

## ALL IS NOT FAIR IN COMPARATIVE ADVERTISING : ANALYSIS OF JUDICIAL PRECEDENTS OF CASES OF DISPARAGEMENT IN INDIA

PUNEET BAFNA<sup>1</sup> & G.S.RAJPUROHIT<sup>2</sup>

<sup>1</sup>Research Scholar, Department of Law, Jagannath University, Chaksu Jaipur

<sup>2</sup>Head of Department, Centre for Post Graduate Legal Studies, Jagannath University, Chaksu Jaipur

\*Corresponding Author, email: puneetbafna@rediffmail.com

**Abstract:** Due to liberalization of our economy there have come upon a plethora of brands in the market among which the competition has increased manifolds. Every brand is employing all ways and means to grab the attention of the consumers. In this foray to reach its takers, they are adopting the techniques of comparative advertisement (CA) too. Basic motive of CA is to create consumer awareness so that comparative evaluation and henceforth rational decision regarding purchase can be made. However, CA done based on unfair practices to disparage the competitors creates confusion. In the present paper we have studied the existing laws in India and the judicial precedents in this matter to analyse that how powerful are these in combating a misleading CA. We find that in most decisions, the courts make the advertisements to cease but the exact loss and its compensation has not been given to the sufferer. Thus a need arises to make stringent laws which can assess the actual loss and relevant financial penalties may be awarded by the courts.

**Keywords:** Comparative Advertisement, Consumer Protection, Monopolies & Restrictive Trade Practices

### INTRODUCTION

Comparative advertisement is a sales promotion technique where in a firm advertises his goods or services by comparing them with similar products and services of its competitors. Comparative claims are variable in nature, (i) a competitor may explicitly be named or (ii) implicitly referred to. The emphasis may be on the similarities of the products which is seen as positive comparisons or the differences between the products may be highlighted which is termed as negative comparisons. In while advertising the product they may make equivalence or parity claims or even superiority claims with the competitor's.

Comparative advertising is profusely used throughout the globe. The basic concept is to bring to fore the merits of the products or services offered by the manufacturer as compared to those of his rivals and to educate and bring awareness among the consumers to clarify doubts about a brand and take a rational purchase decision.<sup>1</sup>

However, in a scenario where each brand wants to gain a foothold in the market, the firms have often disregarded honest and fair representation of their product/service. The

comparison has inevitably involved competitor's product disparagement. Disparagement is explained to be a false, misleading detrimental statement or claim which damages the reputation of another's product or service.

Thus, not all comparative advertisements are permissible<sup>2,3</sup>. Recent judicial decisions in these matters in our country present an opportune moment to review this area of law, and this work seeks to outline the current position. In the present work, we have focused on the concept, advantages and disadvantages of comparative advertisement and shall do a critical analysis of the existing legal system in India to restrain disparaging in comparative advertising based on the critical examination of the judicial decisions on such matters.

### STATUTORY FRAMEWORK IN INDIA

A careful study of the existing literature reveals that various laws have been enacted in our country to deal with the subject. Initially the laws were formulated to curb monopolies in the market and keeping pace with the changing circumstances; they were amended

to encourage competition. To combat monopolies and restrictive trade practices in the market, first, the MRTP act<sup>4</sup> was formulated in 1969. Further to prevent unfair trade practices, this law was amended in 1984. Several actions that could be undertaken against unfair trade practices were listed under Section 36 A of this Act. The Section 36 A (1) (X) contains the provisions related to comparative representation of goods/services. According to it if a trade practice adopts deceptive methods of making a statement, oral or written or by visual presentation, which provides untrue or misleading claims disparaging the product or trade of another person for promotion of sales, shall be termed to be unfair. Due to this amendment, a statutory body called Director General of Investigation and Registration (DGIR) came into existence, whose work was to investigate the case of a restrictive or unfair trade practice. The investigations were put before a judicial body called MRTPC comprising of benches of commission. On finding a case to be unfair trade practice, the commission could order the offending party to stop the practice. The MRTP Act, 1969 was amended several times with changing market situations but was finally repealed in August 2009 by ministry of Corporate Affairs, Government of India as a need of stronger pro-competitive regulations was felt. All cases relating solely to unfair trade practices were now to be dealt in accordance with the provisions of the Consumer Protection Act 1986. The Competition Appellate Tribunal was to take the cases related to providing false or misleading information and sneering the goods, services or trade of another person.

