattered, with largely, sector specific legislations prohibiting misleading advertisements with respect to their respective products. Accordingly, the regulatory bodies established under these laws have been empowered to issue directions, regulations and rules to regulate misleading advertisements.

However, to an extent, the Consumer Protection Act, 1986 (“COPRA”) provides for a general condemnation of misleading

⁸ Halsbury Laws of England, ¶¶ 1044, 1045 (4th edn., 1998).

⁹ AIR 1989 SC 1692.

¹⁰ *Id.*

advertisements, in as much it deals with goods and services¹¹. COPRA classifies the issuance of a misleading advertisement as an unfair trade practice (“UTP”). Section 2(1) (r) states that when a trader:

“(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services”;

then such an act will be deemed to be a UTP. The District Collector can, *inter alia*, award compensation to the consumer for the injury suffered, or order withdrawal of the advertisement,¹² or direct the issuance of corrective advertisement at the defaulter's cost.¹³

Additionally, Section 6 of the Cable Television Networks (Regulation) Act, 1995 prohibits the transmission of advertisements which are not in conformity with the advertisement code, as set out under Rule 7 of the Cable Television Network Rules, 1994. Rule 7(9) was amended to incorporate the Advertising Standards Council of India Code¹⁴ (“ASCI Code”), which obligates the advertiser to ensure that the advertisements do not distort facts or mislead the consumer by means of implications or omissions.¹⁵

¹¹ COPRA, Section 1(4).

¹² COPRA, Section 14.

¹³ Consumer Protection (Amendment) Act, 2002, Section 10.

¹⁴ An amendment to the Cable Television Network Rules, 1994, notified on Aug. 2, 2006, incorporated the ASCI code.

¹⁵ The Code for Self-Regulation in advertising 2007, Declaration of Fundamental Principles, Principle I.

Further, Rule 7(1)(l),(g),(h) of the Bureau of Indian Standards (Certification) Regulations, 1988 which are framed under the Bureau of Indian Standards Act, 1986 prohibits advertisements wherein a person *claims or implies* that product manufactured by him has been approved by Bureau of Indian Standards ("BIS") when he does not hold a *valid license* for that product under the recognized product certification scheme of the BIS.

While the above legislations are applicable across all kinds of products, certain laws dealing with a specific category of products also exist. For instance, an advertisement pertaining to drugs cannot purport or claim *to prevent or cure or convey to the intending user thereof any idea that it may prevent or cure* certain *specified* diseases, as stipulated under Rule 106 of the Drugs and Cosmetics Rules, 1945¹⁶. Such specified diseases span from genetic disorders, baldness, diabetes, obesity to life threatening diseases such as AIDS, cancer etc.

Similarly, Section 4 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, prohibits advertisements relating to a drug if it contains any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false claim about the drug or is otherwise false or misleading. Additionally, under Section 3 of The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 ("Infant Foods Act") a person cannot *advertise or take part in the publication of an advertisement* pertaining to infant milk

¹⁶ Framed under Sections 6(2), 12, 33, 33N of the Drugs and Cosmetics Act, 1940.

substitutes, infant foods and feeding bottles which *creates a belief* in or *gives an impression* to the consumers that such products are better than or equivalent to the mother's milk.

Further, Section 5 (1) of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ("2003 Act") prohibits all persons from taking part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.¹⁷ Section 5(3) clearly states that no person under a contract or otherwise shall agree to promote the use or consumption of such products. Although the 2003 Act and Infant Foods Act also deals with consumable products, the target area is restricted to tobacco products and infant foods respectively.

Hence, in order to deal with all kinds of food products, the Government enacted the Food Safety and Standards Act, 2006 ("FSSA"). The FSSA prohibits misleading advertisements pertaining to food products,¹⁸ and imposes a penalty which may extend up to Rs.10 lakhs in case of default¹⁹. In addition to the aforementioned legislations, the regulatory bodies established under different sector specific legislations have also brought out guidelines, regulations and rules that regulate misleading advertisements.

¹⁷ Section 5(1), Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

¹⁸ FSSA, Section 24.

¹⁹ FSSA, Section 53.

