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The Thin Line Between Comparative Advertisement and Product Disparagement


by

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INTRODUCTION

Advertising has evolved drastically in the last 20 years since every company is striving to leave an everlasting impression on the minds of consumers by creating a unique and positive influence on the buying decision of the consumer.¹ Advertisement is one of the easiest ways to reach the potential consumer on a mass scale and to provide relative information about their products. Comparative advertisement is a term used to describe advertisements where the goods and services of one trader are compared with the goods and services of another trader.² In EU directive 97/55/EC, comparative advertisement is defined as "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor".³ This form of advertisement benefits the consumers since it usually compares the price, quantity, etc., thus providing consumers the access to the merits and demerits of different products.⁴ Though, there are no specific provisions with respect to comparative advertisement and its scope, but considering the precedence set by different Courts in India, they allow it to extend to a limit where the trader is not delineating or disparaging the goods of the other trader. Non-adherence of such guidelines would make the trader liable for product disparagement.

The rationale behind comparative advertisement is to bring forth the attention of the consumers to their products/services by portraying them as better quality, quantity, pricing, etc. than that of their counterparts, consequently, also influencing the decision making of the consumer. Sometimes, such advertisement effects the buying choices of the consumers and works in favor of the company, which eventually helps them in cementing the


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position of the goods or services in the relevant market and thus, increasing the sales and net profit of the company.

Comparative advertisement can be broadly classified in two forms i.e. implicit and explicit. Implicit advertisements are those advertisements in which no direct mentioning or a reference has been made to the competitor but an illusion is created in the minds of the consumers that it refers to the goods/services of the competitor and such translucent reference is generally clear to the reasonable man. Whereas in an explicit comparative advertisement, a clear and specific comparison or reference is made to the goods/services provided by competitor.⁵ Further, there are two schools of thought dealing with the jurisprudence and justifications for comparative advertisement. First, that it is a positive practice which helps the consumer as it compares the goods or services intended for a particular purpose. Second, it hampers the brand value and reputation of the competitor in the said market taking advantage of the already established goodwill of the trader's goods or services in the market and

amongst the mind of the consumers.⁶

Comparative advertisement is generally in the form of puffery where the advertising company exaggerates the subjective quality of its product or services as compared to its competitors however it has to be regulated, if the facts so stated are untrue. The reason for such regulation is to protect consumers from any such misrepresentation and also to limit the unfair competition in the market. McCarthy says, "Puffing is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely upon and is not actionable under Section 43(a) [of Lanham Act, 15 U.S.C.]². In *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.*⁸ the Court observed, "It is well known law that merely puffing is not dishonest and mere poking fun at a competitor is a normal practice of comparative advertising and is acceptable in the market." If the advertisement is false, misleading, unfair or deceptive it cannot be granted protection under the provisions of Constitution and Trade Marks Act. Puffing is a superlative claim which an average consumer is not likely to take on its face value⁹, for example, X brand of shampoo claims to be the most effective anti-dandruff shampoo in the market. This always creates a room for consumers to decide and not be misled by any


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such information. It is actionable if the advertising goes more than a mere puffing and tends to denigrate the value of the rival's product by untrue and misleading statements. As High Court of Delhi stated in *Dabur India Ltd. v. Wipro Ltd.*, "[I]t is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to that of the defendant".¹⁰ There is a thin line drawn between the comparison and denigration. If this line is crossed, then it will amount to disparagement of their trademark. Comparative advertisement often leads to clash of legal and ethical principles between the two brands.¹¹ A consumer may look at a commercial from a particular point of view and come to a conclusion that one product is superior to the other, while another consumer may look at the same commercial from another point of view and come to a conclusion that one product is inferior to the other.¹²

DISPARAGEMENT OF PRODUCT

According to *Black's Law Dictionary* the word *disparagement* means "A statement about a competitor's goods which is untrue or misleading and is made to influence or tends to influence the public not to buy."¹³ Disparagement of goods is any injurious statement which discredits and detracts from the reputation of another's property, product or business.¹⁴ Comparative advertisement is often driven by Article 19(1)(a) of the Constitution, however one has to keep in mind that freedom of speech and expression does not allow defaming or denigrating the competitor's product through advertisement. Thus, one cannot disparage the product under the garb of freedom of expression provided by the statute.¹⁵ The guiding principles on the law of disparagement are:¹⁶

- i. An advertisement is a commercial speech protected by Article 19(1)(a) of the constitution.¹⁷
- ii. It must not be false, misleading, unfair or deceptive.

