

CENTRAL CONSUMER PROTECTION AUTHORITY
Room No 365, Krishi Bhawan, New Delhi - 110001

F.No. CCPA-2/45/2023-CCPA [E-31936]

CORAM:

Smt. Nidhi Khare, Chief Commissioner, CCPA

Shri Anupam Mishra, Commissioner, CCPA

Appearance on behalf of Indira IVF and Hospitals Pvt. Ltd.

Shri Yogesh Naidu, Advocate

Date: 18.10.2024

ORDER

1. This is a suo-moto case taken up by the Central Consumer Protection Authority (hereinafter referred as CCPA) established under section 10 of the Consumer Protection Act 2019, against Indira IVF and Hospitals Pvt. Ltd. (hereinafter referred as opposite party) on the issue of a misleading advertisement using unfair trade practice (as envisaged under the Consumer Protection Act 2019) through a video in which the opposite party endorsed "*free infertility consultation through the portrayal of a model attired in a white coat and stethoscope*" (hereinafter referred to as the impugned advertisement). Such representation is likely to mislead the common man into believing that the model is a qualified doctor.
2. Accordingly, the CCPA took cognizance of the matter and conducted a preliminary inquiry to examine the veracity of the visual representations and assertions in the impugned advertisement by the Opposite Party. The preliminary inquiry report indicated that the impugned advertisement was published and available on the official YouTube channel namely Indira IVF of opposite party under the video title "Indira IVF – Fertility Treatment" on November 25, 2021. As of June 16, 2023, the video (<https://www.youtube.com/watch?v=sGbqJK6z1LE>) had garnered a total of 4,70,197 views. It is observed that no documentation was provided in the description section of the video to substantiate the claims made in the impugned advertisement.
3. Further, it was observed that the opposing party has engaged in false representation in impugned advertisement by portraying a model as a doctor. Furthermore, the impugned advertisement promotes the services of Indira IVF through a persistent pop-up banner prominently displaying the name "Indira IVF". This display signifies a deliberate intent to convey both express and implied representations, designed to entice and mislead consumers, thereby constitutes violation u/s 2(28) of the Consumer Protection Act, 2019 under Misleading advertisement.

4. Inter-alia, Regulation 6.1.1 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 stipulates that soliciting of patients directly or indirectly, by a physician, by a group of physicians or by institutions or organizations is unethical.... Further, Regulation 7.19 states that a Physician shall not use touts or agents for procuring patients. Therefore, in the preliminary inquiry report prima facie it construed as a fit case of misleading advertisement and unfair trade practice that was likely to adversely impact the consumers as a class.

5. In light of the findings of the preliminary inquiry report, a notice dated 21.06.2023 was issued to the Opposite Party, requiring a written response regarding the representation of the model in the attire of a doctor. The Notice also requested clarification concerning the claims in statistics cited- that one in every six couples in India is suffering infertility, in the impugned advertisement, along with supporting documentation, the credentials of the model, and any agreements between Indira IVF and the model featured in the video.

6. In response to the above Notice, a reply dated 05.07.2023 was received from opposite party, wherein, following submission were made:-

- i. The YouTube video is characterized as an awareness film and the submission further states that Indira IVF being one of the oldest and most experienced clinics, asserts its understanding of infertility from medical, technical, psychological, and social perspectives.
- ii. Every statement made in the awareness film intends to aware the masses and is backed either by statistical data, medical protocol or by factual matrix.
- iii. Inter-alia, it was highlighted that approximately 70% of the population resides in rural areas doesn't have primary healthcare facilities. Consequently, the awareness film aims to destigmatize infertility by citing statistics indicating that one in every six couples in India is suffering infertility.
- iv. The model appeared, in the last part of the video utter the name of Indira IVF followed by infertility and test tube baby center to ensure that for any infertility issue test tube baby centers like Indira IVF can be approached.
- v. The awareness film does not make any claims regarding the standard quality or grade of the service. Hence, it refuted the allegations of misleading advertisement and unfair trade practice.
- vi. Pertinently, the definition of "Service" u/s 2 (42) of the Consumer Protection Act, 2019 excludes services which are free of charge. Therefore, the content of the awareness film cannot be contemplated as misleading advertisement or unfair trade practice which deals with the product or service.
- vii. The statement of free infertility consultation in the awareness film doesn't appeal to avail service of Indira IVF.

- viii. The awareness film is in conformity with the clause 11 of the Guidelines for Prevention of Misleading Advertisement and Endorsement of Misleading Advertisement 2022 by providing a clean, prominent and legible disclaimer that the model is used for illustrative purpose. Inter-alia, the opposite party submitted it's Agreement with the producer of video.

