



BALANCING ACCEPTABLE COMPETITIVE BEHAVIOUR AND LAW OF DISPARAGEMENT IN INDIA: AN ANALYSIS

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Comparative advertising, as a special form of advertising, is a sales promotion device that compares the products or services of one undertaking with those of another, or with those of other competitors. All comparative advertising is designed to highlight the advantages of the goods or services offered by the advertiser as compared to those of a competitor. In order to achieve this objective, the message of the advertisement must necessarily underline the differences between the goods or services compared by describing their main characteristics. The comparison made by the advertiser will necessarily flow from such a description.

Comparative advertising should enable advertisers to objectively demonstrate the merits of their products. Comparative advertising improves the quality of information available to consumers enabling them to make well-founded and more informed decisions relating to the choice between competing products/services by demonstrating the merits of various comparable products. Based on this information, consumers may make informed and therefore efficient choices. (These statements are true only if the comparative advertising is objective.) Comparative advertising which aims to objectively and truthfully inform the consumer promotes the transparency of the market. Market transparency is also deemed to benefit the public interest as the functioning of competition is improved resulting in keeping down prices and improving products. Comparative advertising can stimulate competition between suppliers of goods and services to the consumer's advantage.

Comparisons between goods and services of different undertakings carry with them some significant risks. There is a danger that once undertakings address the merits and inadequacies of competing goods or services, they may be tempted to denigrate them or derive unfair advantages from such inaccurate comparisons. Just like traditional forms of advertising, comparative advertising seeks to both assist the development of the undertaking

concerned and to inform consumers. Although both forms of advertising seek to attract customers, in case of comparative advertising, commercial relationships may be exposed to the constant threat of unfair practices.

Anatomy and Analysis of Statutory Provisions in India

Any attempt to evolve a regulatory framework on comparative advertising in India necessitates the study of constitutional guarantee provided to the same under Article 19 of Constitution of India. Article 19 (1) of the Constitution invests all citizens having the right to freedom of speech and expression. This freedom has been available for public speaking, radio, television and press. However, the freedom of speech and expression has limitations. Article 19(2) permits the State to limit the freedom in so far as such law imposes reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The question had arisen before the Supreme Court whether advertisement was 'commercial speech' and, thus, had the protection of Fundamental Right under Article 19(1) (a). The Supreme Court had maintained in its judgment:

"Commercial speech" cannot be denied the protection of Article 19(1)(a) of the Constitution merely because the same are issued by businessmen.

The Supreme Court was categorical in its position in the *Tata Yellow Pages Case*:

Advertising as a "commercial speech" has two facets. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefitted by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech."¹

The Supreme Court had continued:

Examined from another angle, the public at large has a right to receive the "commercial speech". Article 19(1) (a) not only guarantees freedom of speech and

¹ *Tata Press v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1) (a) is available to the speaker as well as to the recipient of the speech. The recipient of "commercial speech" may be having much deeper interest in the advertisement than the businessman who is behind the publication.

The Supreme Court was significantly led by judgment of the American Courts. The American Courts in 1940s had doubts if advertisement could be protected by the freedom of speech. This doubt had reflected in the Indian Supreme Court's decision in 1960 in the *Hamdard Case*.² The Supreme Court, giving the judgment in the *Tata Yellow Pages Case* in 1985, in the backdrop of revisions which had taken in the position of the American courts, was categorical:

We, therefore, hold that "commercial speech" is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.³

In the contemporary sense, comparative advertising is a widely accepted marketing device.⁴ Unfortunately, it has also attracted tremendous litigation owing to dissemination of untruthful and disparaging material. In India, the statutory control is being manifested by the Monopolies and Restrictive Trade Practices Act, 1984(MRTP Act), the Trade Marks Act, 1999(TMA) and the Consumer Protection Act, 1986(CPA). Primarily, the purpose behind the MRTP Act was to inquire into the extent and effect of concentration of economic power in the private hands and the control of monopolies and prohibition of restrictive trade practices in important sectors of economic activity.⁵ The Act defined an 'unfair practice' under Section 36 to include any false representation of goods with regard to their quality, quantity or utility. The provision also incorporated the clause that a warranty or guarantee of performance or durability of the product, if not adequately substantiated, would amount to

² *Hamdard Dwakhana v. Union of India*, AIR 1960 SC 554 where Supreme Court held that while advertisements were a form of speech, they were not constitutive of the concept of 'free speech' as they were guided by the object of commercial gain.

³ *Tata Press v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

⁴ Abrams B, Comparative ads are getting more popular, harder, hitting, *Wall Street Journal*, (11 March 1982) Column 1, p.25.