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iii. There may be some grey area but then these must not be taken as serious representation of fact but only as glorifying one's product.

In *Hindustan Unilever Ltd. v. Reckitt Benckiser (India) Ltd.*,¹⁸ the Court while determining whether a particular statement disparages or defames the product, held that it should be considered from a viewpoint of general and reasonable public rather than a specific class of people.¹⁹

STATUTORY PROVISIONS FOR COMPARATIVE ADVERTISING IN INDIA

Initially advertising was dealt under Monopolies and Restrictive Trade Practices Act, 1984 (MRTP Act) as it was termed under 'unfair trade practices'. Now, advertising is dealt under The Trade Marks Act, 1999. The Trade Marks Act came into existence after strict compliance with the TRIPS agreement, which provides for a favorable balance between rights of the trademark owner at one side and consumer's interest for informative advertising on the other.²⁰ Section 29(8) of the Trade Marks Act, 1999²¹ Act deals with infringement of the mark by different kinds of advertisement, whereas, Section 30(1) of the Trade Marks Act, 1999²² provides for defense, if it is done with honest practice by not taking an unfair advantage and not being detrimental to the reputation of the trade mark. In easier terms, it allows use of the trade mark by another if it is done under the ambit of Section 30(1).

The factors to be considered while framing the viewpoint for disparagement under Section 29(8) of the Act are- 'in accordance with honest practices' and 'is not such as to be detrimental to repute of the trademark.'²³ Thus, from this we can get a hold that 'intention' and 'manner' by which the advertisement is portrayed to the public is important while examining the disparagement factor in an advertisement. It is in affirmative that while comparing the product, the trader has the liberty to show that his products are better than that of the competitor but it should not be at the cost of being detriment to the reputation of the another's trademark.²⁴ Under the Consumer Protection Act, 1986, there has been an effective mechanism for

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consumer grievance for '*unfair trade practices*' as defined under Section 2(1)(r) of the Act. It fails to provide adequate relief to the competing seller as the Act only includes benefit of consumers and doesn't include manufacturers, sellers and service providers.²⁵ The only recourse for compensation and damages for the violation of their intellectual property rights through the alleged commercial or advertisement is left under the Common law and Trade Marks Act.²⁶

The Advertising Standards Council of India, 1985 (ASCI) also prescribes conditions under which comparative advertisement can be made. It is a non-statutory tribunal comprising an association of advertisers established in 1985.²⁷ Following are the basic guidelines for regulating advertising in best interest of the consumers-²⁸

- I. Honest Representations
- II. Non-Offensive to Public
- III. Against Harmful Products/Situations
- IV. Fair in Competition

One of the major drawbacks of the ASCI is the lack of effective control mechanism

of complaints since it is merely suggestive in nature and does not have a statutory authority for regulation of the advertising activities in India.²⁹ Perhaps, this is the main difference between Advertising Standards Authority (ASA) in Britain and ASCI in India that the former has the powers conferred to it to ensure the enforceability of their guidelines and directives. ASA is also a self-regulatory authority but what makes it different, is their agreement with newspaper to not contain any advertisement if it tends to breach their directives.³⁰ They can also refer cases to Director General of Fair Trading for getting a statutory injunction against the impugned advertisement.³¹ Also unlike the Indian Courts, the guidelines which allows for a certain

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extent of puffing statements made in UK have to be based on facts and be verifiable in nature.³²


However, in the United States of America, comparative advertisement is dealt by Federal Trade Commission ('FTC'), which is a federal agency acting in the interest of the consumers. FTC generally deals with matters having significant effect on the interest of the consumers and competition in the market. Power to investigate and prosecute against such an advertisement is granted under Section 41 of the Federal Trade Commission Act, 15 USC.³³ According to this Act, any information or practice which has a potential to mislead a reasonable consumer is termed to be deceptive under the Act. The very objective of the said act is to protect the rights and interests of the consumers along with maintaining a healthy and fair competition in the market. In circumstances where FTC offers inadequate damages to the competitor, there is an alternate remedy in the form of a recourse to the Court under Section 43(a)(1)(A) of the Lanham Trademark Act, 1946, which provides for civil action for "false or misleading representation of fact" in "commercial advertising or promotion" that "represents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities."³⁴

