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RESEARCH ARTICLE

COMPARATIVE ADVERTISEMENT: PROTECTION OR INFRINGEMENT OF THE TRADEMARK

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Abstract

Marketing the product has been seen as one of the most strategic developments in the industry. Now the product, along with the quality, needs excellent and representable marketing to attract the customer. People are primarily being recruited and appointed to look after the same. But for selling the product in the market, are the producer crossing the line of competition and the rights of Intellectual property nowadays? In the present article, an attempt has been made to discuss comparative advertising and why trademarks should be protected to promote goods in the market. The discussion between the same highlights the public policy to protect the consumer interest at large. Comparative advertising and trademark protection embark on the fair competition for consumer welfare.

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“An advertising agency is 85 percent confusion and 15 percent commission.”

-Fred Allen

Introduction:-

In the second part of the 20th century, advertising's significance as a necessary product sales method has grown significantly.¹ Advertisement is the best marketing strategy to increase the sale of the product. Corporations will go to any length to ensure that their product reaches many individuals. It has been observed in all cola battles to employ a pug. Companies are doing their best to nail it down to project their product at its best. Initially, the emphasis was on casting their product as the best by quantifying its excellence; however, the advertising world has evolved to a fiercer competitive method of demonstrating that the product is superior to the competition. This system of drawing the product from the similar one has left out the basic sense of competition. This sort of promotion, referred to as comparative advertising, has caused the advertising world to include trademarks or, in a broader sense, the trade dress of the items, in addition to hiring celebrities to pitch the product.²

In the race to sell their products as the best, businesses have started to utilise cutting-edge strategies to outperform their rivals.³ They do not shy away from showcasing the product in comparison by using trademarks or any other

¹Jane C. Ginsburg et al., Trademark and Unfair Competition Law: Cases and Materials, 57 (Carolina Academic Press Durham NC, 6th Edition 2022)

² Jessica Littman, “Breakfast with Batman: The Public Interest in the Advertising Age” 108 The Yale Law Journal 1717-1735 (May 1999)

³Bibek Debroy, Intellectual Property Rights 28 (B.R. Publishing Corporation, Delhi, 1998).

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familiar identification of the product. They use a variety of promotional strategies, such as craftiness advertising and celebrity advertising, to draw attention to their products. Some even compare their products using their competitors' trademarks, logos, and trade dresses.⁴ Comparative advertising is a type of advertising that does precisely that.

Comparative Advertisement

In many nations, comparative advertising is a standard system of commercial advertising. Using the competitor's product or image to showcase its owner's product may be permissible. By contrasting the attributes of the advertorial product with the competitor's offering, this advertising style aims to influence consumer behaviour. The quality of comparative claims diverges. They may expressly or tacitly refer to a competitor. Competitors have lowered the level of marketing to the extent that they are ready to reflect the images of the product in question. They may stress the similarities in the context of favourable comparisons or the contrasts in the context of unfavourable comparisons.⁵ They may, while marketing, claims that the promoted product is "better than" or "as good as" the competitors' product, thereby establishing superiority claims, or that it is "as good as" the competitors' product, thereby showing comparability equilibrium or parity claims. For example, nearby 2006, apple Company came out with the line "I am a Mac" in opposition to the "I am PC." At that time, PC was part of every household, but the company strategically wanted to get the generation out of that box to think separately about technology. This notion aims to allow for an authentic, but not deceptive, distinction of the characteristics of one seller's objects with those of someone; such an analysis will unvaryingly contain the tradition of trademarks linked with the advertised product.⁶ Without any regulations, such use might be considered trademark infringement. There is no legal classification of comparative advertising in Indian laws. However, the UK Regulation defines it as a commercial that "explicitly or by connotation, identifies a competitor or the goods or services carried by a competitor".⁷

The term "comparative advertising" describes advertisements in which the goods or services of one business are distinguished from those of another company.⁸ As we know, the rivalries of the famous beverage brand in India are Pepsi and Coca-cola. Both brands have indifferently marketed the product so that the consumer has constantly been looking for the same marketing skill. The approaches of both companies may be different from each other. Still, the goal remains the same, i.e., to catch the market by showing superior taste and superiority claims with their advertisement. Consumers also gain from comparative advertising of similar products since it recurrently contrasts the price, value, quality, or other characteristics of competing items, raising customer awareness. These policies have now become part of the marketing skill of the product. However, one essential caveat to this is that consumer understanding may only be improved if advertisements do not contain misleading information. Disinformation is always possible if consumer education is given to institutions with vested interests.⁹

