

TRENDS OF JUDICIAL PRONOUNCEMENTS REGARDING COMPARATIVE ADVERTISING IN INDIA

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ABSTRACT: *Comparative advertising came into existence to increase consumer awareness and allow consumer to make a judicial selection from plethora of choices, however under market pressures it has engaged in unhealthy practices of product disparagement and infringement of trademarks. Consequently, in the last few decades, there have been spates of litigations in this regard. As there have been a proliferation in the number of cases in the courts regarding this matter and there have been interestingly such conflicting judgments concerning the issue in the recent past that the topic seemed quite fascinating and motivating to ponder and analyze at. Here the author has listed cases of prominence in India. The decisions of the Courts indicate that the judiciary tends to accept the global trend of advertising regulation, which allows comparative advertising as a way of ensuring free competition for all market players, provided that the information presented is objective and verifiable, and does not damage the integrity and reputation of the compared trademark. It is vital that the court issues precedents and guidance in order to harmonize the issue at national level.*

Keywords: *Comparative Advertising, Product disparagement, Trademark infringement, judicial pronouncement*

1. Introduction

By Comparative advertising the market players want to ensure that the consumer receives the message that their product is superior and more sought after. However, in order to grab the attention of the consumer towards its brand and to hold their market share a number of firms have started taking bolder stance by show their rival / competitors product in a poor light and denigrating them. Comparative advertising, when utilised in a competitive context, can be unlawful either due to infringement of the registered trade mark or by unlawful competition (deceptive, misleading or disparaging) at common law. In the modern world, the emergence of Intellectual property rights have been to safeguard and grant exclusive right to the Intellect product like patents, designs, trademarks, copyright etc. Out of these Intellectual rights, the law that concerns competitive aspects of advertising are mainly the laws of trademarks and the general laws pertaining to unfair competition. The research work undertaken in the present paper lies within the broad scope of Intellectual Property Laws pertaining to the aspects of infringement of trademarks and product disparagement in the realm of comparative advertising.

The study in this direction in India reveals that no statutory mechanism is consecrated completely to regulate the dissemination of misleading or disparaging information or material through comparative advertising in India and the onus of regulating such advertising is taken up by a wide array of governmental authorities and tribunals. Primarily, matters related to deceptive and misleading trade practices including advertising were adjudicated upon by the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act'). Subsequently, this Act got repealed, yet another statute §66 of the Competition Act, 1986 provides the power to enquire into complaints of unfair trade practices. In context of 'comparative advertising' the parties are firms (whose products are endorsed by the advertisements), and they do not come in the ambit of 'consumers' to approach the consumer forum. Section 29(8) of Trademark Act 1999 enunciates situations, where use of another's mark in advertising can amount to infringement, if such use does not comply with the conditions laid down under the section. At the same time, Section 30(1) makes such use, an exception, if it is in accordance with the conditions provided under this section. Nevertheless, the judicial pronouncements are playing an important role to determine the extent of disparagement and infringement of trademarks in comparative advertising.

2. Court Jurisdiction of Lawsuits in India in a nutshell

In this work, the author has therefore tried to understand the current situation and determine the extent of the judicial approaches towards dealing with unfair use of comparative advertising. Thus here the important judicial pronouncements that lay the foundation of legal mechanism for issues related to comparative advertising in this country are listed.

S.No	Case Law	Verdict	Reasoning
1	Reckitt & Colman of India Ltd. v. Kiwi T.T.K. (Cherry Blossom vs. KIWI Shoe Polish Case)	Case of disparagement	Can make superior claims for his own goods but cannot claim another's good in poor light
2	Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr.(1999) (Ujala vs Robin Blue Case)	Case of disparagement and Infringement of trademarks	Enunciated the five principles
3	Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr. (2003) (Pepsi vs. Cocacola)	Neither case of disparagement nor Infringement of trademarks	No disparagement as it was mere puffing and poking fun and not dishonest. No infringement of trademarks as the use of