JUDICIAL PRECEDENCE

Landmark Cases Under the Mrtp Act

Under the MRTP Act, there were significant cases dealing with comparative advertisement, where-majorly the focus was to protect the interest of the rival company and curb the unfair trade practices. The landmark judgments in the same regard were the two *Reckitt & Colman cases*.³⁵

The *Reckitt & Colman of India Ltd. v. Kiwi TTK*³⁶ was one of the first case that evolved the provisions for comparative advertisement in India. Plaintiff and defendant were in business of liquid shoe polish where the plaintiff's product was branded under the name 'Cherry Blossom Premium Liquid Wax Polish' and defendants as KIWI shoe polish. In this case, the defendant aired a commercial in which bottle of defendant with the name

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'KIWI' written on its surface did not drip as against bottle of the other brand written as 'X' which dripped to prove the inferior quality of the product 'X'.³⁷ Brand X was held to be identifiable by a reasonable man since the plaintiffs had a unique red blob on its surface which was a unique thing with respect to recollection of plaintiff's product was

shown in the alleged advertisement. It was stated that "comparative advertisement is admissible provided, the same should not in any manner be intended to disparage or defame the product of the competitor."³⁸ The Court also went to state that the advertising company should not puff as to defame about the competitors' goods over his goods. The action may lie for defamation in this scenario. It was held in plaintiff's favour and restrained the defendant from publishing or circulating the impugned disparaging advertisement.

One of the major steps was taken by the Calcutta High Court in *Reckitt & Colman of India Ltd. v. M.P. Ramchandran*³⁹. The defendants and plaintiff were in the same line of business i.e. manufacturing of 'blue whitener' for clothes. The defendants issued an advertisement comparing their product with plaintiff's stating that their product is cheaper and far more effective. The Court laid down principles in the matter dealing with disparagement for helping the courts in reaching a conclusion for grant of injunctions:⁴⁰

- I. A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue;
- II. He can also say that my goods are better than his competitors', even though such statement is untrue;
- III. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others;
- IV. He, however, cannot while saying his goods are better than his competitors, say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible;
- V. If there is no defamation to the goods or to the manufacturer of such goods, no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is

also competent to grant an order of injunction restraining repetition of such defamation.

In 2003, there was a famous advertisement dispute going on between Pepsi and Coca Cola. After the famous advertisement of Pepsi stating the slogan 'Yeh Dil Mange More', Coca Cola came out with a little twist in the advertisement for which Pepsi filed complaint. The plaintiff in the present case filed for both disparagements of the trademark and copyright against the two advertisements of the defendants. One, the advertisement depicted PEPSI through a blurred veil, which was subtle enough for a reasonable man to distinguish the brand as Pepsi. They showed it as a 'bachhonwali drink' (drink for kids) while clearly making fun of Pepsi's slogan by twisting it to 'Yeh Dil Mange No More'. It was depicted to the viewer with the intention to convey the message that Pepsi is for children and they should prefer Thumps Up if they want to grow up.⁴¹ Delhi High Court was handling this infamous case known as the *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.* for trademark disparagement and copyright protection of a product.⁴² The Court using the principles laid down in earlier judgements⁴³, provided certain factors for deciding on the question of disparagement:⁴⁴

- (I) Intent of commercial

(ii) Manner of the commercial

(iii) Story line of the commercial and the message sought to be conveyed by the commercial.

This was in line with the ratio laid down by *Reckitt & Colman* cases. The Court focused on the 'manner of the commercial' and held this as a threshold for deciding on the issue of disparagement. Any statement that is derogative, ridiculing or condemning of the product of the competitor can be actionable in the court.⁴⁵ Further, it was stated that these commercials leave an indelible impression in the minds of the consumers/buyers. Further, if an advertisement is shown to denigrate the product, then there lies an actionable claim.

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The Court concluded that the advertisement was in nature of disparagement and stated that

*"Comparison is permissible so long it does not undervalue the product of the rival. In the commercials shown by respondent and as quoted above, children are made to understand that young people don't drink sweet Cola. It is not an indication of superiority in technology of respondent's drink but showing inferior quality of the appellant's product as if "PEPSI COLA" is not liked by the young people or that it is meant only for children, therefore, the choice of the Boy for Pepsi is said to be a wrong choice. By projecting so the respondent through the lead actor conveys in a sophisticated way that the product of the appellant is rubbish."*⁴⁶

The Court, also in first of its kind, allowed the Pepsi Advertising slogan 'Yeh Dil Maange More' to be granted copyright under the statute. Finally, the commercial was held to be in violation of copyright law of the plaintiff and not disparagement of their trade mark. It was reasoned that the advertisement was a literal imitation of the plaintiff's work with certain changes leading to be more in nature of a parody than denigration of the mark.⁴⁷ Injunction was granted to the effect that the defendant was refrained from showing the advertisement in their present form.