7. The reply of the opposite party has been carefully examined by CCPA. It was observed that the opposite party did not submit any documents for substantiation of their impugned advertisement. Therefore, it is clear that a person of ordinary prudence could be easily misled by the Opposite Party's deceptive visual representations and claims. The following factors are worth noting:

- i. Firstly, the impugned advertisement represented a model as a Doctor.
- ii. Secondly, it asserted that 70% of the population resides in rural areas lacks primary healthcare facilities and that one in every six couples in India faces infertility; however, no market survey or supporting documentation was provided to substantiate these claims.
- iii. Thirdly, the Representation and Warranties clause of the Agreement indicates that the producer (the video developer) engages skilled and talented actors and personnel to execute the shoot in accordance with the script provided by the Client (the Opposite Party) Hence the opposite party deliberately portrayed model as doctor.
- iv. Fourthly, the production scope of the impugned advertisement encompasses a total of 18 videos, specifically comprising three videos in each of the following languages: Hindi, Marathi, and Kannada. Each language group includes videos with two different durations: three videos of 60 seconds each and three videos of 30 seconds each. Therefore, advertisement has a wider reach.

In light of the above, CCPA finds that there exists a prima facie case and the submissions made by the opposite party cannot be considered a valid defense in this matter.

8. Subsequently, vide letter dated 05.02.2024, CCPA forwarded the matter to DG (Investigation), in order to investigate the matter.

9. In the investigation report dated 07.06.2024 received from DG (Investigation) the following findings has been submitted:

- i. Based on the documents and responses submitted, Indira IVF and Hospital Pvt. Ltd. has provided documentation supporting the claim in the video that one in six couples suffer from infertility. However, no such source material or evidence underpinning the cited statistics was provided to consumers in the video.

- ii. The very fact that advertisers are portraying celebrities/models in white coats with/ without stethoscopes knowing that it would lead the common man to believe that the character is one of a doctor and therefore trust the endorsement by the actor portraying the role, may be construed as an 'unfair trade practice'.
- iii. Also, it should be noted that as Doctors themselves are barred from advertising, resorting to usage of characters/actors portraying the role of doctors, misleads the unsuspecting consumer by implication. Such advertisements misleads consumers to believe that the products are genuinely endorsed by the medical fraternity.
- iv. Furthermore, based on the agreement for creation of impugned advertisement it can also be inferred that Indira IVF intended to profit from the awareness film, as evidenced by its substantial investment of ₹. 8.30,000/- Lakhs (INR Eight Lakhs Thirty Thousand Only), plus GST, in the production of the film.
- v. Thus, endorsing services by portraying of a model as a doctor is misleading to the consumers and appears to be in violation of Section 28(ii), (iii) under Consumer Protection Act, 2019.

10. Central Authority (CCPA) vide letter dated 10.07.2024 shared the investigation report to the opposite party to furnish their comments on the investigation report at the earliest and latest by 16.07.2024. A opportunity was also provided by a hearing on 18.07.2024.

11. Vide email dated 16.07.2024 Shri Dhananjay Sathe, Head – Legal, representative of the opposite party submitted the following reply:

- i. It has been emphasized that a substantial material including peer-reviewed studies and reports from international organizations, is available to address the complex issues pertaining to infertility.
- ii. The awareness-raising film, produced and disseminated via social media platforms, was intended to empower afflicted couples by informing them of the availability of IVF treatment options within India for infertility in subtle manner.
- iii. There is no evidence of any false or misleading representation regarding the need for or usefulness of the services provided by Indira IVF. Furthermore, the message does not advertise or promote any specific service or product associated with Indira IVF.
- iv. Inter alia, there are other awareness advertising films that fail to properly disclose the source of the data referenced therein.
- v. The mere representation of a character incorporating certain elements commonly associated with a particular profession does not, in and of itself, constitute a violation of any statute.

- vi. It is pertinent to note that, as of 16.07.2024, there has been no complaint from any of the approximately six lakh viewers of the advertisement alleging that the advertisement misled them or conveyed any message other than what was intended.
- vii. The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, apply exclusively to registered medical practitioners and do not extend to hospitals or institutions such as Indira IVF.
- viii. In so far as the comments of the National Medical Commission (NMC) are concerned, Indira IVF is unable to provide a response, as the content of the Report appears to be incomplete. Indira IVF reserves the right to respond upon receipt of a complete copy of the Report.
- ix. It is learnt that the Investigating officer has secured comments of National Medical Commission but the same is not made available to Indira IVF. Additionally, investigator has not considered the data supplied to him. Therefore, the investigating report is equivocal and bereft of any legal or valid material to substantiate the conclusion.
- x. In view of the above, it was prayed that the show cause notice be discharged and the case be closed accordingly.