⁵ See Anurag K. Aggarwal, *Competition Law in India: Need to Go Slow and Steady*, IIM Ahmedabad, W.P. No. 2005-10-05, 5 October 2005, <http://www.iiahd.ernet.in/publications/data/2005-10-05anurag.pdf>.

unfair trade practice.⁶ Further, to advertise a ‘false or misleading fact disparaging the goods, services or trade of another person’ too was brought within the ambit of the same.⁷ However, the Act was amended several times to suit the changing circumstances until it was finally repealed by virtue of Section 66 of the Competition Act, 2002. The Competition Commission was of the view that the Competition Act should not be burdened with unfair trade practices.⁸ This was instead, to be given effect under the Consumer Protection Act, 1986.

While the Consumer Protection Act was being enacted in 1986, the provisions on unfair trade practices under the MRTP Act has been incorporated *pari materia* in Section 2(1)(r) of the CPA. Within the Act, a ‘consumer’ cannot take up a case of an unfair trade practice before a consumer forum. It can only be taken up by a consumer association, central government or the state governments. Thus, within the existing law, a manufacturer whose product is disparaged has no *locus standi* to seek a remedy. The only option is to bring it to the notice of a consumer association or represent to the central or state government. These are only oblique routes of seeking justice. Such parties are often compelled to take recourse to common law remedies in the form of injunctive action or monetary damages, for the securing of their interests, with a significant proportion of complaints by competing manufacturers and sellers involving alleged violations of their intellectual property rights through the said advertisements.

In the absence of an established statutory mechanism dedicated to the regulation of advertising, the industry itself has sought to develop a model for voluntary self-regulation in the form of the Advertising Standards Council of India (‘ASCI’). The same is a non-statutory tribunal comprising an association of advertisers established in 1985. The ASCI position on the form and manner of comparative advertising has been laid out in Chapter IV of the body’s Code for Self Regulation in Advertising.⁹ It is stated herein that advertisements containing comparisons with competing manufacturers and sellers are permissible in the interests of vigorous competition and free dissemination of information, subject to the following requirements being satisfied:

⁶ Section 36 of *The Monopolies and Restrictive Trade Practices Act, 1969*.

⁷ *Id.*, Section 36A(x). The Commission has maintained that unless a product could be specifically identified, it would not be a case of ‘disparaging of goods’. Moving further, even if a representation has qualified to be a case of ‘disparaging of others goods’, disparaging on its own is not an unfair trade practice. Within Section 36(1)(x), a disparagement of another’s good becomes an unfair trade practice only if there is use of ‘false or misleading facts’. In order to establish that the facts in the representation are false or misleading, it requires scientific and technical assessment of the claims. As it came out in the *Colgate Palmolive(India) Limited and Another v. Hindustan Lever Limited* 1999(2) CPJ 19.

⁸ Report of the High Level Committee on Competition Policy and Law, May 2000, available at www.nic.in/dca/comp.

⁹ ASCI Code for Self Regulation in Advertising (2007).

- (a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.
- (b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
- (c) The comparisons are factual, accurate and capable of substantiation.
- (d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.
- (e) The advertisement does not unfairly denigrate attack or discredit other products, advertisers or advertisements, directly or by implication.¹⁰

The Trade Marks Act, 1999 is an attempt to balance the conflicting interests of rights of registered trade owners and a compelling consumer interest in informative advertising. Section 29(8) of the TMA provides that a registered trademark is infringed by the use of any advertising which is not in accordance with honest practices, and does not cause detriment to the distinctive character, or to the repute of the mark.¹¹ At the same time Section 30(1) makes an exception, to acts constituting infringement under Section 29(8). It provides that any advertising which is in accordance with honest practices, and does not cause detriment to the distinctive character or to the repute of the trademark will be permissible and will not constitute infringement.

The phrase 'in accordance with honest practices' as used under Section 29(8) and Section 30(1) of TMA, 1999 cannot have a perfect test to construe its meaning. One of the propositions is that, it may be interpreted in reference to particular practices or codes of conduct developed in different trades. However, the courts have rejected this view as it would lead to disparity in standards, as infringement would be harder to avoid in highly regulated trades than in others.¹² The courts, while admitting that the first part of the section was to give legal sanction to comparative advertising, the proviso was referred to as 'mess'.¹³

¹⁰ Id., Chapter IV(1).

¹¹ In India, the law on comparative advertising and product disparagement, in relation to trademarks is based upon the law as laid down in *Irving's Yeast Vite Ltd.v.FA Horse-nail* (1934) 51 RPC 110 wherein it was held that use of another's trademark in comparative advertising does amount to infringement.

¹² *Barclays Bank Plc v. RBS Advanta* (1996) RPC 307.