Consumer Associations, Central Government or state governments can seek relief and get financial compensation against unfair trade practices under Consumer Protection law. However, a firm whose products/ services have been disparaged cannot claim relief against unfair CA under this Act. That is under the provisions of this law the courts

make the advertisements to cease but the exact loss and its compensation is not been given to the sufferer. Even the duration after which the judgement is given is also too prolonged, so that the firm whose products have been disparaged, incurs severe loss both financially and goodwill in the market.

The legal stance and extent of CA in India has been laid down by courts in several decisions given in this matter. Few of those judicial precedents are discussed further.

### SIGNIFICANT JUDICIAL PRECEDENTS

Some of the prominent Judicial decisions in this matter in India are:-

*Reckitt & Colman of India Ltd. vs. Kiwi T.T. K. Ltd.*<sup>5</sup>

The advertisement in which the defedants promoted their brand "Kiwi Shoe Polish" eulogizing their product while disparaging a unnamed product that bore conspicuous resemblance to design of plaintiff's "cherry blossom"; was regarded as a case of unfair comparative advertisement.

Delhi High Court (S.K.Mahajan, J.) held that - In order to promote one's products, a firm can claim its goods to be the best and make some statements for puffing of his products/ services and will not be taken as a case of disparagement or defamation to the competitors goods. However, a manufacturer cannot vocalize that his contender's commodities are appalling or show them to be inferior to puff and promote his goods. This will be considered as case of disparagement.

*Reckitt & Colman of India Ltd. vs. M.P. Ramachandran & Anr*

In this case<sup>6</sup> the plaintiff possessed a design registration of bottle of their brand "Robin Blue". The defendants compared their product to a bottle possessing same design and pricing as that of plaintiff's bottle. This ad was also held as a case of disparagement by the court.



Calcutta High Court (Barin Ghosh, J.) laid down the basic principles for granting an injunction in case of comparative advertising: "A tradesman can claim his goods to be best even when such declaration is untrue; for this purpose he can even compare the merits of his commodities over the commodities of others. A tradesman can further claim his goods to be better than his competitor's, even when such claim may be untrue. However, he cannot claim his competitor's goods to be bad. Such a claim shall be considered to be done on malicious intentions of slandering the goods of his competitors and this shall not be permissible. If such defamation case arises and 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."

*Pepsi Co. Inc. Vs Hindustan Coca Cola Ltd.*

In order to push up sales of its product Thumps Up, Hindustan Coca Cola Ltd., aired a commercial ad on TV, in which it mocked on Pepsi calling it "Bachchon Wali drink", or "Wrong Choice Baby"

Hon'ble Delhi High Court held that Thumps Up depicted Pepsi by derogatory remarks and this case<sup>7</sup> cannot be called "puffing up". It further made it clear that the case of disparagement shown in a commercial can be decided on the basis of intent, manner, storyline and message conveyed by it. According to decision held in this case there is prima facie no infringement and CA is permissible only when it does not denigrate the competitor's product. If a firm compares its goods with those of rival by condemning it then it tantamounts to disparagement.

*Dabur India Ltd. vs. Colgate Palmolive India Ltd.<sup>8</sup>*

In this ad the defendant shows the marks left on a surface when his & his rivals product are rubbed on it, to show that his product was less harmful to teeth and was sixteen times less abrasive than plaintiff's product.

This case was held as a case of disparagement and was ordered to desist.

*Dabur India Ltd. vs. Emami India Ltd.*

This case<sup>9</sup> is a very important one for making a ground for laws for CA. Hon'ble Delhi High Court held that even when there is no specific reference or pinpointing to the rival product but reference is made to entire genre of product then it is equally objectionable.

