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Scope of Comparative Advertising in India : a Review of Present Legal Framework

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ABSTRACT

The paper in hand conducts a study in investigating the scope of comparative advertising in India with reference to the present legal framework in the country, and the two foremost cases of Colgate vs. Pepsodent, and Rin vs Tide vs. Ujala. The research in paper has been conducted entirely using secondary sources, and the focus in the paper has been rather to present the critical arguments. The case studies reveal that specific laws need to be introduced in order to deal with both the forms of comparative advertising namely puffery and denigration. For this globally standard approach needs to be adopted.

KEYWORDS : comparative, advertising, legal, puffery, denigration

Introduction

Comparative advertising is an established practice in various parts of the world, particularly in developed markets, where consumer markets have become stagnant. However, it is a new phenomenon in India, and came into being after the economy of the country was liberalized. This paper conducts a study investigating the scope of comparative advertising in India from the perspective of the present legal framework in the country. The study is a critical review of the obtainable literature and further draw conclusions and recommendations based on the findings of the review. In the paper only secondary sources have been used. The paper is structured into various sections. First of all the concept of comparative advertising is defined and conceptualized, and further comparative advertising practices in the various countries are discussed. Further the practices in India are discussed with reference to legal framework, and case illustration of Colgate vs. Pepsodent, Rin vs Tide vs. Ujala. Further the scope of comparative advertising is discussed.

Meaning of Comparative Advertising

Comparative advertising is defined as a type of advertising which is a brand owner endeavours to have the benefit of pecuniary advantage from a comparison with product, service or brand to a competitor (Romano, 2005). Further comparative advertising overall has two components in the forms of puffery and denigration. In the case of puffery, the advertisers look for drawing the attention of consumers notice through making superlative claims about the product, service or brand that are declarations of opinion rather than verifiable declarations of the fact. The most notable thing about puffery component of comparative advertising is that it traverses the limits of forbearance and attempts to portray the competing product, service or brand in a negative light. The case is nothing different about denigration, even this component of comparative advertising is portrayed as illegal and legal system strictly prohibits the practice denigration as comparative advertising (Gokhale and Datta, 2011). It is in this context that the question arises as to what degree comparative advertising might be allowed or restricted from the perspective of conflict of interests of the different stakeholders involved. The conflict of interest may well be understood through the fact that on the one hand, the objective of advertiser using comparative advertising would be to present the product, service or brand to the consumers in such a way that consumers are more likely to purchase the advertised. On the other hand, the competitor will make every effort to stop any advertising that targets to denigrating its product, service or brand or fake claims. The issue sometimes becomes so litigious that the competitor moves the court. Hence, the issue needs to be explored and investigated from the perspective of mechanism regulate comparative advertising.

Evolution/ Genesis

Comparative advertising is the brainchild of Federal Trade Commission, and the idea was coined and developed during the 1970's. Federal Trade Commission conceptualized comparative advertising as advertising that contrasts substitute brands on impartially quantifiable features or price, and making out the substitute product or brand through name, design or other distinct information (Berns and Morgan, 2002). Formerly, particularly in the context of the European and American approach of comparative advertising was noticeably unusual and outlawed, nevertheless currently competition authorities in the countries permit comparative advertising and consider it as a vital tool in promoting competition.

Comparative Advertising in Countries

With reference to the legal framework of comparative advertising in Europe and the US Barigozzi and Peitz (2004) find that in the case of product, service or brand promoted through comparative advertising, it may well relax price competition through differentiating products, nevertheless, in the case of experience and credibility product, service or brand, comparative advertising might intensify competition through gesturing the sponsoring brand's quality. In the various parts of the world, comparative advertising is prohibited as per the current regulatory framework. For example, comparative advertising is prohibited in Belgium. Further in Netherlands, although there is no absolute prohibition, yet there is some restrictions. However Spain has a more compassionate approach towards comparative advertising. On the other hand, Portugal permits comparative advertising, nevertheless firmly limits. Even Greece permits the restricted utilization of comparative advertising. In Denmark too comparative advertising is permitted. Formerly Germany and UK did not give green thumb to comparative advertising, but now it is allowed within the boundary of legal framework existing (Gangwar, 2012). The case of Latin American countries illustrates that comparative advertising was is not found to be more effectual than non-comparative advertising, and this is because of cultural prejudices and the uniqueness of comparative advertising, as articulated all the way through believability of negative message (Manzur et al, 2012). This becomes apparent here that comparative advertising is now a well-known concept in perhaps every part of the world from US to Europe to Latin America. More or all the countries allow comparative advertising but within the limits of existing legal framework. Particularly the experience of Europe and US reveals that comparative advertising relaxes price competition and as well intensify competition, but comparative advertising is yet emerge as effectual as non-comparative advertising in the context of trust of negative message by comparative advertising.

