



Comparative Advertising: An Incentive or a Jeopardy

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Comparative Advertisement, Product Disparagement, Judicial pronouncements.

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ABSTRACT

The laws in India related to comparative advertising and product disparagement and the judicial pronouncements in this matter tend to accept comparative advertising as means of providing free competition to all manufacturing firms and service providers. This is permitted to the extent that the information given is honest, objective and can be verified and that this comparison must not denigrate or damage the integrity and reputation of the competitor's product or services. This study reveals the fact that comparative advertising is a sword in the hands of the people who use it. On one hand it can be used as an incentive to arouse curiosity towards the product and persuade the consumers to buy it. On the other hand it can turn to be jeopardy if not used carefully as one can be sued by competitors for unfair comparison.

INTRODUCTION

The basic purpose and concept of advertising is to allow the manufacturing firms to demonstrate the benefits of their products or services having a particular trademark, thus persuading the consumers to buy them. Advertising not only promotes the products but also help in creating awareness of the existence, attributes and specific features of the goods available in the market.¹ Since an effective advertising influences the choice of the consumer, so it has become an indispensable tool in the hands of companies to survive in this competitive world. So the companies are not even hesitating to promote their products by adopting comparative advertising. Through this measure they 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^{2,3}. Consequently, spates of litigations have been witnessed in this regard in the last few decades.

In this present paper the authors intent to explore the legal position of advertising & comparative advertising in relation to product disparagement in India. It also ponders on the fact that 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.

LEGAL STANDARDS IN INDIA

In India, there is no specific or explicit legal provision dedicated to advertising. However Article 19 (1) (a) of our constitution which gives its citizens the fundamental right to freedom of speech and expression, implicitly provides the provision of advertising. In a prominent case "Hamdard DawaKhana"⁴, the supreme court held that the objective of the advertisement should demonstrate the genuine character of the advertisement and stressed that advertisement for non prohibited products would only be safeguarded under Article 19 (1) (a). Thus Article 19 (2) of the constitution applies reasonable restriction on Article 19 (1) (a). On the other hand in the case of Tata press Limited vs. Mahanagar Telephone Nigam Limited⁵, Hon'ble court main-

tained that any commercial advertisement related to dissemination of information regarding the product should be shielded under the constitution. The court also made it explicit that the government had the right to regulate commercial advertisement deceptive, misleading and dishonest commercial advertisement. In 1969 the Monopolies Restrictive Trade Practices Act was enforced to curb the monopoly present in the market. This law got further amended in 1984, to prevent Unfair Trade Practices. The law on comparative advertising and product disparagement in relation to trade marks has been laid down on the judgement given in the famous *Irvings yeast v. F.A. Horse-nail Ltd.* case. Section 29 (8) and section 30 (1) of the trademarks act 1999 addresses all the issues related to comparative advertising involving infringement of trade marks.

The Advertising Standards council of India (ASCI) has laid down certain guidelines to control the content of advertising so as to favour the consumers at large. These guidelines, a Rule to cable television networks act ensures that the advertisement:

- should be based on facts.
- the claims and representations must not be misleading.
- should not violate the standards of public morals and decency.
- should not promote any product which may turn to be hazardous to any individual or society at large.
- should observe a just competition as the consumers have the right to be informed about the alternatives present in the market.

ENFORCEMENT IN COURTS

In the case of *Reckitt & Colman of India Ltd. Vs. M.P. Ramchandran and another*,⁶ the Calcutta High Court clearly stated that the tradesman could puff up his products but was not entitled to denigrate the competitors products. It also clarified that the use of new technology can be mentioned to be superior but one cannot mention the use of old technology by the competitor to be inferior.

In yet another case of *Reckitt & Colman of India Ltd. Vs. Kiwi T.T.K.* ⁷, the Hon'ble Delhi High Court marked that the tradesman may highlight his products virtues and may claim it to be the best but is forbidden to condemn other

competitive product. The court made it clear that exaggeration is permissible to the extent it does not defames or denigrates others.

The judgement in the very popular dispute between PepsiCo Inc. vs. Hindustan Coco Cola Ltd.⁸ the Hon'ble Delhi High Court held that it is not merely the content of the advertisement which should not be disparaging but also the mannerism in which it is been depicted, the expression and the feelings shown should also not disparage the competitors item.

Yet another landmark case is that of Dabur India Ltd. vs. Emami India Ltd.⁹ wherein the court made it clear that a competitor would not only disparage or denigrate a particular product but he cannot also disparage or defame a complete genre of products. Thus the prudent court granted an Injunction to the notion of generic disparagement.

In Glaxo Smithkline and Horlicks vs. Complan from Heinz¹⁰, Justice Bhatt ruled out that the commercial campaign is disparaging then the sufferer should be financially compensated. In his judgement he ordered complain to pay Horlicks a compensation of Rupees 22 lakhs as the ad war between the two was given an ugly turn by Complan by calling Horlicks as cheap.

There are several more cases like that of Unilever's RIN and Proctor and Gamble Tide or controversies involving mobile phones of Nokia and Onida, or Godrej vs. Vasmol or Regaul vs. Ujala case or Colgate Dental Cream vs Hindustan Unilever Ltd. to name a few.

CONCLUSION

It seems that in order to promote their products and services more and more firms are getting involved in mere mockery and disparagement of their rivals product. They are not only exaggerating the qualities of their goods, but also are not hesitating in giving misleading statements. The increase in such disputes is an alarming situation which needs immediate attention. The responsibility of ensuring healthy and fair competition does not lie merely on the courts. It is basically the responsibility of the manufacturing firms and the advertising firms to ensure that they use competitive advertising within the permissible realm of law. Further it is equally important that the society also compels and abandon the unlawful and misleading practices. In fact the manufacturing firms, companies, judiciary and the society should work in tandem and set standard guidelines to restore parity and keep a watch on misuse in comparative advertising. This will enhance fair trade practices and protection of consumer interest.

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