DETERMINING THE THIN LINE BETWEEN COMPARATIVE ADVERTISING AND DISPARAGEMENT UNDER THE INDIAN LEGAL SYSTEM

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1) INTRODUCTION
Advertising is a mode of promoting the product of a manufacturer. The modus operandi of advertisements has undergone radical change in the 19th century. The razzmatazz through pamphlets and newspapers has given way to advertisements through electronic media that are aired and viewed by customers worldwide. In this era of stiff competition, advertising plays an extremely important role in the marketing of a product. “Comparative advertisement” has brought vast opportunities and at the same time, tremendous challenges before the present-day open economy. It is nothing but a keen sense of competition and the desire to capture markets that have resulted in comparative advertising.

It can be defined as “advertising that specifically compares the advertised brand with another brand of the same product.”

Comparative advertising, in its broadest sense, is the promotion of a product or service by comparing it to similar products or services of competitors. Mostly, the products or services are advertised comparing it with other products or services and depicting itself to possess the characteristics which ‘others lack’. Sometimes, also boasting their product, and claiming how they are ‘superior’ or best. The comparison lies at the base of every advertisement, it is the soul for creating a distinction. The packaging, shape or style of a particular brand may be used by an advertiser, but the label may be ordinary. It aims to provide consumers with a fair and accurate comparison of the characteristics of one trader’s products and services with those of another, in order to make a lasting impression. Without actually saying against it.

There is a thin dividing line between comparative advertising rights and wrongs. The New International Websters comprehensive dictionary defines disparage/disparagement to mean, “to speak of slightly, undervalue, to bring discredit or dishonour upon, the act of deprecating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation.” Thus, one should be varied in his approach towards the same. If, on the one hand, comparative advertising can rightfully be used as an important business strategy for the successful promotion of the products and services of a trader. On the other hand, if proper precaution is not taken, it may inescapably result in various wrongs, to name a few, commercial disparagement, trademarks infringement, passing off, and unfair trade practices, etc.

Therefore, the comparative advertisement often leads to a clash of legal and ethical principles between the two brands, that need to be taken into consideration for avoiding the same.  

Unlike the UK, USA or China, India does not have in place a specific statute regulating the area of comparative advertising. The Competition Act, 2002 also does not explicitly make mention of comparative advertising. In the scarcity of specific legislation on the subject, the law relating to comparative advertising in India seems to be scattered. Inevitably, the law on commercial torts, free speech, trademark, unfair competition, and the guidelines laid in several judgments govern the present regime of comparative advertising litigation in India that is it is mainly based on judicial activism.

2) COMPARATIVE ADVERTISING AS A FUNDAMENTAL RIGHT
The Indian Law derives its whole basic structure from the sacrosanct document of India that is the constitution of India, without it any law is in itself never complete. So here again this grey dot in the commercial market has been dealt with by the court, giving at most importance to the fundamental rights, therefore the Honourable Supreme Court of India, way back in the year 1995, in the leading case of Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.,7 recognised “commercial speech” to be included within the expression of “freedom of speech and expression” under article 19 of the Constitution of India, to quote the judgement:-

“....the public at large has a right to receive the ‘commercial speech’. Article (19)(1)(a) not only guarantees freedom of speech and 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 fulfilment 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. An advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.”

It was further stated that ‘Commercial speech’ cannot be denied the protection of Article 19 (1)(a) of the Constitution merely because the same is issued by businessmen in the following para:-

“Advertising which is no more than a commercial transaction is, nonetheless, dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. Accordingly 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”.

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6 Swaraj Barooah and Shivaji Bhattacharya, Comparative Advertisements : Balancing Consumer Interest Vis-À-Vis IPR Infringement, IJIPL (2009).
8 Id ¶ 24.
9 Id ¶ 23.
2.1) Restrictions can only be under Article 19(2)
The restriction under Article 19 are not valid as it is accepted that free commercial speech is a fundamental right guaranteed under Article 19(1)(a), then the curtailment can only be under the limited horizon of the same that is it can only be by law that would fall under Article 19(2), therefore imposing a reasonable restriction on such a right, 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, only can be justified otherwise not as also in other landmark cases.

2.2) Prioritizing Public Welfare
The Indian Courts have given such an interpretation which has not only helped the rival businessman to get benefit from comparative advertisement but also saved the public at large from the exploitation of the traders. As long as it is not motivated by a hidden desire to gain an unfair advantage, an advertisement that aims to educate and inform the public either by exposing the falsity or disclosing misleading claims of rival traders or by presenting an analysis of the merits (or demerits) of their respective products and services, is for the public good and henceforth cannot be taken to be an actionable wrong.