For instance, the Telecom Regulatory Authority of India, through its Direction on Preventing Misleading Tariff Advertisement, 2012 has obligated all telecom service providers to *only* make advertisements that are unambiguous, transparent and non-misleading. An advertisement is considered misleading by TRAI if it is likely to induce the consumer to a tariff plan which he would not have otherwise subscribed or if it contains an untrue statement or omits a material fact or fails to disclose attached limitations and restrictions.

The service providers are also required to submit a compliance report in this regard to TRAI on a half yearly basis. Similarly, the Insurance Regulatory Development Authority ("IRDA"), under the IRDA (Insurance Advertisements and Disclosure) Regulations, 2000 has prohibited insurers, intermediaries and insurance agents from making misleading advertisements.²⁰ Such persons also have to adhere to the ASCI Code while making and publishing the advertisement.²¹ Further, the IRDA is empowered to direct the person to publish a corrective advertisement in case his advertisement is found to be misleading.²²

Additionally, in respect of securities, the Securities and Exchange Board of India ("SEBI"), has been empowered to prohibit misleading advertisements. SEBI classifies a misleading advertisement or which contains distorted material facts as a fraudulent and unfair trade practice and prohibits

²⁰ As defined under Regulation 2(d) of the IRDA (Insurance Advertisements and Disclosure) Regulations, 2000 ("IRDA Regulations").

²¹ IRDA Regulations, Regulation 12.

²² IRDA Regulations, Regulation 11.

such practice.²³ The Reserve Bank of India is also empowered to suppress the use of misleading advertisements by financial institutions.²⁴

These restrictions have been deemed to be consistent with the principles of reasonableness enshrined under Article 19(2) of the Indian Constitution. In the case of *Hamdard Dawakhana v. Union of India*²⁵:

“An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed... When it takes the form of a commercial advertisement which has an element of trade or commerce, it no longer falls under the concept of freedom of speech.”

The freedom of speech and expression conferred on the advertisers is counter-balanced by the consumers' right to receive accurate information, which is inherent in Article 19(1)²⁶ and bolstered by Section 6 of COPRA.²⁷ The National Consumer Disputes Redressal Commission (NCDRC), has also made its position with regards to misleading advertisements clear. In the case of *MR Ramesh v. M/S Prakash Moped House*,²⁸ the Commission warned against the use of fine print to conceal crucial information that might mislead the consumers. The Commission has used its powers to issue corrective advertisements for instances of misleading advertisements which squarely fell

²³ Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, Regulation 4(k).

²⁴ Reserve Bank of India Act, 1934, Section 45J.

²⁵ AIR 1960 SC 554.

²⁶ Secretary, Ministry of Information and Broadcasting, Government of India v. The Cricket Association of Bengal (1995) 2 SCC 161.

²⁷ COPRA, Section 6.

²⁸ RP No. 831 of 2001.

within the definition of unfair trade practices (aside from misrepresentation) according to the COPRA.²⁹

III. LEGAL DIMENSIONS OF THE MAGGI CONTROVERSY

The instant Maggi controversy arose when the Uttar Pradesh Food Safety and Drug Administration collected samples of the instant noodles subsequent to a complaint and found that the noodles contained lead and monosodium glutamate ("MSG") in excess of the prescribed limits.³⁰ Further, a First Information Report ("FIR") was also filed under various provisions of the Indian Penal Code ("IPC") relating to cheating³¹ and noxious food³² against Nestle India and the three brand endorsers before the Chief Judicial Magistrate in the Muzaffarpur district court.³³ The FSSAI, in its order dated June 5, 2015 found that Nestle India had violated *inter alia*:

- Section 20 of the Food Safety and Standards Act, 2006- This section mandates that the food product should not contain any toxin or heavy metal in excess of the prescribed limit. However, the FSSAI found that Maggi contained 17 parts per million lead, exceeding the prescribed limit of 2.5 part per million. Section 48 of the FSSA also makes it an offence to

²⁹ M/S Cox & Kings Pvt Ltd v. Mr Joseph A. Fernandes & Anr., RP No. 366 of 2005; Tesol India v. Shri Govind Singh Patwal, RP No. 2501 of 2010; United Breweries Limited v. Mumbai Grahak Panchayat, FA No. 491 of 2005.

³⁰ FSSAI Order dated June 5, 2015 available at http://www.fssai.gov.in/Portals/0/Pdf/Order_Nestle.pdf.

³¹ IPC, Section 420.