Today, the entire world is viewed as one global village. Trademarks are critical in the uniqueness of the goods of one corporation from persons of another. The terminology of a trademark is described as a mark or sign that identifies one product from others similar. Its objective is to identify a product's place of manufacture and set it apart from comparable ones. Customers will find it simpler to recognise a product with a personality from others of its kind. The Trademark acknowledges the product's origin, guarantees its unaltered quality and aids in developing a brand image by advertising the products. In a contest to promote their products as the best, businesses use advertising strategies that combine informative and persuasive elements, such as trademarks, trade names, and other trade symbols. Both the utilisation of their brand and the Trademark of their rival have increased in popularity.

Concept Of Trademark

The term "trademark" refers to a mark that may be visually represented and used to distinguish one person's goods or services from another. It can refer to the items' appearance, packaging, or combination of colours.

⁴Jane C. Ginsburg et al., Trademark, and Unfair Competition Law: Cases and Materials, 57 (Carolina Academic Press Durham NC, 6th Edition 2022)

⁵Stephen Fishman, Trademark, Legal Care for your business & product name, 218 (Nolo Publishers, 11th Ed. 2016)

⁶Marl D. Janis, Trademark and Unfair Competition in a nutshell, (Aspen Publishing House, 2nd Ed. 2017)

⁷Lionel Bently and Brad Sherman, Intellectual Property Law, 1061 (OUP oxford Publishers 4th Edition 2001)

⁸Stephen Fishman, Trademark, Legal Care for your business & product name, 218 (Nolo Publishers, 11th Ed. 2016)

⁹Jerre B. Swann, ShariSeidman Diamond, Trademark and Deceptive Advertising Surveys: Law, Science, and designs, (American Bar Association, 2012)

Trademarks are signs that identify goods or services. The concept of Trademarks is not new. Traditionally, ancient Greeks and Romans stamped or scripted an identifying symbol or name on various goods.¹⁰ Now the Trademark is a way to attract and generate confidence among the public, as consumers look at trademarks to choose goods and services, which increases the role of trademarks in global marketing. The industrial property system offers a legal means for such protection.¹¹

To “distinguish one person’s goods from those of another” is the main objective of a trademark. A trademark enables a product to stand out from competing goods. A trademark allows a client to identify products and their source. Suppose a corporation promoting a product uses a competitor’s Trademark in an advertisement to compare its products, demeaning the latter in the process. In that case, this will raise comparative advertising, product disparagement, and trademark infringement questions.¹² Trademarks are only invented in the public interest to create awareness among the consumer about the product and to make itself independent for their advertisement as served in the public policy scheme.¹³

In **Duracell International Ltd v. Ever Ready Ltd**,¹⁴ the corporation in the advertisement mentioned its competitor’s name to draw a comparison. Duracell batteries indeed imitate the appearance of the battery without saying a word. The Court held that Trademark had not been infringed. Furthermore, Duracell had registered their Trademark in different colours and has used different colours in the advertisement, not the same as ever ready. Therefore, they have not said to infringe the Trademark of their competitors.

In **Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd**,¹⁵ Court critically analysed that the “majority of the consumers are benefited by the information made available through the advertisement.” The courts consider an ignorant buyer who could buy a fake good under the mistaken belief that it was brand ‘x’ when enforcing trademark law, which only protects consumers. The same reasoning ought to guide decisions on offensive advertising.”

What Is Trademark Infringement?

Consumer confusion is the central attraction of the trademark infringement problem. The consumer is the king of the market. Every corporation is here to please him to nail the sale content. Nevertheless, to sell the goods, the corporation is making the product similar to an existing one. “Whether the mark is similar to another turning buyer confused, misled, deceived about the sources of the products or service?”¹⁶ The rule of Deceptively similar, as mentioned by the law relating to Trademarks, has made the provision to clarify the goods distinctively.¹⁷ The test of the deceptively similar has one source of how the consumer responds to the two characters. If he is likely to be tricked as the customer, misunderstanding has been the most significant common source of trademark infringement. Confusion and passing off are two kinds of ambiguity related to fooling or confusing ordinary customers. Evidence of trade confusion has been regarded as extremely valuable in infringement cases. Actual evidence of passing off, wherein a dealer knowingly and earnestly attempts to pass off one sound as the next, is also valued in infringement claims. is author

Comparative Advertising And Trademark Infringement

To “distinguish one person’s goods from those of another,” a trademark is employed. A trademark enables customers to recognise products and their source.¹⁸ Suppose a promoter compares his assets to a competitor while using a competitor’s Trademark, disparaging the competition. In that case, such an act on the advertiser’s part will create concerns about publicity and promotion, product disparagement, and trademark infringement.