LANDMARK CASES UNDER THE TRADE MARK ACT, 1999

After the institution of The Trade Marks Act in 1999, one of the famous disparagement case that came before the Court was *Dabur India Ltd. v. Emami Ltd.*⁴⁸ in 2004. This case is significant for disparagement since the Court allowed injunction against the defendant even though there was no specific reference to plaintiff's product. The commercial declared that 'Garmion Mein Chyawanprash Bhool Jao, Himani Sona-Chandi Amritprash Khao'.⁴⁹ In English, it would read as follows- "Forget Chyawanprash in summers, eat Sona-Chandi Amritprash instead". The plaintiff submitted that defendant attempted to insinuate the product and there existed a malafide attempt to have a negative

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campaign towards the plaintiff's product that has a majority market share. The Court relied on the ratio⁵⁰ led in the *Reckitt & Colman* (1999)⁵¹ case and held that:

"In my considered opinion, even if there be no direct reference to the product of

the plaintiff and only a reference is made to the entire class of Chayawanprash in its generic sense, even in those circumstances disparagement is possible. There is insinuation against user of Chayawanprash during the summer months, in the advertisement in question, for Dabur Chayawanprash is also a Chayawanprash as against which disparagement is made."

The main issue which came with this ruling was that it allowed a generic disparagement for entire class of a product, in a way disallowing the person to make any statement for entire class of product which can be denigrating to the reputation. Here they referred 'Chayawanprash' for the whole class of the product and as we go towards the law for defamation, it clearly states that in an action for defamation, it should be shown that it is specific or individual in nature i.e. it must refer to the plaintiff.⁵² Thus, the Court made it very clear with the ruling that disparagement with respect to a generic class can be actionable. This creates confusion amongst the minds of the advertisers with respect to the extent they can go, considering a generic reference to a particular class can be troublesome in the Court of law. In the most recent judgement on disparagement between *Hindustan Unilever Ltd. v. Amul* (which is discussed in the end) pointed that⁵³:

"For a Plaintiff to establish a case of generic disparagement, it has to be in a position to demonstrate that either the class or the product reflected in the impugned advertisement is that of the Plaintiff or that the Plaintiff's product is synonymous or associated with the class, that any reference to a product in that class would evoke only the Plaintiff's product in the mind of the consumers."


The Court in *Procter & Gamble Home Products Ltd. v. Hindustan Unilever Ltd.*⁵⁴ clearly highlighted the issue of comparative advertisement by explaining defamation, puffery and denigration or the negative assertion through the advertisement. The respondent took the defense of the

laboratory report for the assertions made in the advertisement. The Court relied on certain factors for deciding on disparagement⁵⁵, few of them are listed below:

- I. The Advertising Code of ASCI incorporated therein permits comparative advertising in the interest of vigorous competition and public enlightenment. The only restrictions which are placed therein are that there should be no likelihood of the consumer being misled as a result of the comparison and the advertisement should not unfairly denigrate, attack or discredit other products directly or by implication. However, while assessing the said factors, the law of defamation would apply.
- II. To prevent a manufacturer/marketer of such goods from enlightening the consumer of these factors/considerations and if such product indeed has an edge over the competitors' product, from publicly claiming the same for the reason of the competitor suffering therefrom, would amount to curbing competition and would be an unreasonable fetter on the fundamental right to commercial speech.
- III. The right to protect own reputation, which is the genesis of the law of defamation, is not to be misunderstood as right to be not spoken against or right to be not criticised for own shortcomings.

Recently, a dispute arose between *Hindustan Unilever Limited (HUL) and Amul*⁵⁶, in an action for generic disparagement/slander of goods of the product category of dairy based desserts referred to as "Frozen Desserts". Amul has aired a commercial for

'frozen desserts' category claiming that only they use fresh milk in the preparation of the same and the other competitor use vanaspati oil for the same. HUL, the manufacturer of 'KWALITY WALLS' ice cream has contended that the commercial seeks to mislead the public by "*factually incorrect statements*" among the consumers.⁵⁷ Finally the single judge bench of the Bombay High Court passed a very extensive judgement and the order confirmed that the advertisement has caused disparagement of the HUL 'frozen desserts' and the products in general. Further, Amul has been restrained from airing the impugned judgement.⁵⁸