³² IPC Section 270 (malignant act likely to spread infection of disease dangerous to life), Section 273 (sale of noxious food or drink) and Section 276 (sale of drug as a different drug or preparation).

³³ Amarnath Tewary, 'Maggi case: Bollywood actors face FIR', THE HINDU (June 3, 2015).

add substances to food which may make it toxic or injurious to health. Hence, Nestle was found to have violated both of these provisions.

- Section 23 of the FSSA Act- This section prohibits the misbranding of products and display of false and misleading information on the packaging. Here, the FSSAI found that MSG was found in the tastemaker of the Maggi noodles while "*No Added MSG*" was advertised on the Maggi packet. On account of this default, Nestle India's actions attracted a fine of Rs. 3 lakhs for misbranded food products as prescribed by Section 52 of the FSSA Act.
- Section 24 of the FSSA Act- As aforementioned, this Section read with Section 53 prohibits misleading advertisements made with respect to food products. It was found that the claim of Maggi being both "healthy and tasty" was misleading in the light of the proven adverse effects of excessive lead and presence of MSG. Nevertheless, the FSSAI did not examine whether the endorsers are also qualifying as persons who 'made' the advertisements, sufficient enough to bear joint responsibility, as required by the provision.
- Section 26 of the FSSA Act- This section enjoins a food business operator to ensure that the food articles manufactured/sold by him are *inter alia* not unsafe and misbranded. Nestle India was found guilty of violating this obligation. Additionally, Section 27 which stipulates that the manufacturer or packer of an article of food shall be liable for such article of food if it does not meet the requirements of the FSSA was also attracted. However,

while these provisions could easily be invoked in the case of manufacturers, their application was more complicated with respect to endorsers. This is because conventionally, persons concerned with the advertisement of such defective products are not liable to the same degree as the manufacturers or sellers or even the distributors.

The FSSAI ordered the recall of nine previously approved products of Maggi from the market. However, this order was set aside by the Bombay High Court vide its order dated August 13, 2015 which held that the principles of natural justice had not been adhered to. The court had allowed Nestle to go in for fresh testing of five samples of each variant of the noodles at three independent laboratories in Punjab, Hyderabad and Jaipur which were accredited with National Accreditation Board for Testing and Calibration Laboratories (“NABL”) pursuant to which Nestle India resumed the sale of Maggi noodles.³⁴ The FSSAI later moved the Supreme Court challenging the Bombay High Court’s decision and the sanctity of the samples provided to the government labs for retest.³⁵

IV. LIABILITY OF CELEBRITY ENDORSERS

In the recent past, a number of celebrities have been embroiled in legal disputes, leaving the legal fraternity divided on the issue of their liability in reference to misleading advertisements. Celebrities have been a popular choice

³⁴ *Bombay High Court puts Maggi back on menu, but after 6 weeks of tests*, THE ECONOMIC TIMES (Aug. 14, 2015).

³⁵ *FSSAI challenges Bombay HC order in Maggi noodles case*, THE INDIAN EXPRESS (Nov. 17, 2015).

for advertisers, who aim to capitalize on the tendency of the public to associate celebrity involvement with credibility. The fiduciary implications of this association make it imperative for celebrities to be accountable for their endorsements.

The Federal Trade Commission (“FTC”) which is the primary consumer protection agency in the USA, has defined an endorsement as,

*“an advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser”.*³⁶

The characterization of a representation as an endorsement in the USA is based upon the status of the endorser and not the content of the representation. Hence, a popular automobile racer who promotes a brand of engine oil, by emphasizing on its “smooth ride, strength, and long life” will be considered to be an endorser even if he does not state that this is his personal opinion.³⁷

American jurisprudence seems to be the most coherent in terms of endorser liability. Section 5 of the FTC Act³⁸ declares unfair or deceptive acts

³⁶ Guides Concerning Use of Endorsements and Testimonials in Advertising 16 C.F.R. § 255 (1980) [“Guides”].

³⁷ Kertz, *supra* note 5.

³⁸ 15 USC 45.

or practices to be unlawful, while Section 12 specifically prohibits false advertisements likely to induce the purchase of food, drugs, devices or cosmetics. These provisions have been made applicable not only to manufacturers but also to retailers, advertising agencies and endorsers.³⁹ In *Porter & Dietsch v. FTC*⁴⁰, a drug store retailer was held liable for false claims about a diet pill as he had a fair and reasonable opportunity to evaluate the appropriateness of the claims made, despite not being involved in generating the advertisement himself.