¹⁰ P. Narayanan, Law of Copyright and Industrial Design 23 (Eastern Law House, Lucknow, 4th edn., 2002)

¹¹ Bibek Debroy, Intellectual Property Rights 28 (B.R. Publishing Corporation, Delhi, 1998).

¹² Ryder Rodney D, Brands, Advertisements and Advertising 326 (LexisNexis Butterworths, New Delhi, 2003)

¹³ Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 YALE LJ 1165, 1206 (1948), reprinted in 108 YALE LJ 1619, 1659 (1999).

¹⁴ (1998) FSR 87

¹⁵ AIR 1995 SC 2438

¹⁶ Jerre B. Swann, Shari Seidman Diamond, Trademark and Deceptive Advertising Surveys: Law, Science, and designs, (American Bar Association, 2012)

¹⁷ Jyoti Rattan, Trademarks Law, (Bharat Law Publication 1st Edition, 2021)

¹⁸ Harry D. Nims, Unfair Competition and Trademarks section 331, pg 1035 (New York Baker, Voorhis & Co. (4th Edition, 1947)

In India, the law of comparative advertising and product accusation in trademarks is based on the precedent of *Irving's Yeast Vite Ltd v FA Horse-nail law*.¹⁹ In the present case, Plaintiff moved to the Court refraining defendants from using their registered Trademark upon its good. Nevertheless, the Court declined the claim, observing that the Trademark Act did not cover the words used by Defendant. Therefore, an injunction was not granted. However, an injunction order against passing off was granted.

Section 30 (1) exempts competitive advertising from the definition of infringement under Section 29. It states that any advertisement conducted in good faith and without injury to the Trademark's unique character or reputation is lawful and does not establish infringement.²⁰

Law Relating To Trademark Infringement And Comparative Advertisement

Knowing the law can help understand the clause referring to comparative advertising and using an anentrant's Trademark. The provisions treasured under Sections 29 (8) and 30 (1) of the Trademarks Act of 1999 have the unbiassed of impartially allowing comparative advertising. As long as a competitor's Trademark is legitimate, there is nothing wrong with informing customers about alternative goods or services and utilising registered trademarks to identify them. It is agreed that the registered administrator must show that the problems mentioned in the proviso to the provision exist. It won't be regarded as an infringement unless legitimate performances aren't using the mark. Comparative advertisement evaluation is objective. It must be remembered that when presented with the advertisement, logical readers would probably conclude that it is accurate. For Sections 29(8) and Section 30, legislative rules of conduct are insufficient to determine whether a practice is honourable. When evaluating morality, one must consider the target market for marketing the goods or services. The precedent does not need the courts to attempt to establish a higher bar through the law, violating Section 29 (8) and Section 30, false advertising (1). It is necessary to refer to the product advertisement in its totality. It should be allowed even if unclear, provided the advertisement supports the explanation.

Enforcement Of Comparative Advertisement Law In The United Kingdom

IP law is characterised by a conflict involving, on the one hand, safeguarding people and businesses from those who would want to gain from their creative and commercial initiatives unfairly and, on the other hand, fostering healthy competition that benefits consumers. The EU Comparative Advertising Directive (2006/114/EC), the principal source of law governing comparative advertising, acknowledges this conflict in its recitals. The benefits of comparative advertising: "Comparative advertising, where it compares substantial, relevant, verifiable, and representative attributes and is not deceptive, maybe a proper way of educating customers of their advantage."²¹

Deception and unfair advantage are the two main overlapping issues of trademark infringement. The standard requirements of trademark law apply. If relevant, an infringement action in Court will be available if the third-party mark in the comparison ad's use creates confusion in the consumers' minds regarding the origin of the advertiser's goods. Like other legal disputes, trademark infringement cases are burdened by the expense of legal action. However, a different and more affordable method of redress is accessible in the United Kingdom. The Advertising Standards Authority (ASA) may receive a complaint when the regulations governing comparative advertising are broken (independent of whether there is also trademark infringement).