The rationale behind this interpretation was that competitor is better equipped and capable to make such exposure than anyone else accordingly the benefit that would flow to the society at large on account of such exposure would always outweigh the loss of business for the person affected as it will be negligible in comparison. If two trade rivals indulge in puffery without hitting each other, the consumer is misled by both, this can be stopped only by increased awareness or governmental intervention. On the other hand, if both are restrained from either making false representations/incorrect representations/misleading representations or issuing unintended warranties (as defined as unfair trade practice under the Consumer Protection Act), then the consumer stands benefitted. Therefore the result will be permitting two rivals to expose each other truthfully, and accordingly will result in consumer education without much effort on the part of the government.

3) COMPARATIVE ADVERTISING UNDER TRADEMARK LAW VIS A VIS COMMERCIAL DISPARAGEMENT
3.1) Statutory Provision and Commercial Disparagement
The statutory shadow to the concept of commercial disparagement has nowhere been discussed in India until now, but for trademark infringement provision has been enshrined under Section 29(1) of the Trade Marks Act, 1999, which states that trademark is supposed to be infringed if an unregistered proprietor or a person using the mark by way of permitted use in the course of trade, uses a mark which is identical with or deceptively similar to the trademark in relation to goods or services, in such a manner as to present the mark like a trademark of the same goods covered by the registration. This came with an inference that only if the mark is used as of

registered good than only it is infringed, this is very limited legal scope, which is an obstacle for prevention of commercial disparagement.  

This limited legal scope is somewhere breaking the soul of the concept of the trademark itself, as the fundamental principle of trademark law or the substantial function of a trademark is to signify the origin of the goods or services to which it is applied. The expression “in relation to any goods respect of which trademark is registered” the deciding factor should ‘in the course of trade’ which has a definite connotation. Accordingly, in order to constitute infringement, the presentation complained of must be used in the course of trade.

Therefore, the defendant must be dealing or selling in some other way, with goods bearing a trademark. The important point for consideration will be the possession of such goods for comparison which will not amount to infringement as discussed above through judicial precedent. The right conferred by the statutory registration is a right to use the mark in the course of trade and therefore logically, this right gets infringed only if the infringer also uses the mark in the course of business. The use “in the course of trade” means in the course of business. It did not mean use as a trademark. Therefore the difference can be summarised as, to use a trademark not for the business profit per se but to recognizes the product of a rival. The purpose for which the mark was applied will not prevent it from constituting an infringement provided that was used in the course of business and was capable of indicating a connection in the course of trade between the goods and the proprietor of the registered trademark.

3.2) Statutory Provision and Comparative Advertising

The Trade Mark Act, 1999\(^\text{16}\) under Section 30(1) in effect permits comparative advertising, by stating that “Nothing in Section 29 shall be preventing the use of registered trade mark” but provided the purposes is of merely identifying goods or services as those of the proprietor with that certain more condition are provided that it should be in accordance with the honest practices in industrial or commercial matters, should not lead to unfair advantage or be detrimental to the distinctive character or reputation of the registered trademark.\(^\text{17}\) Furthermore, Section 29(8) of the said Act, also discuss what form of advertising would amount to infringement, and accordingly again states that if the act is taking unfair advantage or is contrary to honest practices prevailing in the industry and is detrimental to its distinctive character or is against the reputation of the trademark than it will lead to infringement. In effect, the provisions read together allow comparative advertising as long as the use of the registered trademark does not amount to infringement. Therefore, if an advertiser makes a consumer aware of the truth, there is nothing wrong with it. The reason for this is nowhere different from the law of defamation that is a party cannot be held liable for libel when all of which has been stated is true, which is a complete and substantial defence against any assault or

\(^{15}\) Biplab Kumar Lenin and Arun Babu, Comparative Advertising and the Consumer - Changing Dynamics, 113 JIPR, 22 (2017).

\(^{16}\) The Trade Mark Act, 1999.

challenge regardless of whether any damage is sustained as a result of it.