Further, in *FTC v. Publishing Clearing House, Inc.*⁴¹, the Court held that in order to hold a celebrity liable for a misleading advertisement as a direct participant, it must be proved that the individual either (1) had actual knowledge of material misrepresentation; or (2) was recklessly indifferent to the veracity of the representation. However, the celebrity is not required to conduct statistical or clinical investigations in order to satisfy the criteria of substantiation.⁴² It is sufficient if (a) the representation reflects his honest opinion, findings or beliefs,⁴³ and (b) he has a good reason to believe that the representation is true on the basis of a perusal of the government accreditations and certifications of the product.

³⁹ Kertz, *supra* note 5; United States of America v. Nu Skin International 297-CV-0626G.

⁴⁰ 605 F 2d 294.

⁴¹ 106 F.3d 407.

⁴² *Id.*

⁴³ *Id.*

This test was applied in *FTC v. Garvey*⁴⁴, wherein the Court did not hold the celebrity liable because the endorsement was based on his own experience and honest personal opinion. To combat the menace of celebrity endorsements, the FTC adopted the “Guides Concerning Use of Endorsements and Testimonials in Advertising”.⁴⁵ Although the Guides lack the force of law, they are taken to have significant persuasive value.⁴⁶ They require that:

1. The accuracy of the celebrity's claims must be substantiated by the advertiser;
2. If the advertisement claims that the celebrity uses the product or service, the celebrity must in fact be a bona fide user; and
3. The advertiser must use the endorsement so long as he believes in good faith that the celebrity continues to hold the views expressed in the advertisement.⁴⁷

China, in comparison, addresses the issue of endorser liability in a more rigid manner. Article 38 of the Advertisement Law of the People's Republic of China, 1995, provides that-

“if an advertising agent or advertisement publisher, who knows clearly or ought to know that the advertisement is false, still designs, produces and

⁴⁴ 383 F.3d 891 (9th Cir. 2004) [“Garvey”].

⁴⁵ Guides, *supra* note 19.

⁴⁶ Garvey *supra* note 27.

⁴⁷ Guides, *supra* note 19.

publishes the advertisement, it shall bear joint and several liability according to law.”

Additionally, the fifth provision of the Food Safety Law propounds that any person who actively participates in the misleading advertising of food products will bear equal responsibility if the consumer’s legitimate interests are harmed.⁴⁸ Therefore, the consumer can choose to sue the manufacturer/advertiser of the product or the celebrity who endorsed it.

Such a standard was adopted by China due to the calamitous effect of misleading celebrity endorsements. In 2007, a popular Chinese actress, Deng Jie, endorsed the Sanlu infant milk, assuring its trustworthiness. However, it was later found out that the milk contained melamine, which caused kidney stones in infants.⁴⁹ Consequently, the Chinese Government heightened the stringency of its position in 2009, when five national ministries jointly issued a circular, banning actors and social celebrities from hosting nutritional, medical and health care media programs.⁵⁰

The reason for such a position was the risk of the erosion of rationality in the perception of the public due to the fact that products were being endorsed by celebrities. It was this need to protect the public from the adverse effects of such unwavering belief that overweighed the personality rights of the endorser, and subjected them to a higher threshold of accountability.

⁴⁸ Mingqian Li, *On Regulation of Celebrity Endorsement in China*, JOURNAL OF POLITICS AND LAW, Vol. 4, No. 1 (March 2011) [“Li”].

⁴⁹ *Id.*

⁵⁰ Li, *supra* note 47.

Nevertheless, it is important to acknowledge that the concept of fiduciary liability is implied and has not *stricto sensu* acquired the force of law. In this context, the FTC enforcement Guides and the Chinese law operate as the only jurisprudential models for the imposition of fiduciary liability for endorsers, until it receives formal legal citation.