The Committee of Advertising Practice (CAP) Codes, which embody the Comparative Advertising Directive provisions, are applied by the ASA, the unbiased regulator of UK advertising across all media.

The Consumer Protection From Unfair Trading Regulations of 2008 and the Business Protection Against Misleading Marketing Regulations of 2008 acknowledge the ASA's role in enforcing the directive. These state that every

¹⁹ (1934) 51 RPC 110

²⁰ *Irving's Yeast Vite Ltd v FA Horse-nail*, (1934) 51 RPC 110

²¹ Mike Shaw and Dafydd Bevan, United Kingdom: Comparative advertising and enforcement in the United Kingdom, *World Trade Review*, 1st September 2016, available at <https://www.worldtrademarkreview.com/article/united-kingdom-comparative-advertising-and-enforcement-in-the-united-kingdom> accessed on 30th June 2022.

enforcement authority must examine the desirability of promoting the control of unfair business practices by any established measures it deems acceptable when choosing how to fulfil its enforcement responsibility.²²

The ASA plays a significant role in upholding the legislation controlling deceptive and unfair advertisements, such as misleading comparison advertising. The ASA investigates complaints regarding specific promotions to determine whether they comply with the applicable CAP Code based on the likely impact of the advertisement as a whole, taking into account the medium in which it appeared, the intended audience, and the type of product advertised.

Settled Law In India

The Trademark Act of 1999 protects registered trademarks. The Trademarks Act likewise covers applications to well-known unregistered marks. It provides a legislative counterpart to the statutory law remedy of passing off for the proprietor. The Trademark Act 1999 permits the concept of comparative advertising u/s 30(1). The Trademarks Act, 1999's Section 29 (8) outlines circumstances where using a trademark in advertising may be illegal. It states that any advertisement that does not follow natural business methods or harms the mark's reputation or distinctiveness constitutes infringement. Comparative advertising is also exempt from the activities considered infringement under Section 29, according to Section 30 (1). It indicates that any commercial that abides by moral norms does not damage the Trademark's reputation or distinctive character and does not infringe upon this provision is permissible.

Section 36A as envisaged under MRTP Act, lists numerous actions as an 'unfair trade practice.'²³The Monopoly Restrictive Trade Practice (MRTP) Act 1969, which was formerly in force but has since been superseded by the Competition Act 2002, serves as a model for the idea of unfair trade practices. Under Section 36A, an "unfair trade practice" is any trade practice that adopts any unfair method or an unfair or deceptive practice to promote the sale, use, or supply of any goods or the provision of any services, including false statements made orally, in writing, or person about the standard, quality, status, condition, usefulness, or price of goods or services.

In the Consumer Protection Act of 1986, the Consumer Grievance Forums investigate complaints of unfair business practices. Although this Act offers a reliable method for resolving consumer complaints, it ignores the interests of producers, merchants, and service providers. In India, there have been several instances involving comparative advertising. The following paragraphs cover a few of the crucial situations.

The provision under Article 19(1)(a) of the Constitution, advertisements and commercial speech are guaranteed as a part of the fundamental right. Nevertheless, it cannot be said that any specific merchandise producer can violate the fundamental right guaranteed under the Constitution by maligning, doubting, and disparaging the creation of another producer through a negative campaign. It is not denied that it is open for an advertiser to waft up its goods and to equivalence only a select or particular trait, feature, or distinguishing of the product with its competitor.

The Advertising Standards Council of India (ASCI), a non-statutory self-regulatory organisation, was founded in 1985 and was created by Section 25 of the Companies Act of 1956. It examines and resolves complaints through its Code of Advertising Practice (CAP). One of the guiding concepts around which the Code is built is "To assure the veracity and honesty of statements and claims made by ads and to protect against misleading advertisements." The ASCI code covers several clauses that are relevant to commercials. Because there is no enforcement mechanism, the conscience agency Advertising Standards Council of India has had trouble ensuring adequate compliance. There is also a risk of non-compliance if a complaint is made against a non-member. Therefore, the only way to prevent future differences is to enact appropriate legislation exhaustively enumerates the law and leaves no room for ambiguity or uncertainty.