According to this judgement, no firm can disparage a class or genre of a product and in its defense claim that any particular firm has not been specifically mentioned to. However in a broader view it even does not permit any firm to make comparison on general basis. That is a manufacturer of car can be sued for disparagement by Scooter Company if he shows through an advertisement that by owning a car a scooter owner will be better off.

*Regaul vs Ujala Case or Colgate Dental Cream vs Hindustan Unilever Ltd.*

According to its ad, Ujala's four drops of liquid blue brought striking whiteness effect in clothes which could be achieved by large use of other brands. A similar product Regaul's manufacturer alleged the advertisement to be disparaging for its goods.

In its advertisement, Colgate Dental Cream (Double Protection) claims itself to be 2.5 times superior over any ordinary cream. HUL moved against this ad to the court claiming "ordinary" is a disparagement of its similar product by Colgate.

The decision held by court in both these matter was that the product / service or trade that is claimed to be disparaged must be an identifiable one. The court did not classify the first as a case of disparagement of goods as the ad merely claimed to be superior in quality by itself but did not carry any else label or had any similarity with any other brand. In the second one also, the court was of the view that



a reference to "ordinary" does not identify any specific or particular product & therefore was not a case of disparagement of goods.

#### *Pepsodent vs Colgate*<sup>10</sup>

HUL claimed Pepsodent to be 102 percent better than the leading toothpaste in its advertisements both print and electronic. In the ad while comparing the samples of the two although the competitor name (COLGATE) was muted but lip movement revealed it. Also the jingle in the background at the time resembled that of Colgate advertisement. Thus the Judges declared it to be a case of unfair CA and Colgate's product disparagement allegation was proved.

There are much more examples of such campaigns led by companies to occupy a large market share. Whether it is detergent brands Uniliver's RIN and Proctor & Gamble's Tide or the health drink products Horlicks of Glaxo SmithKline Consumer Healthcare Limited vs. Complain from Heinz India Private Limited or recent CA controversies involving Godrej vs. Vasmol and Nokia and Onida mobile phone.

According to judgement passed in various cases in this matter we can conclude:-

- (i) Through Comparative Advertising competitors can compare similar products only. (products fulfilling similar needs or purpose)
- (ii) Comparison has to be specific and identifiable for a case of disparagement to be considered. Comparison with "another" or "ordinary" does not make a case of competitors product disparagement.
- (iii) Any indirect referencing made to competitors product (mutable lip movement, similar background music, similar design and colour etc.) can lead to a case of unfair comparative advertising.

## CONCLUSIONS

After a careful analysis of the judgements of these aforesaid cases one can conclude that laws regarding CA in India are well framed but the issue to be dealt with is that are they settled in right manner?<sup>11</sup> Indian courts have generously allowed puffing up to promote one's product (so long as it does not affect a competitor adversely). The emphases have been on leveraging product disparagement but have turned a blind eye to consumer's right to get correct information. With a malicious intent to increase the market share the companies are treading the advertisements into mockery game and are not standing to truthfulness and fair representation. Thus, the developing scenario is subverting the soul of CA. The right of the public to get correct, rational and unbiased information should be safeguarded. If need arise newer stringent laws should be enacted to promote honest trade practices.

## REFERENCES

- A. Kumar, Sukanya, Comparative Advertising: Benefits to Consumers, The Hindu, June 15, 2000, <http://www.hindunet.com/thehindu/2000/06/15/06/500h.htm>
- Semila Fernandes, JBM & SSR, Vol 2, No. 6, 2013.
- Comparative ads to be curtailed : HC, the Hindu, Business Line, Dec.15, 2005
- MRTI Act No.54,1969, Statement of Object & reasons.
- 1996 P.T.C. 193 T 399
- 1999 P.T.C. (19) 741.
- 2001(21) P.T.C. 699 & 722
- 2004 (29) P.T.C. 401
- 2004 (29) P.T.C. 1
- 1997(199) P.T.C. 13
- Manisha Singh Nair, India: Roads Ahead CA, [http://www.mondaq.com/article\\_id39572](http://www.mondaq.com/article_id39572)