As opposed to USA and China which follow a liability regime, the European Union⁵¹ and Malaysian legal framework⁵² propose a prohibitory mechanism, wherein by means of a self-imposed voluntary advertising code, celebrities are precluded from endorsing products like drugs, medicines, tobacco, alcohol and food items. In India, a consumer can generally, seek relief under the following statutes:

A. COPRA

A consumer, consumer organisation or the State or Central Government can file a complaint with the District Forum, in respect of a UTP committed by a trader under Section 12 read with section 2(c). It is to be noted that the Government took aid of this provision while filing the complaint against Nestle in the Maggi case.⁵³As discussed above, misleading advertisements fall within the ambit of UTP. However, the term trader has

⁵¹ Sudipto Dey, *Making Celeb Endorsers Liable*, BUSINESS STANDARD (Jun. 7, 2015) available at http://www.business-standard.com/article/opinion/making-celeb-endorsers-liable-115060700745_1.html [last accessed on July 10, 2015].

⁵² MALAYSIAN CODE OF ADVERTISING PRACTICE, Advertising Standards Authority Malaysia (3rd edn., 2008).

⁵³ *Maggi row: In a first, Centre moves Consumer Forum*, THE HINDU (Jun. 3, 2015).

been defined to include the seller, distributor, manufacturer and the packer.⁵⁴ This definition is exhaustive, signifying thereby that middlemen,⁵⁵ dealers⁵⁶ and endorsers do not fall within its purview. Hence, currently, a consumer cannot proceed against an endorser under the COPRA.

B. FSSA

As discussed, Section 24(2)(c) of the FSSA imposes liability on any person who makes a representation and gives to the public a guarantee of the efficacy of a product unaccompanied by any scientific or adequate justification. The ambit of the term ‘person’ is extremely wide and not restricted to a manufacturer or a trader. Hence an endorser can be held liable under FSSA.

C. ASCI Code

The Advertising Standards Council of India (“ASCI”) is a non-governmental initiative started in 1985 with an aim to regulate the content of advertisements.⁵⁷ This self-regulatory body deals with complaints from consumers or the industry against advertisements that are in contravention of the ASCI Code, which is a voluntary, self-imposed code.⁵⁸ The ASCI can also take *suo moto* action⁵⁹ and in general, works towards increasing consumer

⁵⁴ COPRA, Section 2(1)(q).

⁵⁵ *Kuldip Singh Kalra v. Roshan Lal Pal*, II (1993) CPJ 170 (171) (NC).

⁵⁶ *Chairman, Ajara Urban Co-operative Bank v. VJ & Sons II* (1993) CPJ 974 (977) (Mah.).

⁵⁷ Survey on Advertising Standards, FICCI (2011) available at <http://m.ficci.com/sectorDetail.asp?secid=80> [last accessed on July 10, 2015].

⁵⁸ *Id.*

⁵⁹ PUSHPA GIRIMAJI, MISLEADING ADVERTISEMENTS AND CONSUMER 10 (2nd edn., Centre for Consumer Studies, 2013).

awareness. The Department of Consumer Affairs has given tacit recognition to ASCI by launching the Grievances against Misleading Advertisements, an online portal in collaboration with the ASCI, with a view to process consumer complaints.⁶⁰

V. LIABILITY OF PAST ENDORSERS

The Maggi controversy also poses questions regarding the liability of an erstwhile endorser of a product when the advertisement is found to be misleading. Although Preity Zinta had endorsed Maggi 12 years ago⁶¹ and Amitabh Bachchan had stopped endorsing the product in 2013, yet they were also impleaded in the FIR filed against Nestle and Madhuri Dixit.

General practice elucidates that the rights and liabilities of the parties to the contract extinguish with the performance of the contract.⁶² However, the expiry of the period of the contract does not preclude tortious claims or criminal liability for the alleged misrepresentation.⁶³ Section 270 of the IPC punishes a defaulter with imprisonment extending up to 2 years for malignant acts likely to spread infection or diseases dangerous to life. Similarly, Section 273 prohibits the sale of noxious food or drinks by a seller who knows or has reason to believe that such items are noxious, whereas section 420 imposes

⁶⁰ Press Information Bureau, Ministry of Consumer Affairs, Food & Public Distribution (Mar. 18, 2015) available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=117262> [last accessed on July 11, 2015].

⁶¹ *Amitabh Bachchan: Stopped endorsing Maggi two years ago*, INDIA TODAY (Jun. 3, 2015), available at <http://indiatoday.intoday.in/story/maggi-noodle-amitabh-bachchan-nestle-india-msg-lead/1/441979.html> [last accessed on July 11, 2015].