Judicial Pronouncements

Even if the mark is not significantly used, the consumer can be held accountable if the connection points to another party's goods and causes it to be disparaged.²⁴

²²Paul Jordan and Timothy Heaps, *Comparative Advertisement*, LexisNexis, available at <https://www.lexisnexis.co.uk/legal/guidance/comparative-advertising> accessed on 30th June 2022.

²³ The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) (MRTP Act) was repealed and was replaced by Competition Act 2002 under section 66.

²⁴Marico Ltd. Vs. Dabour Limited IP Suit (L) No. 1262 of 2019 dated 14 February 2020.

In **Reckitt & Colman of India Ltd. v. Kiwi TTK Ltd.**²⁵, The suing company manufactures and markets consumer goods. Cherry Blossom Premium Liquid Wax Polish is one of their products, which they produce and market under the name Cherry Blossom Premium Liquid Wax Polish. The “KIWI” label of liquid polish is one of the labels developed and promoted by Defendant, a polish maker. It is claimed that Defendant’s and other manufacturers’ liquid polishes include significantly less wax and significantly more acrylic than Petitioner’s liquid polish. The acrylic base is said to develop a film on the shoe that cracks with time, causing the footwear to be damaged. As a result, Plaintiff’s liquid polish, which has a wax-rich recipe, is superior to other polishes. Plaintiff’s liquid wax is offered and promoted in angle neck bottles allegedly designed to make applying the polish on footwear simple. According to reports, the container is equipped with an imported applicator strengthened by the organic assembly on the surface that entraps the sponge to the plastic applicator base. Plaintiff asserts that it has a 68 percent market share for liquid shoe polish and that its creation is better than comparable goods made by rivals. In contrast, Defendant only has a 20 percent market segment.

Defendant advertises its product through electronic media. Defendant’s commercial depicts a bottle of “KIWI.” The white bottle with the word “KIWI” written on it does not dribble, unlike the one with the phrase “OTHERS,” which does. The substance observed flowing from the “OTHERS” bottle originates from a “Brand X” bottle that allegedly mimics the container of Plaintiff’s liquid shoe polish, for which Plaintiff allegedly has a design registration number of 165756. A red blob appears on the surface of the “OTHERS” container marked “Brand X,” which purportedly represents “CHERRY,” which appears on the bottle of Plaintiff’s goods. In addition to the electronic media campaign, Defendant had also been distributing “point of sale” poster materials in stores and other advertising venues that offered similar items. It is claimed that the bottle depicted as “OTHERS” with a malfunctioning applicator in Defendant’s promotional material looks suspiciously like Plaintiff’s applicator.

The Court laid down some rules to adhere to while determining whether the advertisement was comparative and whether the aggrieved person was eligible for an injunction. Even if the claim is false, an owner can assert that its goods are the greatest and best in a particular situation. The corporation may even argue that its products are better than its rivals, even though this is incorrect. The advertiser can even contrast the features of his product with those of his rivals, as well as the benefits of his interests over competing products. He cannot claim that his products are incorrect while claiming they are superior to his rivals. If he says so, he disparages the effects of his opponents. It has been noted that he disparages his enemies and their interests, which is unacceptable. There is no need to complain since there is no disdain for the goods or their maker. Defamation, on the other hand, is a reason for complaint. The Court has the power to make an order of injunction barring further defamation if it is a claim for damages for defamation.

Since there is no disparagement or defamation of the manufacturer’s goods in doing so, A creator was ruled to have the full right to proclaim that his creations are the finest and to generate other exaggerated statements about them. This decision also holds that a manufacturer has no right to sue other traders or producers of comparable goods. However, a producer has no right to denigrate his rival’s interests to the highpoint and shop his own.

In **Dabur India Limited Vs. Colgate Palmolive India Ltd.**²⁶, Trade conflicts have resulted in this lawsuit filed by Plaintiff, which makes Dabur Lal DantManjan Powder, against Defendant, who manufactures Colgate tooth powder. Defendant’s advertising on the visual media prompted this lawsuit to seek an interim injunction. The gist of the TV commercial complaint is that Actor Sunil Shetty is seen stopping people from buying Lal DantManjan powders. He further establishes the undesirable significance of such Lal DantManjan by rubbing it on the client’s glasses, leaving scratches that Sunil Shetty compares to sandpapering. He further claims that Defendant Colgate’s teeth powder is 16 times less abrasive and does not harm eyewear. He is overheard advising the buyer that changing eyewear is simple, but changing teeth is rugged.