In *Paras Pharmaceuticals Ltd. v. Ranbaxy Laboratories Ltd.*\(^{18}\), the High Court of Gujarat was faced with a comparative advertising case in which the counsel for the appellant successfully contended that the respondents have used the mark without any license or permission from the appellant, therefore, as per the provisions of Section 29 of the Trade Marks Act, 1999 the respondents are liable for infringement. The Court held that, if the product is popular amongst the general public as a pain reliever or with some specialist, and for the same, if rival party take unfair advantage that accordingly may amount to an infringement of the Trade Mark within the meaning of Section 29(8)(a) of the Act. Court held that malign intention can be presented of rival by the very fact that, by taking shelter of a product which was not even existing, if the respondent tries to establish that its product is true pain reliever or the desired product than the other product, it would certainly affect the reputation of the trademark of the appellant and to this extent, clause (c) of Section 29(8) of the Act can also be invoked to satisfy the Court that the respondent has infringed the trademark of the appellant.\(^{19}\)

### 3.3) The Difference in Approach for Passing off Action and Disparagement

The trademarks law is not merely restricted to registered trademark but also finds its applicability to well known unregistered marks where the action of passing off can resort. Therefore, a comparison of the approach for a passing-off action and disparagement is also a guiding light for this concept. In a case of passing off, the question indifferently is whether the trademark or trade dress employed by A for his product is so deceptively and indistinguishably similar to the well-known mark or trade dress of B's product that A's product could be confused by consumers as B's product? Here the comparison is of rival products but with a similar trademark. The purpose behind this is to exploit the well-known trademark, as it is presumed that, the consumer is familiar with the well-known trademark.

In contrast, the person who disparages another's product does not intend to make his own product similar to that product or to take advantage of familiarity, but rather to be the opposite of that product and, as a result, to differentiate it from the disparaged product in question. The goal of disparaging a product is to make it appear as similar as possible to the product of the competitor. Disparagement and passing off have different distinguishing principles.\(^{20}\) Therefore, a person with imperfect recollection must be used to make the comparison, but that person must be chosen from the group of users who are allegedly disparaging or defaming the product.\(^{21}\)

The act of comparing the goods of one trader with those of another trader and stating that his goods are inferior is not an infringement. However, if the trader goes further and makes a false statement of fact about his competitor's goods, for example, by stating that the products are mouldy or uglier than his own, it is. An action for defamation will be

\(^{18}\) Paras Pharmaceuticals Ltd. v. Ranbaxy Laboratories Ltd., AIR 2008 Guj 94.

\(^{19}\) Id ¶ 37.

\(^{20}\) Karmachand Appliances Pvt. Ltd. v. Shree Adhikari Brothers and Others, 2005 (2) AJ 570.

\(^{21}\) Hindustan Unilever Limited v. Reckitt Benckiser India Limited, ILR (2014) 2 Del 1288, ¶ 16.
admissible in this situation, provided that it can be proven the statement was published with malicious intent\textsuperscript{22} and that special\textsuperscript{23} damage has resulted from it.\textsuperscript{24} As long as the trader's goal is to promote his own business and not to degrade the business of others, it is acceptable to do so. Act must be committed with the explicit intent to impede and harm the other person's business in order to be classified as a malicious act. This means that merely damaging another person's business does not constitute proof of malice.\textsuperscript{25}

Honourable Justice Walton in \textit{De Beers Abrasive Products Ltd. v. International General Electric Co. of New York Ltd.}\textsuperscript{26} has summarized the law point where he pointed that, on the one hand, it can be noticed that the law is that any trader is entitled to puff and brag about his goods, even though such puff must, as a matter of pure and plain logic, involve the denigration of his rival's goods and services.\textsuperscript{27} And this is where the line can be seen as it's not merely puffing about your goods but about denigrating rival’s goods and services, and consequently it becomes actionable. It is not, mere comparison but with that, there should be something more about rival’s goods and services that is denigrating than it becomes actionable in straight terms.\textsuperscript{28}

Thus, the line between permissible comparative advertising and impermissible 'rubbishing and denigrating' of a competitor's product is not always clear. In drawing a line, one has to consider whether a prudent man would take the alleged slanderer seriously or treat it as mere puffery. If it is the former then, it is a case of disparagement and if it is the latter then, it is a case of mere puffery which is consequentially not actionable.\textsuperscript{29}

### 4) LEADING INDIAN JUDICIARY VERDICTS ON COMPARATIVE ADVERTISING AND DISPARAGEMENT

The jurisprudence regarding comparative advertising in India has mostly evolved through case laws. While the Trade Marks Act of India permits advertisement subject to limitations imposed by the provision, the concept has evolved largely from the decided cases.