⁶² *Sarda Prasad v. Lala Jumma Prasad* AIR 1961 SC 1074.

⁶³ *Marakkar v. State of Kerala* A.S. No. 918 of 1997.

punishment for the offence of cheating and dishonestly inducing any person to deliver property or valuable security.

In order to attract liability under the aforementioned sections, *mens rea*, though in varying degrees, has to be mandatorily present. The offence of cheating requires proof of an intention on the part of the accused to cause wrongful loss to the other person or wrongful gain to himself,⁶⁴ whereas the presence of malice along with reason to believe needs to be proved to attract Section 270⁶⁵. Section 273, in comparison, requires only knowledge of the noxious nature of the product or a reason to believe the same.⁶⁶

Although the aforementioned provisions were invoked in filing an FIR against the endorsers of Maggi, it is highly improbable for them to be successfully prosecuted under them. In India, in the absence of a legal duty imposed on the endorsers to make an independent inquiry into the quality of the product, it is unlikely for the celebrities to do so voluntarily. Likewise, without proof of explicit disclosure of the defect by the manufacturer to the celebrity (which is unlikely to happen as it would be against commercial sense), the fulfilment of *mens rea* is a distant possibility.

Nevertheless, an alternative possibility of affixing liability lies under the tort of misrepresentation. When a person makes a false statement with the intention to defraud the plaintiff and the plaintiff suffers detriment as a result

⁶⁴ IPC, Section 420.

⁶⁵ State of Orissa v. Dr. R.C. Chowala AIR 1966 Ori 192.

⁶⁶ Kailash Chand Gupta v. State 2005 CriLJ 2846.

of relying on the representation, such an act qualifies as misrepresentation.⁶⁷ The intention is presumed if the defendant wilfully used language calculated to induce a person in the circumstances of the case to act as the plaintiff did.⁶⁸ In the claim for damages arising out of a tort, the commission of the tortious act and the damage suffered form part of the cause of action.⁶⁹ In this context, the concept of limitation period comes into play. The Limitation Act, 1963 prescribes a three year period during which the right to sue for the tort of misrepresentation persists.⁷⁰

Applying this limitation to the case of Preity Zinta, it can be reasonably concluded that no action can lie against her. However, with respect to the liability of Amitabh Bachchan, the situation seems to be murkier. A market survey reveals that a packet of Maggi can be consumed for a period of nine months from the date of manufacture.⁷¹ Considering that cause of action is a “bundle of facts”,⁷² and that damage is a prerequisite in order to prove accrual of right to sue, it can be presumed that a cause of action against the representation made by Amitabh Bachchan could have arisen latest in 2014 (assuming that the last packet was bought in 2013).

⁶⁷ *JEB Fasteners v. Marks Bloom & Co.* [1983] 1 All ER 583.

⁶⁸ *Richardson v. Silvester* (1873) LR 9 QB 34.

⁶⁹ *P.K. Kalasami Nadar v. Alwar Chettiar & Ors.* AIR 1962 Mad. 44.

⁷⁰ Limitation Act, 1963, Schedule, Article 113, Part X.

⁷¹ *Nestle inches up after clarification on reports of recall of Maggi noodles*, BUSINESS STANDARD (May 22, 2015) available at http://www.business-standard.com/article/news-cm/nestle-india-inches-up-after-clarification-on-reports-of-recall-of-maggi-noodles-115052200449_1.html [last accessed on July 11, 2015].

⁷² *State Bank of India v. B.S. Agricultural Industries* JT 2009 (4) SC 191.

A claim against him will be barred by limitation only if it is brought in or after 2017. A pragmatic evaluation of this scenario will lead us to the understanding that such a claim is highly improbable but not legally impermissible. However, the approach which the Courts will adopt remains to be seen since the rules of limitation are not meant to destroy the rights of the parties but to ensure that they do not resort to deliberate tactics and seek their remedy promptly.⁷³

VI. CONCLUSION AND SUGGESTIONS

In the absence of a stringent law, commercialization has overhauled the rights of the consumers. For instance, popular actor Govinda was questioned by the Food and Drugs Administration in relation to his endorsement of a herbal oil Sandhi Sudha Plus which was violative of the provisions of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955. In his reply, Govinda pleaded ignorance of the law.⁷⁴ Similar accusations were made against Genelia D'Souza⁷⁵ and Mithun Chakroborthy⁷⁶ who were brand ambassadors for real estate companies which consequently embezzled the investor funds. Both of them refuted the charges of collusion.