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CONCLUSION

Sections 29(8) and 30(1) of the Trade Marks Act have been provided to specifically deal with issues such as comparative advertisement. Various judicial pronouncements have allowed comparative advertisement provided they are not in the nature of disparaging the competitor's product. Though there are provisions with respect to comparative advertisement in India, one can truly feel the absence of a dedicated statutory mechanism for its effective regulation. There should be statutory body like Federal Trade Commission (USA) in India for proper screening and tackling of comparative advertisements. It should be embodied with powers of initial screening, investigation and to prosecute offenders for violating the guidelines and the principles set through the Courts in India. The Courts should be seen as the final recourse for settlement of such commercial issues where there is an express violation of law rather than their regular intervention for settlement of market rivalries between the competitors. Further, considering the consumer interest, the Courts in India are clearly missing the fact that 'puffing' can sometimes mislead the average consumers. Keeping in view the major objective of comparative advertisement i.e. helping the consumer by providing relevant information regarding the two products, it sometimes confuses people with respect to tenacity of the information claimed in the advertisement. It should be more informative in nature rather than attempting to denigrate the other products in the market. So, in a way the interest of consumers have been neglected by the Courts in India.⁵⁹

If all the guidelines and factors laid down in several judgements discussed in this paper are strictly adhered, companies and judiciary could easily work together to secure a perfect balance between fair trade practices and safeguarding the intellectual property at one side and the consumer rights on the other.

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¹⁰ *Dabur India Ltd v. Wipro Ltd*, 2006 SCC OnLine Del 391 : (2006) 32 PTC 677.

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¹³ Henry Campbell Black, *Black's Law Dictionary* (4th edn, West Publishing Co 1968) 556; *Edwin L Wiegand Co v. Harold E Trent Co*, 122 F 2d 920, 924 (3rd Cir 1941).

¹⁴ *Gamer Bryan*, *Black's Law Dictionary* (7th edn, West Group, Minnesota 1999).

¹⁵ *Dabur India Ltd* (n 143).

¹⁶ Madhavi Goradia Divan, *Facets of Media Law* (2nd edn, Eastern Book Company 2013) 392.

¹⁷ *Tata Press Ltd v. MTNL*, (1995) 5 SCC 139 : AIR 1995 SC 2438.

¹⁸ *Hindustan Unilever Ltd v. Reckitt Benckiser (India) Ltd*, 2014 SCC OnLine Del 490.

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²⁰ Swaraj Barooah (n 144) 117.

²¹ The Trade Marks Act 1999, s. 29(8).

²² The Trade Marks Act 1999, s. 30(1).

²³ Uphar Shukla (n 135).

²⁴ David T Keeling, *Kerly's Law of Trade Marks and Trade Names* (14th edn, Sweet & Maxwell 2005) 623.

²⁵ *Colgate-Palmolive (India) Ltd v. Anchor Health & Beauty Care (P) Ltd*, 2008 SCC OnLine Mad 627 : (2009) 40 PTC 653.

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³⁰ Parth Gokhale and Shriyani Datta (n 159) 137.

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- ³⁵ *Reckitt & Colman of India Ltd v. Kiwi TTK Ltd*, 1996 SCC OnLine Del 349 : (1996) 16 PTC 393; *Reckitt & Colman of India Ltd. v. MP Ramchandran*, 1998 SCC OnLine Cal 422 : (1999) 19 PTC 741.
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- ³⁹ *Reckitt & Colman of India Ltd v. MP Ramchandran*, 1998 SCC OnLine Cal 422 : (1999) 19 PTC 741.
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- ⁴³ *Reckitt & Colman of India Ltd v. Kiwi TTK Ltd*, 1996 SCC OnLine Del 349 : (1996) 16 PTC 393; *Reckitt & Colman of India Ltd v. MP Ramchandran*, 1998 SCC OnLine Cal 422 : (1999) 19 PTC 741.
- ⁴⁴ *Pepsi* (n 175) 309.
- ⁴⁵ *Ibid* 317.
- ⁴⁶ *Ibid* 321.
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- ⁵³ *Hindustan Unilever Ltd v. Gujarat Coop Milk Mktg Federation Ltd*, 2017 SCC OnLine Bom 2572.
- ⁵⁴ *Procter & Gamble Home Products Ltd v. Hindustan Unilever Ltd*, (2010) 43 PTC 460.
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