In \textit{Reckitt and Colman of India Ltd. v. M.P. Ramachandran}\textsuperscript{30} a learned Single Judge of the High Court of Calcutta had considered the concept of negative campaigning. The learned Judge after considering several English decisions including \textit{White v. Mellin}\textsuperscript{31}, \textit{Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd.}\textsuperscript{32}, and \textit{De Beers Abrasive Products Ltd. v. International General Electric Co.}\textsuperscript{33} observed that a tradesman has the right to declare his goods to be the best in the world and he can also say that they are better than

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  \item \textsuperscript{22} Hindustan Unilever Limited v. Cavincare Private Limited, 2010 SCC OnLine Del 2652.
  \item \textsuperscript{23} Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd., 1899 (1) QB 86.
  \item \textsuperscript{24} Lyne v. Nicholls, 23 T.L.R 86 (1906).
  \item \textsuperscript{25} Dunlop Pneumatic Tyre Co. v. Maison Talbot, 20 T.L.R. 579 (1904).
  \item \textsuperscript{26} De Beers Abrasive Products Ltd. v. International General Electric Co. of New York Ltd., 1 WLR 972 (1975).
  \item \textsuperscript{27} Hindustan Unilever Limited v. Reckitt Benckiser India Limited, (2012) 5 CHN 54 Cal.
  \item \textsuperscript{28} White v. Mellin, AC 154 (1895).
  \item \textsuperscript{29} Havells v. Amritanshu CS, (OS) 107/2015.
  \item \textsuperscript{30} Reckitt and Colman of India Ltd. v. M.P. Ramachandran, (1999) 19 PTC 741.
  \item \textsuperscript{31} Supra note 25.
  \item \textsuperscript{32} Hubbuck & Sons Ltd. v. Wilkinson Heywood & Clark Ltd.,1 QB 86 (1899).
  \item \textsuperscript{33} Supra note 21.
\end{itemize}
the competitor, with comparison as they being advantageous to rival’s goods even though it is untrue.

But this freedom is restricted and as soon as he says something bad about a rival’s good, in this term, it is slandering or defaming the competitor, that’s not permissible. No action lies otherwise, and accordingly, if there is defamation action can be for recovery of damages and an order of injunction can also be obtained restraining repetition of such defamation.\(^{34}\)

The same was followed in a similar case of Delhi High Court in \textit{Reckitt and Colman of India Ltd. v. Kiwi TTK Ltd.}\(^{35}\). It was held that “the general principle is that the courts will injunct an advertiser from publishing or circulating an article if the dominant purpose is to injure the reputation of the plaintiff.”\(^{36}\) Furthermore, it was held that though a comparative advertisement is permissible and getting promoted by the judiciary, the same shall not, in any manner, be intended to disparage or defame the product of the competitor or rival, otherwise, this will lead to legal action for the same.\(^{37}\)

In another famous case, of Pepsi and Coca Cola, the television-based advertisement was highlighted in such a manner that, the actor was disclosing the name of Pepsi as the wrong choice and also stating Pepsi as a sweet drink not made for grown-up children, this advertisement would have surely impacted the mindset of an innocent customer, concluding that it is sweet and not meant for grown-up children, which would have lead to loss of revenue, as the market share might have got shrieked of Pepsi. The court held that the intent of the commercial, manner of the commercial, the storyline of the commercial, the message sought to be conveyed by the commercial are all needed to be taken into consideration, before coming to any conclusion. If the manner is ridiculing or condemning the product or services of the competitor then it may amount to disparaging\(^{38}\) but if the manner is only to show one's product better over a rival’s product without derogating another's product then that is not actionable.\(^{39}\)

In \textit{Dabur India Ltd. v. Emami Ltd.}\(^{40}\), where again an advertisement was attacked, the offending voice-over of the advertisement was “Garmion mein Chyawanprash bhool jao, Himani Sona Chandi Amritprash khao”. Court held that the respective effort on the part of the defendant was disparagement of the product Chyawanprash. It was again defined that “even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of Chyawanprash in its generic sense, even in those circumstances disparagement is possible. For Dabur, Chayawanprash is also a Chayawanprash as against which disparagement is made.”\(^{41}\)

The above decision can be further supported by the Gujrat High Court decision in \textit{Hindustan Unilever Ltd v. Gujarat Coop Milk}

\(^{36}\) Id ¶ 8.
\(^{40}\) Dabur India Ltd. v. Emami Ltd., (2004) 29 PTC 1 (Del).
\(^{41}\) Id ¶ 7.
Mktg Federation Ltd., where the honourable court took the view that the generic disparagement of a rival product without particularly identifying or pinpointing the rival product is also equally objectionable.42

In Karamchand Appliances (P) Ltd. v. Shri Adhikari Bros.,43 the Delhi High Court with mosquito repellents ALL OUT and GOOD NIGHT stated a different sect of this section. The respective advertisement showed a lady removing ALL OUT and plugging and replacing it with GOOD NIGHT with a background voice stating that the latter's turbo vapour chases the mosquitoes at double the speed as in comparison. The Delhi High Court held in it as “the moment the rival manufacturer or trader disparages or defames the goods of another manufacturer or trader, the aggrieved trader would be entitled to seek reliefs including redress by way of a prohibitory injunction”44.