Regardless of the veracity of the defense, these incidents are reflective of the reluctant attitude of endorsers towards bearing social responsibility for

⁷³ State of Jammu and Kashmir v. Ghulam Rasool Rather AIR 1989 SC 2125.

⁷⁴ *Govinda in legal trouble over misleading ad*, HINDUSTAN TIMES (Aug. 23, 2012) available at <http://www.hindustantimes.com/tabloid/govinda-in-legal-trouble-over-misleading-ad/article1-918139.aspx> [last accessed on July 11, 2015].

⁷⁵ Bharathi Pradhan, *Look before you endorse*, THE TELEGRAPH (Mar. 25, 2012).

⁷⁶ Mr. Sajjan Khaitan & Ors. v. Mr. Sanjoy Das & Ors. Case No. 16 of 2011.

their actions. There is a need to enforce the Hohfeldian idea of correlativity of rights and duties.⁷⁷ Considering that the personality rights of celebrities have been recognized in Indian jurisprudence⁷⁸, it is only fair that such rights be accompanied by an affirmative duty towards the public. This duty can be manifested in the form of a liability in case of non-compliance. As discussed above, an endorser cannot be made liable under COPRA. On the other hand, though the FSSA does not qualify the defendant who can be made liable, its applicability is restricted to food items.

While prima facie it may seem that the problem exists due to a lack of binding advertising norms, a deeper analysis reveals that most advertisers capitalize on the loopholes in the related legislations, thereby taking actions which are not contrary to law per se but defeat the spirit of the law. Hence, introduction of liability alone will not rectify the systemic failure. For instance, Cadbury advertises Bournvita as a drink which restores the vitamins which are lost in the process of boiling milk.

It presumes that the pasteurized milk is stored at the suitable temperature till the point of usage. However, the law mandates the storage of the milk at that temperature only till the milk is stored in the dairy; leaving the quality of milk during transportation unregulated.⁷⁹ In such a situation, Bournvita cannot substitute for the nutritional value that is lost; thereby

⁷⁷ Arthur Corbin, *Rights and Duties*, YALE LAW SCHOOL FACULTY SCHOLARSHIP (1924).

⁷⁸ ICC Development (International) Ltd. v. Arvee Enterprises 2003 VII AD (Delhi) 405.

⁷⁹ Jyotsna Singh, *Celebrities liable for commercials*, DOWN TO EARTH (Feb. 14, 2014) available at <http://live.downtoearth.org.in/news/celebrities-liable-for-commercials-43523> [last accessed on July 11, 2015].

making the claims of the advertisement baseless. We believe that the following recommendations would be a step in the right direction to tackle the aforementioned problems:

A. Expansion of the Definition of “trader” under COPRA

Section 2(1)(q) should be amended to include advertising agencies and endorsers. This step will serve two purposes: (a) clear identification of culpability of celebrities and (b) extending the scope of this liability across all products. However, COPRA should be suitably amended to make the liability of the endorser joint and several. Emulating the Chinese model, we believe that while ensuring that there is no deflection of blame from the manufacturer, the consumer at the same time should not be denied the right to restitution by the celebrity.

Such a proposal had also been discussed by the Sub-Committee set up by the Central Consumer Protection Council under the Chairmanship of K.V.Thomas.⁸⁰ The standard of culpability in order to evaluate the celebrity’s conduct should be imported from the USA. The celebrity should be held liable in cases where he/she has knowledge of the defect, or has been recklessly indifferent to it. Further, there must be a reversal of the burden of proof,⁸¹ thereby presuming knowledge on part of the endorser and placing a corresponding burden on him/her to disprove it.

⁸⁰ Agenda for the 28th Meeting of the CCPC (Feb. 2014) available at consumeraffairs.nic.in/consumer/writereaddata/Agenda.pdf [last accessed on July 11, 2015].

⁸¹ Indian Evidence Act, 1872, Section 102.