Comparative Advertising in India

The practice of comparative advertising started in India with the liberalization and globalization of the economy in 1991. Now companies in India are aggressively and vigorously promoting their products through comparative advertising. The most common way of comparative advertising in India is puffery than denigration, where companies use words in comparative advertising as 'others are not' (Pathak, 2005). In other words, largely comparative advertising is practiced by companies in India through false and misleading facts which breach the trust of consumers or stakeholders. The trends and cases to the court suggest that comparative advertising is more frequent in FMCG sector of the country than other sector. This is what in this paper the cases of FMCG companies are discussed in the next section, but before that we need to present a sketchy overview of legal framework existing in the country.

Present Legal Framework in India

Comparing the existing legal framework of developed markets such as UK and US, India fails to have a specific law to deal with comparative

advertisement, yet courts in the country have referred the various laws in the existing system that may be applied in the cases of comparative advertising. For case illustration, Delhi High court has established Monopolies of Restrictive Trade Practices Act, 1984 and the Trade Marks Act, 1999 to some extent is applicable to deal with comparative advertising (Gangwar, 2012). This suggests that in order to deal with comparative advertising, the appropriate legal framework is yet to come with full comparing the developed countries. In this context Gokhale and Datta (2011) aptly put that due to lack of a dedicated legal mechanism there is no consistency in dealing with the cases and disputes of comparative advertising, and therefore a comprehensive approach needs to be taken by the legislative establishment in the country.

Examples of Companies: Colgate vs. Pepsodent, Rin vs Tide vs. Ujala

In the case of Colgate vs. Pepsodent, the latter is found using comparative advertising to claim that the 'New Pepsodent is 102 percent better than the leading toothpaste.' in the advertisement, samples of saliva of two boys are taken for testing hours subsequent to brushing. One boy is shown brushing with the New Pepsodent whereas the other one using leading company. The test of two samples is visually depicted side by side. The slide shows the sample of a leading company as the leading toothpaste demonstrating a big number of germs even as that of New Pepsodent showing minor quantity of germs. Colgate objected and carried the case of advertisement to the court, where the court ruled since the company has largest market share, the other has toothpaste indicates Colgate vindicating the stand of Colgate. In this way the case turned out to be a comparative advertisement case and a claim of disparagement of Colgate's products was declared by the court (Kaushik, 2012).

On the other hand, in the case of Regaul vs. Ujala, a television advertisement promoting Ujala liquid blue demonstrates that four drops of this brand are sufficient to bring remarkable whiteness of clothes even as numerous spoons of other brands are necessary for the similar effect. The advertisement shows that a lady holding a bottle of Ujala is looking down on another bottle with no any label, but using the words of disgust. The Regaul brand owner company took the case into the court. In this case the court established that for bringing a charge under clause (X) of section 36 A (1) there ought to be confirmed that disparagement is of products, services or brands of another have an explicit undertone. Further it was established that a just claim to the dominance in the quality of one's product by itself is not enough to attract clause (X) (Kaushik, 2012).

In the case Colgate vs. Pepsodent, it is found that the existing legal framework in India does not allow denigration form of comparative advising, whereas the case of Regaul vs. Ujala suggest that puffery form of comparative advertising is still has deterrent. Hence, specific laws need to be introduced in order to deal with comparative advertising cases in the country.

Effective Approach of Comparative Advertising

Now it is a reality that there is no complete go back from comparative advertising in India, as more and more multinational companies are operating in the country, at the same time India must not promote unethical marketing practices. It is in this context that Barigozzi, Garella and Peitz (2012) suggest that in the case of comparative advertising replacing content advertising, firstly legal system should be made relevant and strong, and further from the part of the companies, comparative advertising should be used as comparing quality of competitors products rather than showing other brands inferior or disgusting. From this perspective India has to go a long way in this direction.

Conclusion

Comparative advertising is now taken as a vital tool in promoting competition in developed parts of the world such as UK and US. The legal framework in these countries is adequate to deal with the disputes coming to the courts. As result, comparative advertising is found relaxing price competition and as well intensifying competition in these markets, at the same tie as comparative advertising is yet emerge as effectual as non-comparative advertising in the context of trust of negative message by comparative advertising. So far as the case of India is concerned, for the most part comparative advertising is put into practice by companies in India through false and misleading facts which breach the trust of consumers or stakeholders. In relation to the existing legal framework of developed markets such as UK and US, India fails to have explicit laws to deal with comparative advertisement; various laws in the existing legal system have been quoted to deal with the cases of comparative advertising. The case of Colgate vs. Pepsodent suggests that denigration form of comparative advising cannot be permitted, whereas the case of Regaul vs Ujala suggest that puffery form of comparative advertising may unethically benefit from legal inadequacy. Conclusively, In India specific laws need to be introduced in order to deal with both the forms of comparative advertising. Further companies need to use comparative advertising for promoting quality based healthy competition than involving in looking down upon other products, services or brands.

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