The Court relied upon **Reckitt & Coleman v. Kiwi TTK Ltd., 1996 PTC (16) 393**, and quoted

“Therefore, in a similar nature, one must note that an advertiser is more likely to extol the virtues of the advertiser’s goods, and the manufacturer should refrain from claiming that their product is superior to that

²⁵ 1996 PTC (16) 393

²⁶ AIR 2005 Delhi 102

of the other trader in the commercial's text. Although, having depicted the container and the price in the advertisement together, it is difficult to proceed because defendant No. 1 was not referring to Robin Blue."

It was sought to contend that unpleasantry remarks against the world may be permissible, but the same may not be regarded against one particular product. The Court refused to accept it for the apparent reason that, although declaring that everyone is terrible, it was noted that everyone and anybody who fulfilled the definition of everyone is harmed by it."

Court also placed reliance upon **Pepsi Co. Inc. and Ors. v. Hindustan Coca-Cola Ltd. and Anr.**²⁷, when it was declared that a breach of a particular brand right obtained under and recognised by the Act qualifies as a violation action. On the other hand, the Plaintiff's right in a passing-off case is distinct from any statutory right to a trademark. It is focused on the Defendant's actions that result in, is intended to result in, or are reasonably likely to result in dishonesty. A person who attempts to gain financially from the reputation that another has built in a particular trade or business by deception is engaging in passing-off, a sort of unfair commercial competition or actionable unfair dealing. The action is considered a deception action. The tort of passing-off is defined as an illegal and unethical by a trader to his potential customers with the intent to impair, as a highly probable consequence, another trader's business or goodwill, resulting in actual or likely damages to the other merchant's business or goodwill.

S. 29(8) could not be highlighted because the mark could not regard as a registered trademark.²⁸ However, the Court found nonspecific disparagement of a contending product without naming or positioning the competing product is similarly unacceptable, based on the precedents cited above. Without expressly mentioning it, clever advertising can attack a competitor's product.²⁹ Nobody can devalue a product class or genre to which a claiming plaintiff belongs and then assert that the Plaintiff has not been acknowledged.³⁰

Plaintiff is not entitled to any remedies where the statement disparages the fact that the goods are genuine compared to advertising. **In Reckitt Benckiser (India) Limited Vs. Naga Limited and Ors.**³¹, After being affected by Defendant's television advertisement featuring a pregnant woman in an extreme stage who needs emergency medical attention while travelling by train, Plaintiff brought this lawsuit in search of a perpetual and mandatory injunction. When the doctor demands hot water, a cake of soap is brought to her, which she rejects because she needs antiseptic soap. Viewers undeniably identified the soap crooked to the clinician as Plaintiff's goods, definitely Dettol Soap. "At a time like this, you do not need only antiseptic; you need a protector," the doctor says in the commercial. Defendant's Ayurvedic soap is displayed, along with the claim that it is a body 'rakshak' soap, the first Ayurvedic soap to eliminate all seven types of words and protect against infection. Plaintiff claims that this commercial is defamatory to their Dettol Soap. The purpose of the advertisement is sarcastic, especially in light of trade literature that indicates Dettol Brand sales are only about 30-35 crores out of a total of Rs. 230 crores. According to Plaintiff, Dettol has the market's most substantial brand equity.

Although Defendant made no false statements, the issue was whether Defendant could be held accountable for denigrating Plaintiff's product. Additionally, it was found that Plaintiff cannot be heard to object if a rival corrects the customer's mistaken notion. When a competitor has spoken the truth, the Court jumps to find that party liable for libel.³² The fact of the matter is always a complete defense, regardless of whether the offence or challenge has caused any damage. Dettol soap is widely believed to have the same medical and curative properties as Dettol liquid. It hardly differentiates whether the manufacturer created the mistake or if it arose spontaneously in the minds of the consumers. It is not illegal if a party, like a defendant, helps to fix the error. The deception that serves as the foundation for the tortious injunction at the centre of this dispute can be assigned to Plaintiff rather than Defendant.