			marks was not in course of their trade and was to make the viewers identify their competitor. It did not deceive or mislead the consumers.
4	Dabur India Limited v. Emami Limited (2004) (Dabur vs. Emami Case)	Case of generic disparagement	Although no direct mention of product yet constituted Generic Disparagement
5	Dabur India Ltd. v/s. Colgate Palmolive India Limited. (2004) (Dabur vs. Colgate)	Case of generic disparagement	Cannot claim all are bad and cannot disparage a entire class or genre of a product.
6	Dabur India Ltd.v. Wipro Ltd., Bangalore, (2006) (Dabur v/s Wipro)	Not a case of disparagement	One can say that his product is better than the competitor's.
7	GlaxoSmithKline Consumer Health Care Limited v. Heinz India Private Limited & Ors (2007) (Horlicks v/s Complian Case)	Case of disparagement	Crossed the tolerable limits of puffery.
8	Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd (2009)	case of disparagement	Claims of the advertisement were misleading. Court gave preference to consumer interests above untrue puffery.
9	M Balasundaram vs Jyothi Laboratories Ltd., (Regaul v/s Ujala)	Not a case of disparagement	a mere claim to superiority in the quality of one's product' by itself is not sufficient to attract clause (x)
10	Procter & Gamble Home Products v. Hindustan Unilever Ltd,(2010) (Rin v/s Tide)	Case of explicit denigration	Puffery is measurable
11	Reckit Benckiser (India) Limited Vs. Naga Limited and Ors.(2003) (Dettol v/s rakshak Soap)	No case of disparagement and trademark infringement	An act to correct the public perception regarding competitors product, commits no legality
12	(Colgate v/s Anchor) Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd. (2010) (Odomas v/s Good Knight)	Considered case of puffery and not disparagement	Every advertiser would highlight the positive points of his product
13	Colgate Palmolive Co. Limited. vs Vicco Laboratories (1997) (Colgate v/s Vicco Case)	Case of disparagement	Content was misleading one
14	Hindustan Lever Limited vs Colgate Palmolive (New Pepsodent v/s Colgate Case)	No case of disparagement and trademark infringement	Every advertiser can inform the public regarding the superiority its product possesses above that of his competitor.
15	Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd 2006 (Mortein vs. Hit)	No case of generic disparagement	Every advertiser can boast of its technological superiority in comparison to competitor's product.
16	Godrej Soaps Ltd. Vs Hygienic Research institute (Godrej v.Vasmo Hair dye)	No case of disparagement	Judgment by MRTP Commission. Held that for disparagement to be considered the competitor's product must be identified

3. Analysis of statutory framework and Judicial pronouncements

From the study of statutory framework and judicial pronouncements' on Comparative Advertising involving use of a competitor's trademark and product disparagement following inferences are summarized as below:

- a. Section 29 (8) and Section 30 (1) of The Trademarks Act, 1999, primarily permits comparative advertising with limitations to the concept of unfair trade practice. Unfair trade Practices were covered under MRTP Act 1969 which stands repealed now. Under the Consumer Protection Act, 1986 the consumers can apply but here the sufferers are the firms which do not fall into the ambit of consumers to get an advantage to approach the consumer forum. The Trade-Mark law permits Comparative Advertising but doesn't allow product disparagement.
- b. Expressing the merits of competing products/services & using registered trademarks to identify them do not invoke legal action against it.
- c. Infringement is considered only when the use of the mark is not in accordance with honest practices.
- d. Statutory or other self regulatory codes of conduct do not provide sufficient and clear guideline to as to determine whether a practice is honest for the purposes of Section 29 (8) and Section 30 (1). The test of Honesty is objective and has to be gauged against as what is reasonable for the public of advertisements for the goods or services in use.
- e. The onus lies on the registered proprietor to prove that the factors indicated in the proviso to the section are applicable.
- f. The Act does not impose on the courts an obligation to try and enforce through the legislation a more puritanical standard than the general public would expect from an advertisement.

- g. The facts pertaining to “Correctness of Representation”, “Scientific and Technical Details”, “Assessing Loss of Business and Profits”, “Interim Injunction: Make or Break” are looked into to declare if advertisement was infringing or not and to decide on claims.
- h. Any advertisement which is misleading does not qualify to be honest as per proviso of Section 29(8) and Section 30(1).
- i. The courts have not encouraged a microscopic approach to the construction of an advertisement on a motion of interlocutory relief. The advertisement has been and ought to be considered as whole. A sensible viewer of the advertisement shall not embark upon the minute textual or frame per frame examination.
- j. The Indian law doesn't encourages firms to make exaggeration of facts beyond simple puffery thereby discouraging rivals from securing lasting benefits.
- k. Based on the decision taken up by Calcutta High Court in relation to the case Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr.(1999), it was clear that mere puffing of goods is not actionable unless it results in slandering or defaming the goods of the competitor. To allow two traders to puff the products in their advertisement without harming each other will finally leave the consumers helpless even if the producers have benefited. Only if one trader gets affected by the CA then only the falsity of the facts produced in the advert relating to the quality, price and the value of the product will get disclosed and the consumers would benefit.

4. Conclusion

The position of law in India in respect of disparaging advertisements of rival products is well settled. Although a tradesman is entitled to make an untrue declaration that his goods are the best, better than his competitors, and for that purpose can even compare the advantages of his goods over the goods of the others; he cannot say that his competitors' goods are bad. Further, regarding law on trademark infringement, the use of a proprietor's trademark in comparative advertising violates the first proprietor's intellectual property rights. But if a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action.

References:

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