

Analysis of Two Prominent Judicial Pronouncements on Cases regarding Product Disparagement in Comparative Advertising

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ABSTRACT

The aim of Comparative advertising is to make the consumer knowledgeable and vigilant about choosing product or service from list of available choice; however the market conditions have lead into it the harmful practices of product disparagement and denigration. Consequently, there have been prevalent rise in number of cases in this regard and the judicial decision regarding these issues has given so much energy to thoughts that the author felt to contemplate and analyze the cases. In the present work, the author discusses two judicial cases pronounced in India; each case exclusively. We find that the judgment delivered in these cases clarifies what limits to puffery and what levels it to denigration. The pronouncements implies that comparative advertising implies only a description of permissible assertion but in no way implies any permission for misrepresentation and it aims to a stop any kind of monopoly prevailing in the market, immediately stop unfair trade practice so that at large the interests of the consumers is protected. The study also provides the base work for the comparative advertising in India. The understanding on the subject is enhanced on going through various judgments given by several Courts.

Keywords

Comparative Advertising, judicial pronouncement, Product disparagement, Trademark infringement

1. INTRODUCTION

This study lies within the broad scope of Intellectual Property Laws pertaining to the aspects of denigration of trademarks and product disparagement in the realm of comparative advertising [1,2]. The advent of Comparative advertising was to make the consumer realize the significance and better utility of a service or product, but the greed of grabbing more and more market share and consumer attention, the brand owners during comparative advertising started to provide deceptive, misleading or denigrating information regarding their competitor's product or service and in some cases even did

infringement of the registered trademarks for giving an impression of an existing popular brand. Previously too, the author has reported several case studies and research analyses in this regard [3-9]. In the present work, the author discusses **two** judicial cases pronounced in India; discussing each case exclusively. The focus of the judicial pronouncement regarding this matter is to provide protection to the consumer's interests, curb monopolies in the market and prevent unfair trade practices.

2. ANALYSIS OF JUDICIAL PRONOUNCEMENTS

2.1 Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd. (2010) (Odomas v/s Good Knight)

Plaintiff: Manufacturer of mosquito repellent creams, namely 'Odomos' and 'Odomos Naturals.'

Defendant: Manufacturer of mosquito repellent cream under the brand name 'Good Knight Naturals.'

Facts of the Comparative Advertisement: In the advertisement Good Knight Naturals claimed that other creams caused stickiness and a voice over stated expressions such as 'there is an apprehension of getting rashes and allergy with the use of mosquito repellent creams'

Plaintiff Complaint: The telecast disparaged its product in an implied manner, so, it was entitled to an injunction against the telecast.

Defendant Arguments: The commercial did not intent to disparage other mosquito repellent creams

Verdict: The Court held that commendatory expressions should not to be treated as serious representations of fact; it further stated that such principle was by no means conclusive as the limits of permissible assertion are not always discernible. The Court thus laid down certain guiding principles wherein it observed that an advertisement is constitutive of commercial speech and is protected by Art. 19(1)(a) of the Constitution. While there

would be some grey areas in the process of representation, any commendatory statements need not necessarily be taken as serious representations of fact, but only as glorifying the product, provided that the advertisement is not false, misleading, unfair or deceptive.

The Court found no content in the commercial to suggest overt or even implied denigration. The Court did not consider the expressions of defendant as disparagement of plaintiff's product rather considered it as an advancement of a general proposition. It was held to be natural to assume that "while comparing its product with any other product, any advertiser would naturally highlight its positive points but this cannot be negatively construed to mean that there is a disparagement of a rival product."

With regard to the point on stickiness, the Court observed that it was entirely dependent on the subjective opinion of the consumer, and thus ended all apprehension of denigration of the appellant's product.

Analysis: The Court observed that a seller always has the scope to represent his product in a manner that gains him additional purchasers than what he would have normally had. This latitude, however, in no way implies any permission for misrepresentation, but only a description of permissible assertion. To substantiate this argument, the Court also placed reliance on the principle of civil law, "simplex commendatio non obligat", which means that simple commendation can only be regarded as a mere invitation to a customer, without any obligation as regards the quality of goods. Thus, each seller has the right to naturally try and affirm that his wares are good enough to be purchased, or of superlative quality.

In this case the Court rejected the argument of the appellant that it was the implied target of denigration since it had a dominant market share. The underlying rationale behind this argument would be to curb the monopoly of the plaintiff in the market because if it was not done, then no company in the market could advertise its product as doing so would necessarily mean that the plaintiff's product was being targeted.

The judgment delivered points out stark differences between tolerable amounts of puffery and what might amount to denigration.

2.2 Procter & Gamble Home Products vs. Hindustan Unilever Ltd, (2010) (*Rin v/s Tide*)

Plaintiff: Manufacturer of a detergent powder brand 'Rin'

Defendant: Manufacturers of the detergent powder 'Tide'.

Facts of the Comparative Advertisement: Rin aired a commercial that compared both Tide and Rin to claim that 'Rin' was more effective than 'Tide' in providing 'whiteness' to clothes.

Plaintiff Complaint: Tide prayed for an injunction to restrain Rin from telecasting the advertisement, contending that the same had not stopped at merely puffing the advertised product, but had disparaged its product.

Defendant Arguments: Rin submitted that the assertions in the advertisement were a comparison of the quality of the two products, in particular the 'whiteness' quotient, that was imparted to it due to presence of certain chemical fluoresces. They 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 defence of truth and that the commercial fell within the ambit of permitted comparative advertising.

Verdict: The Court held that there was an express denigration of the petitioner's product. It took reference of the principles laid down in *Dabur India Cases* and held that the advertisement 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 Court considered that lab test were not the focus of the advertisement and there was sufficient scope for ambiguity surrounding the degree of accuracy of such tests. It was also clear from the audio component that the petitioner's product was being expressly denigrated.

Analysis: The Calcutta High Court highlighted the difference between express denigration and puffery. 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.

3. CONCLUSION

There are a considerable number of comparative advertising cases decided by the courts in India as well as in other Countries. This work addresses two judicial cases pronounced in India that provides protection to the trademark holder's right, curb monopolies in the market, prevents unfair trade practices so that at large the interests

of the consumers is protected. This analysis also serves to understand the various facets of comparative advertising and when it turns from puffery to denigration.

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