The Consumer Protection Bill, 2015 which was introduced in the Lok Sabha on August 10, 2015 is a positive step in this direction. The Bill seeks to establish the Central Consumer Protection Authority that is tasked with inquiring and investigating into consumer complaints, issue directions and impose penalties.⁸² Commenting on the reforms that the Bill seeks to usher, the Parliamentary Standing Committee on Food, Consumer Affairs and Public Distribution (Headed by MP JC Divakar Reddy) in its report, submitted on April 26, 2016, stressed that the misrepresentation of a product especially a food product should be taken very seriously considering the influence of celebrities and high net-worth individuals or companies.⁸³

The Committee, assisted by the FSSAI and the Health Ministry, recommended that a for first time offence of misleading advertisement, the offender may be penalized with either a fine of Rs 10 lakhs or imprisonment up to two years or both; for second time offence, a fine of Rs 50 lakhs and imprisonment of five years. This has been encapsulated in Section 17(2) of the Consumer Protection Bill 2015 which imposes a penalty on all persons who were party to the publication of the misleading advertisements, thereby ensuring that celebrity endorsers are within the reach of the law.

B. Increasing Awareness about the Different Remedies Available to the Endorser

⁸² Consumer Protection Bill 2015, Section 11.

⁸³ *Parliamentary panel suggests fine or jail for celebrities for misleading ads*, THE INDIAN EXPRESS (Apr. 26, 2016).

While considering the culpability of celebrity endorsers, the formulation of a legal redressal mechanism to accommodate the grievances of celebrities against the indiscriminate actions of the advertisers and manufacturers is equally important. The rationale for introducing this concept is to create an amicable environment where the interests of all stakeholders are accommodated without restricting the legal avenues for the consumer. The principle of restitution can be applied in situations where the consumer has directly proceeded against the celebrity for the misleading advertisement without the latter having any knowledge of the falsity of the representation.

In the USA, a majority of the endorsement contracts contain clearly demarcated rights of indemnification to deal with such situations.⁸⁴ Aside from the contractual remedies, the endorser can claim damages for the tort of misrepresentation. A manufacturer is equally bound by the duty of full disclosure towards the celebrity with regards to the product and hence legal costs or amounts paid off as compensation are capable of being indemnified.⁸⁵

There can be situations wherein there is no contract between the endorser and the manufacturer/advertiser, with the advertising agency being the intermediary. In such situations, the celebrity can file for damages against the agency which in turn can recover the same from the manufacturer. It is suggested that a homogenous standard for celebrity endorsement contracts be

⁸⁴ Kertz, *supra* note 5.

⁸⁵ *Swiss Marien Services SAA v. Gupta Coal India Pvt. Ltd.* [2015] EWHC 265.

adopted which clearly delineates the rights and liabilities of the manufacturers/advertisers and the endorser.

C. Ensuring Greater Transparency in Advertising

In order to prevent the advertisers from taking undue advantage of the discrepancies of the law, no claim regarding the efficacy of the product should be permitted to be dependent on the existence of a circumstance which is practically unfeasible. This regulation shall deter claims like the ones made by Bournvita. Further, advertisements should not be allowed to use the disclaimer of “conditions apply”. Putting a greater burden on the manufacturers/advertisers will be in line with the publicity rights of the celebrities and the recommendations of the Seminar on Law and the Consumer, 1980 which argued for greater responsibility at the behest of the media houses⁸⁶.

This need to inculcate advertising ethics among the advertisers can be tackled either by creating advertising codes for each media house (as is the case with Doordarshan⁸⁷) or making membership of the ASCI mandatory for advertisers. The Department of Consumer Affairs has also suggested that the ASCI be conferred with greater powers to issue corrective advertisements under the Consumer Protection Bill, 2015.⁸⁸

⁸⁶ V.B. ERADI, CONSUMER PROTECTION JURISPRUDENCE 234 (1st edn, Lexis Nexis Publishers, 2004).

⁸⁷ Code for Commercial Advertising on Doordarshan, 1995.

⁸⁸ Standing Committee on Food, Consumer Affairs and Public Distribution, Ninth report on the Consumer Protection Bill, 2015.

In the recent past, the Indian milieu has become more receptive to the idea of increasing transparency in the public fora. Consequently, laws, now donning a protective gear, are being tilted in the favour of the common man. Hence, we believe that the time is ripe for introducing social liability of the celebrities for their involvement in misleading advertisements.