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Advertisements as a Medium of Expression

Keenu Goel

Research Scholar, Kurukshetra University Kurukshetra

Abstract: **How far are advertisements protected under Art. 19 (1) (a)\ The Supreme Court has considered this question in *Hamdrad Dawakhana v Union of India* Parliament enacted an Act with a view to control advertisements of drugs in certain cases. The Act was challenged on the ground that restriction on advertisements was a direct abridgment of the freedom of expression. The Court ruled that the predominant object of the Act was not merely to curb advertisements of fending against decency or morality, but also to prevent self-medication by prohibiting instruments which might be used to advocate or spread the evil. The Court stated that an advertisement, no doubt, is a form of speech, but its true character is to be determined by the object which it seeks to promote. It may amount to an expression of ideas and propagation of human thought and thus, would fall within the scope of Art. 19 (1) (a). But a commercial advertisement having an element of trade and commerce and promoting business has an element of trade and commerce, and it no longer falls within the concept of freedom of speech for its object is not to propagate any ideas – social political or economic or to further literature or human thought.**

Keywords: **Advertisement, Impact**

1. Introduction :

An advertisement promoting drugs and commodities, the sale of which is not in public interest, could not be regarded as propagating any idea and, as such, could not claim the protection of Art. 19 (1) (a).

An advertisement meant to further business falls within the concept of trade or commerce. A commercial advertisement advertising an individual's business cannot be regarded as a part of freedom of speech.

But the Supreme Court has modified its view expressed in Hamdard Dawakhana somewhat in later cases. In Sakal[1] and Bennett Coleman,[2] the Supreme Court has dilated upon the great significance of advertisement revenue for the economy of newspapers. In *Indian Express Newspapers*,[3] differing from Hamdard Dawakhana ruling, the Court has observed: "We are of the view that all commercial advertisements cannot be denied the protection of Art. 19 (1) (a) of the Constitution merely because they are issued by business men". Advertising pays large portion of the costs of supplying the public with newspapers. "For a democratic press the advertising "subsidy" is crucial". With the curtailment in advertisements, the price of newspaper will be forced up and this will adversely affect its circulation and this will be a direct interference with the right of freedom of speech and expression guaranteed under Art. 19(1)(a).

Reading Hamdard Dawakhana and Indian Express together, the Supreme Court has concluded in *Tata Press*[4] that "commercial speech" cannot be denied the protection of Art.19 (1)(a) merely because the same is issued by businessmen. "Commercial speech" is a part of freedom of speech guaranteed under Art. 19 (1) (a). The public at large has a right to receive the "commercial speech". Art 19 (1) (a) protects the rights of an individual "to listen, read and receive" the "commercial speech". The protection of Art. 19 (1) (a) is available both to the speaker as well as the recipient of the speech.

Advertising is a 'commercial speech' which has two facets:

(1) advertising which is no more than a commercial transaction, nonetheless, disseminates information regarding the product advertised. Public at large stands benefited by the information made available through advertisement. In a democratic economy, free flow of commercial information is indispensable. Therefore, any curtailment of advertisement would affect the Fundamental Right under Art. 19 (1) (a) on the aspects of propagation, publication and circulation.

(2) The public at large has a right to receive commercial information. Art. 19 (1) (a) protects the right of an individual to listen, read and receive the said speech. The protection of Art.19 (1) (a) is available to the speaker as well as the recipient of the speech.

In Tata, the Supreme Court accepted as valid the printing of yellow pages by the Tata Press. Printing of a directory of telephone subscribers is to be done exclusively by the Telephone Department as a part of its service to the telephone subscribers. But yellow pages only contain commercial advertisements and Art. 19 (1) (a) guarantee freedom to publish the same.

Reference may be made here to a few foreign cases having a bearing on the freedom of the press.

In *New York Times v Sullivan*,[5] the facts were as follows: In 1960, the New York times carried a full page paid advertisement sponsored by the 'Committee to Defend Martin Luther King and the Struggle for Freedom in the South', which asserted or implied that law enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr. King and other civil rights demonstrators on various occasions. The respondent, who was the elected Police Commissioner of Montgomery, brought on action for libel

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1 Sakal Papers.

2 Bennett Coleman.

3 AIR 1986 SC 515; (1985) 1 SCC 641.

4 Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., AIR 1995 SC 2438, 2446; (1995) 5 SCC 139.

5 (1964) 376 US 254.

against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate.

The State Court awarded damages against the newspaper, but the U.S. Supreme Court reversed. Brennan, J., stated:

> *"Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving the truth on the speaker ..... A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to ..... "self-censorship". Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred... Under such a rule, would be critics of oficial conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expenses of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." .... The rule thus dampens the vigor and limits the variety of public debate. If is inconsistent with the First and Fourteenth Amendment.*

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard to whether it was false or not..."

In *Derbyshire Country Council V. Times Newspapers Ltd.*[6] the House of Lords ruled that a local authority could not sue the press for libel. The Lords held that there is no public interest in allowing government institutions to sue for liable; it is "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech."

In *Leonard Hector V. Att.Gen. of Antiqua and Berbuda*,[7] the Privy Council has observed:

> *"In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."*

2. Discussion :

The question is how far the principles stated in the above cases are applicable in India. The Supreme Court has answered this question as follows:[8]

"So far as the freedom of press is concerned, if flows from the freedom of speech and expression guaranteed by Article 19 (1) (a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after commencement of the constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of Torts providing for damages for invasion of the right to privacy and defamation and section 499/500, I.P.C. are the existing laws saved under clause (2). But what is called for today – in the present times – is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding – and in the process becoming more inquisitive. Our system of government demands – as do the systems of Government of the United States of America and United Kingdom – constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our constitution is not identical

6 (1993) 2 WLR 449.

7 (1990) 2 AC 312.

8 R. Rajagopal v State of Tamil Nadu, AIR 1995 SC 264 : (1994) 6 SCC 632.

though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system."

3. Conclusion :

One principles which the Court did lay down is that the State or its officers cannot impose any prior restraint or prohibition on any publication because they apprehend that they may be defamed. Their remedy, if any, would arise only after the publication.