¹³ Laddie J in *Barclays Bank Plc v. RBS Advanta* (1996) RPC 307, while commenting on the proviso to Section 10 (6) of Trademarks Act, 1994 Of UK(which is a counterpart to Section 29(8) and Section 30(1) of the Trademarks Act, 1999, and also uses the same phraseology) referred to it as 'mess'.

Section 29 (8) and Section 30 (1) of the Trademarks Act, are adequate to address the issues related to trademark infringement, made in garb of comparative advertising. Judicial pronouncements on the issue have made it clear that there is no harm in saying that one's goods are better than his competitors'. He, however, cannot while saying his goods are better, say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words if he defames his competitors and their goods, an action lies for recovery of damages and the court is also competent to grant an order of injunction.¹⁴ On the other hand, it is not actionable if the manner is only to show one's product is better or best without derogating the competitors' product. Thus, the position is that "publicity and advertisement of one's product with a view to boosting sales is a legitimate market strategy."¹⁵

Judicial Response

In subsequent cases, Indian judiciary attempted to protect the rights of consumers by bringing 'false, misleading and harmful' claims or 'disparagement of the goods' of the competitor, within the ambit of 'unfair trade practice' as defined under section 2(i)(r) of the Consumer Protection Act, 1986. In *Glaxo Smith Kline Consumer Health Care Ltd. v. Heinz India Pvt.Ltd.&Ors*¹⁶ the parties were manufacturers of nutritional drinks 'Horlicks' and 'Complan' respectively. It was argued by the plaintiff that the said commercial of defendant's drink 'Complan' attempted to misguide the consumers with there being no substantiate basis that its drink was the only factor contributing to the growth of children. However, the court held that an advertiser was allowed to engage in puffing so long as it does not slander competitor's product. On the other hand, it also sought to regulate such mechanism as to verify the tenability of claims.

Colgate Palmolive (India) Limited v. Anchor Health & Beauty Care Pvt Ltd.,¹⁷ was one of its kind where the court asserted that consumer interest is an element which must be considered when assessing comparative advertising. Herein, the plaintiff objected to the claims made the defendant's product 'Anchor' as the 'only' toothpaste containing the ingredients calcium,

¹⁴As laid down in *Reckitt & Colman of India Ltd. v. MP Ramachandran and Anr.* 1999 (19) P.T.C. 741; followed in *Reckitt & Colman of India Ltd. v. Kiwi TTK Ltd* 63(1996) DLT 29; *Pepsi Co INC and Ors v. Hindustan Coca Cola Ltd and Anr* 2003 (270 P.T.C.305); *Dabur India Ltd v. Emami Ltd* 2004 (29) P.T.C. 1; *Dabur India Ltd v. Wipro Ltd.* 2006 (32) P.T.C. 677.

¹⁵ The Decision in *Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd.* 2006 (32) P.T.C. 307. is a reflective of what the courts thought 'honest' comparative advertising to mean. Upholding the claim of 'Mortein' that their product which is meant to kill both cockroaches and mosquitoes and in a way better than 'Hit' which had two separate versions for killing cockroaches and mosquitoes, by no stretch of imagination amounted to disparaging the product of the plaintiff.

¹⁶ 2007 (2) CHN 44.

¹⁷ 2009(40) PTC 653.

fluoride and triclosan; and the 'first' all-round protection toothpaste and that the fluoride in 'Anchor' gave 30% more cavity protection and triclosan was ten times more effective in reducing bacteria. The plaintiff contested that its own toothpaste contained the three ingredients prior to 'Anchor'. 'Colgate' claimed that Anchor's statement regarding fluoride protection and the efficacy of triclosan was false and misleading as the amount of fluoride in toothpaste is mandated by Rule 149-A of the Drugs and Cosmetics Rules. The court observed that consumers being easy target of misleading advertisements needs to be protected and thus requires a substantive mechanism to regulate comparative advertising.

Indian judiciary has broadened the consumer jurisprudence in *Reckitt Benckiser(India)Ltd. v. Naga Ltd and Ors*¹⁸ by upholding the 'disparagement' of the product without making any false statement. It was held that if a competitor makes the consumer aware of the mistaken impression created by his rival trader, the plaintiff cannot be heard of such action. It stated that truth is always a complete defence against any challenge regardless of whether any damage is sustained as a result of it.

The very essence of comparative advertising in India has often been disregarded by companies while promoting their products and services. In *Procter & Gamble Home Products v. Hindustan Unilever Limited*,¹⁹ the petitioners and respondents were manufacturers of a detergent powder brand 'Tide' and 'Rin' respectively. The respondents aired a commercial that compared both the products and allegedly portrayed the petitioner's product in a negative manner, claiming that 'Rin' was more effective than 'Tide' in providing 'whiteness' to clothes. The petitioner thus prayed for an injunction to restrain the respondent from telecasting the advertisement, contending that the same had not stopped at merely puffing the advertised product, but had disparaged the competing product. The respondents argued that the fact that the whiteness provided by Rin was better could be inferred from laboratory tests conducted by both the respondent and independent agencies, thus resulting in an absolute defense of truth. Since the comparison was strictly restricted to the whiteness as provided by the respondent's product due to the chemical fluoresces, it was argued that the commercial fell within the ambit of permitted comparative advertising. The Court, however, differed from the respondent's view and held that there was an express denigration of the petitioner's product. According to the Court, on application of the principles laid down in

¹⁸ 104 (2003) DLT 490.