²⁷2003 (27) PTC 305 (Del)(DB)

²⁸ Harry D. Nims, Unfair Competition and Trademarks section 331, 1035 (New York Baker, Voorhis & Co .4th Edition, 1947)

²⁹ Ryder Rodney D, Brands, Advertisements and Advertising 23 (LexisNexis Butterworths, New Delhi) 2003, p 326

³⁰ Hindustan Unilever Limited vs. Gujarat Co-Operative Milk, 2017 Bombay HC

³¹ 104 (2003) DLT 490

³² Jerre B. Swann, Shari Seidman Diamond, Trademark and Deceptive Advertising Surveys: Law, Science, and designs, (2012)

In **Hindustan Unilever Limited vs Gujarat Co-Operative Milk**,³³ the action was sought for nonspecific disparagement/slander of the products category of Dairy-based Dessert referred to as “Frozen Dessert.” Plaintiff has claimed to be a market leader among the organised players for a frozen dessert. They have submitted that Defendant tried to showcase false information about frozen desserts. They have directly targeted them, Plaintiff being the market leader. The product disparagement issue was discussed, and essential rules for the tradesperson were framed. Even if their product isn’t mentioned by name, an honest producer may always advocate and try to prevent such disparagement by a comparison advertisement. Equally offensive is the general hypocrisy of a competing product in advertising without naming or mentioning the rival product. Advertising campaigns in visual media, especially those featuring well-known movie stars, have an instant and powerful influence on viewers and potential customers. There should be a distinction between actionable remarks and those that are not. An interim order of nature should apply to advertising, where a statement of superiority over a competing product is made until a panellist can demonstrate the same. The advertiser can praise its technological greatness over a competitor’s development, but he cannot criticise its products. No reasonable complaint can be made if the Defendants stress their brighter future while contrasting their goods with the Plaintiffs in advertising. If the primary goal of an article is to harm the Plaintiff’s reputation, the courts will hold an advertiser liable for publishing the piece.

The following considerations should be used when deciding whether or not there has been disparagement: (1) the purpose of the advertising; (2) its style; (3) its plot; and (4) the message that the producer hoped the advertisement would send. The level of disparagement must be close enough to defamation to qualify. An advertisement may claim that its products are better than a competitor, but it may not assert that its development is superior to the competitors. The Court said that Defendant is guilty of disparaging the rival product, namely frozen desserts, by giving false information about the same, participating in a dirty campaign, and encouraging customers to pick its commodity over frozen desserts, which is prohibited.

Suggestion And Conclusion

Advertisement is a marketing strategy of the business house and the right to showcase the product. This tool allows the consumer to choose the right product in the market per their needs and requirements. However, the legality of such comparative advertisements is a shady area that must be considered carefully. As discussed above, the courts have taken a stand for the producers to protect them from any infringement and action of passing off. However, there is no law directly applicable to the comparative advertisement. Only the Trademarks Act’s Sections 29(8) and 30(1) can guide on issues involving trademark infringement disguised as comparative advertising.³⁴ Therefore it is being suggested that more direct and appropriate laws should be framed to preserve the producer’s goodwill.

Secondly, it is suggested that if any party is found guilty, the orders for corrective advertisement could have been passed along with the liquidated damages for the potential loss of the manufacturer.

Last but not least, protection should be provided at the international level also. Once the advertisement goes on air, it spreads quickly and remains on the virtual channel for a long time. The goodwill of the manufacturer is affected. So, it is suggested that more stringent laws should be framed with dispute resolution remedies by the TRIPS and WTO guidelines.

The Court’s rulings in the current case have established a precedent that suggests no harm in comparing your products to those of a rival. Comparative advertising is permitted if the comparison is correct and does not disparage the rival’s things or trademarks. Comparative advertising that denigrates products is still unacceptable. Comparative marketing is unquestionably advantageous because it raises customer awareness. Additionally, it allows an advertiser to build his creation in the market by asserting his superiority over other brands that are already well-known. However, regulations must also be in place to prevent abuses. The public interest would have been severely harmed if the courts had mandated that the market’s trade disputes be resolved because the issue is not whether the product is superior but raising public awareness. Comparative advertising should not mislead the audience because it aims to raise public awareness without being overly deceptive.

³³5 suit (L) No. 204 of 2017 Bom HC

³⁴Soothe Healthcare Private Limited vs. Dabour India Limited, CS (COMM) 18/2022 dated 3 March 2022 (Delhi)

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