12. During the hearing held on 18.07.2024 Shri Yogesh Naidu, Advocate Bombay High Court appeared on behalf of the opposite party and made the following submissions:

- i. Indira IVF has made substantial contributions in India, ensuring that patients suffering from infertility no longer need to seek treatment abroad.
- ii. Further, it was emphasized that a key finding from the WHO report on "Infertility Prevalence Estimates 1990-2021" clearly indicates that infertility affects a significant proportion of the global population, with approximately one in six individuals experiencing infertility during their lifetime.
- iii. Emphasis was placed on the script of the impugned advertisement, specifically regarding its depiction of the conditions that contribute to infertility.
- iv. Further, it was stated that opposite party has included a disclaimer, which appears between the time stamps of 00:21 and 00:31 in the impugned advertisement.
- v. The opposite party requested for the comments received by investigating officer from National Medical Council.

13. Further, opposite party after the hearing vide email dated 18.07.2024 submitted the following reports for the consideration:

- i. Infertility Prevalence Estimates 1990-2021 by the World Health Organization (WHO): The report states addressing infertility is central to achieving Sustainable Development Goal (SDG) 3 – Ensure healthy lives and promote well-being for all at all ages – and SDG 5 – Achieve gender equality and empower all women and girls. Inter-alia, as per the Global infertility prevalence estimates approximately one in six people have experienced infertility at some stage in their lives, globally.
- ii. Infertility Burden Across Indian States: Insights from a Nationally Representative Study during 2019-2021: The findings of result showed that the prevalence of infertility is 18.7 per 1,000 women among those married for at least five years and currently in union. This prevalence increases as the duration of marriage decreases.
- iii. Prevalence of Primary Infertility and its Associated Risk Factors in Urban Population of Central India: A Community-Based Cross-Sectional Study: The prevalence rate of primary infertility in urban population of Central India was lower than reported trends of infertility from developing countries. Sound knowledge about various factors related to infertility can help health-care providers and policymakers to design and implement various policies.
- iv. ICMR Bulletin June-July 2000: It highlights the need and feasibility of providing assisted technologies for infertility management and assisted reproductive Technologies.
- v. Document on Male Infertility by the All India Institute of Medical Sciences (AIIMS): It states that 10-15% of all married couples face a problem in conceiving a child. Abnormalities in the male partner are responsible in about half of these cases. Infertility is defined as the male partner are responsible in about half of these cases and further the inability to conceive after one year of unprotected intercourse.

14. The Central Authority considered the submissions made by the opposite party during the hearing and vide email dated 01.08.2024 shared copy of letter of National Medical Council granting a time of 15 days to submit the comments, if any, on the comments received by investigating officer from National Medical Council. Accordingly, the matter was listed for issuance of Order based on the additional response of opposite party.

15. The opposite party vide email dated 06.08.2024 made the following additional written submissions:

- i. The opposite party challenges the analysis of the investigation officer pertaining to the inputs obtained from National Medical Council.

- ii. The opposing party underscored that the National Medical Council stated, "Though soliciting of patients whether directly or indirectly, by a physician, a group of physicians or by institutions or organizations is deemed unethical, the NMC is not empowered to govern the content of any advertisement".
- iii. The NMC has nowhere held that Indira IVF and Hospitals Pvt. Ltd. has engaged in any activity of soliciting of patients directly or indirectly.
- iv. The opposite party does have a disclaimer reading "The model is being used for illustrative purpose only". From time stamp 00:21 to 00:31 seconds.
- v. In view of above circumstances, the inputs from the NMC unequivocally refute the two charges reiterated in Regulations 6.1.1 and 7.19 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.
- vi. In consideration of the foregoing submissions, it is submitted that the Hon'ble CCPA be requested to discharge the Notice and close the case accordingly.

15. The reply of the opposite party has been carefully considered. CCPA understands that the opposite party seeks to invoke a defense that a disclaimer was displayed for a duration of ten seconds (from time stamp 00:21 seconds to 00:31 seconds) within a sixty-second video, asserting that this adequately prevents misleading the consumers or viewers. However, after minutely going through the video CCPA finds that the disclaimer in question was difficult to perceive by an individual of ordinary eyesight. The 10 seconds disclaimer is too fleeting in a 60 seconds content to serve the intended purpose. Further, the opposite party has prominently given the banner and mobile number throughout the impugned advertisement. Thus inducing the patients to take up service of opposite party.