¹⁹ *Procter & Gamble Home Products v. Hindustan Unilever Ltd.*, High Court of Calcutta, G.A. No. 614 of 2010, C.S. No. 43 of 2010.

*Dabur India*²⁰, it was discernible from the format of the advertisement and the manner of its depiction that it had the overall effect of portraying the competing product in a poor light rather than promoting the seller's own product. The mention of the tickler mentioning independent laboratory tests had not been the focus of the advertisement, with there being sufficient scope for ambiguity surrounding the degree of accuracy of such tests. Considering the deep impact that the electronic media has on the psyche of the consumers, the Court upheld the request for an interim injunction, restraining the petitioner from broadcasting the denigrating advertisement.

A more recent dispute has arisen between Procter & Gamble ('P&G') and Hindustan Unilever Ltd ('HUL')²¹ wherein the latter has contended that the latest advertisement of the former's shampoo brand 'Pantene' is false and misleading in asserting that the said product was the most preferred one in the Indian market. In addition, it was alleged that the said campaign was disparaging Unilever's brand 'Dove'. The hoardings put up by P&G towards the end of July 2010 depicted a 'mystery shampoo' which "80% women say is better than anything else." P&G's move was immediately countered by Unilever, which came out with a parallel campaign of 'Dove', saying, "There is no mystery. Dove is the No.1 shampoo". It later filed a complaint with the Advertising Standards Council of India ('ASCI') against P&G's original assertion of popularity, terming it as misleading and untrue, as the conclusions were based on an old study conducted in Thailand, rather than indicating recent trends in the Indian market. ASCI upheld the complaint and recommended that P&G desist from engaging in any advertising campaign of such nature. Unilever has subsequently approached the Delhi High Court to seek an authoritative determination of the issue.

Conclusion

The above analysis on comparative advertising in India reveals that Indian law needs to be further strengthened in its application. The existing laws have diluted the effectiveness as The Consumer Protection Act, 1986, has proved insufficient as it excludes from its purview competing manufacturers and sellers. The self-regulatory process as has been established by the advertising industry has been relegated to a purely recommendatory function, with it having no enforcement mechanism to ensure compliance with its directives. So long as a competitor is not adversely affected, the courts have turned a blind eye towards the equally important consumer and his interests. The onus of ensuring healthy competition however

²⁰ *Supra* note 24.

²¹ For details see, Parth Gokhale and Shriyani Datta: *Comparative Advertising In India: Evolving A Regulatory Framework* 4 NUJS L.Rev,131 (2011).

does not merely lie with the courts. It is of equal importance that the marketers of products engage in comparative advertising engage in the activity within the permissible parameters of the law. It is important to keep the following guidelines in mind while engaging in the activity:²²

1. A comparison should be made based on verifiable facts about the advertisers' and the competitors' products/services, which can be substantiated.
2. If a comparison is based on clinical tests results there should be sufficient proof that they were conducted by an independent/objective body. Partial results or differences should not be shown in the advertisements because consumers may draw improper conclusions from them.
3. Always accurately depict the competitor's mark with appropriate trade mark symbols/notices and add a footnote identifying the correct owner and disclaiming any affiliation. A competitor's mark should not be altered in any form.
4. Avoid using a rival mark in a highlighted or prominent fashion that implies an affiliation with or sponsorship by the competitor of your advertisement.
5. Keep the primary goal of your advertisement limited to inform the consumer and not to unfairly attack, criticize, or discredit other products, advertisers or advertisements directly or by implication.
6. The product or services being compared should reflect their value and usefulness to the consumer. The comparative advertisement should be informative and convey positive merits of the product/service.
7. The advertisement should not make unjustifiable use of any firm, company or institution and should not take unfair advantage of the goodwill of any trade name or symbol of another firm.

If guidelines along these lines are followed by the product marketers, it allows for the fostering of a better corporate environment to invest in. It is of utmost importance for both companies and the judiciary to work in tandem to restore the parity in comparative advertising whereby fair trade practices; intellectual property protection and consumer interest can go hand in hand.

²² See Keshav S. Dhadak and Vaishali Mittal, *India: How to Gain From Comparative Advertising*, <http://www.managingip.com/Article.aspx?ArticleID=1321496>.