In a complex case of Dabur India Ltd. v. Wipro Ltd.45, the defendant Wipro Limited in a TV commercial for the product specified ‘Wipro Sanjivani Honey’ to belittle and denigrate the plaintiff’s product ‘Dabur Honey’. In the impugned advertisement, the plaintiff’s bottle was shown full since two years and the respondent’s bottle was shown empty, as it was consumed immediately. The court found that the defendant's intent was to suggest that its product was superior or better than the plaintiff's. In light of this fact, it was acceptable for a trader to claim that his product was the best, proving that all other similar products were inferior.46

In comparative advertising when a consumer compares two products, one may come to the conclusion that one product is superior to the other, while another consumer may come to the conclusion that one product is inferior to the other.47 Therefore the degree of disparagement should be such that it would be equivalent to defamation, as pointing towards the specific plaintiff and then defaming the same.48 As per the judgment, the overall audio-visual impact did not prove denigration or defamation of the rival product. Having found no element in the commercial advertisement which could be disapproved, the application for an injunction, in this case, was dismissed.49 The rulings of the above leading cases have been followed in the most recent judgements of many cases like that of Havells India Ltd. & Anr. v. Amritanshu Khaitan & Ors.50 and Horlicks Ltd. v. Heinz India Pvt. Ltd.51 and thus, the same are not reproduced here for the sake of brevity.

5) CONCLUSION

The commercial market is all about marketing skills but this does not mean that only marketing skill will lend a trader in wings of

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44 Id ¶ 18.
49 Annamalayar Agencies v. VVS & Sons Pvt. Ltd. & Others.
50 Havells India Ltd. & Anr. v. Amritanshu Khaitan & Ors, 2015 SCC Online Del 8115.
profit, rather if the own product is so well designed and full fill the principle of utility, it is not required to depend upon the faults of the rival traders. This has been the base of the legal principle derived from *Reckitt & Colman of India Ltd. v. M.P. Ramachandran*\(^{52}\) that recognized the permissibility of puffing up and rights of like traders engaging in comparative practices to *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.*\(^{53}\) which held that false and deceptive advertising is not protected commercial speech, the unwinding road gives a clear sign post that while puffing up is permitted, the road map has a red signal where the advertisement is intended to disparage the goods of the rival. While hyped-up advertising may be permissible, it cannot trespass the grey areas of permissible assertion. The advertiser must have some reasonable factual basis for the assertion made. The prior judgments holding that a trader is eligible to proclaim his goods to be the finest in the world are no longer good law.\(^{54}\)

The changing face of comparative advertisement should be given more clarity through a legislative intervention thus bringing in more clarity to vague terms like disparagement and puffing up. Law should be laid down in clear terms specifying the boundaries of the comparative advertisement so that there will be no confusion. While competition should not be stifled, the legitimate rights of the trademark holder to not have his mark diluted also stands on the same footing. This necessitates a balancing of the conflicting interests, namely that of the public at large in promoting competition and the private in protecting the trademark. The rights of the trademark holder should be protected to safeguard the interest not alone of the holder of the mark, but of the public also as a trademark is an insignia that identifies the goods to the consumer.

Any dilution in the trademark affects the consumer and while drafting legislation, the ambit of protection accorded to the use of the trademark for comparative advertising should be specified in lucid terms without any leeway for ambiguity. Terms like disparagement, puffing up, denigration, etc. ought to be defined. The extent to which honest use can be made for comparative advertisement as laid down in the trademarks act must be also be elaborated. The evolution of law through case laws has its inherent drawbacks as precedents are often dissented or distinguished which paves way for lack of certainty. The Act should be well defined giving little room for judicial intervention. This will ensure that the advertiser knows the exact boundaries within which he can legitimately make use of the registered trademark, without fear of infringement. The limits on comparative advertising should also consider the fundamental rights guaranteed by the Constitution of India and should not be an unreasonable restraint on freedom of speech. Thus a harmonious approach has to be adopted while limiting the right of the trademark holder against use for comparative advertising.

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\(^{54}\) *Dabur India Ltd. v. Emami Ltd.*, (2004) 29 PTC 1 (Del).