16. (a) Therefore, the presentation of a disclaimer not properly legible or if inconspicuous, significantly undermines the clinic's diligence to adequately inform consumers/viewers regarding the limitations, necessary precautions, and representations made in the advertisement. Such lack of clarity has the potential to deceive consumers, erode trust, and expose the clinic to legal liabilities. Thus, the opposite party cannot absolve itself of responsibility by merely claiming compliance with the guidelines established under the Consumer Protection Act, 2019 in a fleeting manner (*with few seconds disclaimer*).

(b) Even if (for the sake of clarity on the violation and without prejudice to the authority of CCPA to question) the impropriety of soliciting patients on ethical grounds is not questioned, even then the advertisement should have disclosed the details. The 10 seconds disclaimer is a deceptive device and comes under the swipe of unfair trade practice defined in section 2(47) of the Consumer Protection Act, 2019. The contention of the opposite party questioning the jurisdiction of National Medical Council would not be of much help as the concealment of information is too apparent to any ordinary prudent person.

17. (a) Section- 2(28) of the Consumer protection Act, 2019 defines “misleading advertisement” in relation to any product or service to mean an advertisement, which—

- i) falsely describes such product or service; or
- ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or
- iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or
- iv) deliberately conceals important information;

(b) Besides, u/s 2 (47) ‘unfair trade practice’ refers to the practice when for the objective of promoting the use or supply of any service, any person, adopts unfair or deceptive practice inter-alia any statement, whether orally or in writing or by visible representation including by means of electronic record which makes a false or misleading representation concerning the need for, or the usefulness of any service which they does not have.

(c) Inter-alia, under the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 refer in para 11(2) (e) that a Disclaimer in advertisement shall be so clear, prominent and legible as to make it clearly visible to a normally-sighted person reading the marketing communication once, from a reasonable distance and at a reasonable speed.

(d) In the present scheme of the consumer statute there are several provisions that entrust duties and responsibilities on the sellers. The thrust of the Consumer protection laws seek to enable the consumer to carry out due diligence and make informed choices. In this pursuit the statute has incorporated the role of seller as a partner in the due diligence. Therefore, with the enactment of the Consumer Protection Act, 2019, the doctrine of *Caveat Emptor* has evolved into *Caveat Venditor*. In this perspective, an advertisement is deemed valid and non-misleading when it comprises honest and truthful representations through statements or disclosures that are clear, prominent, and extremely hard to miss for viewers/consumers to notice and may also provide voice overs of disclaimer. Additionally, it must not mislead consumers by exaggerating the practical usefulness of the service or by making false representations regarding the service offered by the opposite party. Inter-alia, the opposite party has made visual representation in the impugned advertisement by showcasing image of doctor appears since beginning however hazy disclaimer appears from 21 second in the impugned advertisement. It is noted that if opposite party intended to aware the consumers in a truthful and honest manner it could have devised ways to make the disclaimer equally attention grabbing like the content.

18. From a bare reading of the above provisions of the Act, it is clear that any advertisement should:

- i. contain Truthful & honest representation of facts,
- ii. Not indulge in unfair Trade practice as defined in Section 2(47) of the Act. It should be free from false representation that the goods/services are of particular standard, quality [(section 2(47) (a)] and should not make false or misleading representation concerning the need for or usefulness of any goods or services (section 2(47) (f) of Consumer Protection Act with respect to unfair trade practice.
- iii. Disclose important information in such a manner that they are clear, prominent and extremely hard to miss for viewers/consumers so as to not conceal important information.

19. (a) After due considerations of the submissions of the opposite party during hearings, written submissions and the investigation report CCPA concludes that information on the representative nature of the characters in the advertisement amounts to false description of the service. The inadequate and fleeting nature of disclaimer of 10 seconds is an unfair trade practice and also a deliberate attempt to conceal information. In light of the above discussions and the findings and conclusions thereon, CCPA is satisfied that the opposite party has engaged in unfair trade practice as CCPA finds that there is sufficient evidence to suggest violation through unfair trade practice as envisaged in section 20 of the Act.

20. In view of the above, the Central Authority hereby issues the following directions:-

- i. To provide a clear and prominent disclaimer, inclusive of voice-overs, in its videos, such that the disclaimer is both visibly discernible to a person of ordinary vision and audibly perceivable to a person with normal hearing capacity on all platforms with immediate effect have such advertisement.
- ii. The opposite party shall submit a compliance report to CCPA on the above directions within 15 days from the date of this Order.

The above order and directions are passed in exercise of the powers conferred upon CCPA under section 10, 20 of the Consumer Protection Act 2019.


(Nidhi Khare)
Chief Commissioner


(Anupam Mishra)
Commissioner

