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Exploring the legal status of comparative advertisement and product disparagement in India

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Abstract

The process of persuasion using the paid media, in which purchases of goods, services or ideas are sought; Its primary aim is to convince the consumer to obtain the advertiser's product/service and/or his specific brand. Advertising is thus a commercial message designed to influence consumer behavior. The commercial involves both information and promotion, always with the aim of enhancing the message which the advertiser wishes to put across to the consumer in order to influence the latter in favor of the particular product/service. The objective information value of the commercial is thus secondary, as the information is used solely if, and insofar as, it can act as a persuasive element in the advertisement. In the modern world, the emergence of Intellectual property rights have been to safeguard and grant exclusive right to the Intellectual product like patents, designs, trademarks, copyright etc. Out of these Intellectual rights, the law that concerns competitive aspects of advertising is mainly the laws of trademarks and the general laws pertaining to unfair competition. This piece of work undertaken by researcher for the purpose of this article lies within the broad scope of Laws protecting the intellectual property rights in India in context of product disparagement in the realm of comparative advertising.

Keywords: Advertising, comparative advertisement, intellectual property rights, trademarks Act, MRTP

Introduction

In the words of Leo Burnett

“Good advertising does not just circulate information. It penetrates the public mind with desires and belief.”

This is exactly what an advertisement can achieve, it will not only enhance the sales of a product, it makes a product a part of one's life. During last two decades, we have witnessed a remarkable change in the marketing and promotion strategy adopted by the companies and the values of the society assigns with the advertisements.

The basic principles of advertising law in India include the dissemination of information and creation of awareness about the products advertised, while ensuring that the same is not offensive to public order and decency. Basically an advertisement's purpose is to pass on relevant information to customers and facilitate and positively influence their buying decisions. But the natural human tendency is to exaggerate the benefits of a product or service beyond mere puffery. So, Advertising has become an instrument in the hands of the people who use it. Today, the business market is clearly focused on developing one brand's superior claim over the other.

Comparative advertising came into existence to increase consumer awareness and allow consumer to make a judicial selection from plethora of choices, however under market pressures it has engaged in unhealthy practices of product disparagement and infringement of trademarks. Consequently, in the last few decades, there have been spates of litigations in this regard. As there have been a proliferation in the number of cases in the courts regarding this matter and there have been interestingly such conflicting judgments concerning the issue in the recent past that the topic seemed quite fascinating and motivating to ponder and analyze at.

In the modern world, the emergence of Intellectual property rights have been to safeguard and grant exclusive right to the Intellectual product like patents, designs, trademarks, copyright etc. Out of these Intellectual rights, the law that concerns competitive aspects of advertising

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is mainly the laws of trademarks and the general laws pertaining to unfair competition. This piece of work undertaken by researcher for the purpose of this article lies within the broad scope of Laws protecting the intellectual property rights in India in context of product disparagement in the realm of comparative advertising.

Meaning of Advertising

Advertisements are the method of promoting the sale, generally used to promote marketing strategically. The report of the EC Committee ^[1] on the environment, public health and consumer protection defined advertising as follows:

"The process of persuasion using the paid media, in which purchases of goods, services or ideas are sought; Its primary aim is to convince the consumer to obtain the advertisers product/service and/or his specific brand. Advertising is thus a commercial message designed to influence consumer behaviour ... The commercial involves both information and promotion, always with the aim of enhancing the message which the advertiser wishes to put across to the consumer in order to influence the latter in favour of the particular product/service. The objective information value of the commercial is thus secondary, as the information is used solely if, and insofar as, it can act as a persuasive element in the advertisement."

This very quote underlies the objectives and outcomes to be attained through advertising. It laid emphasis on the fact that in advertising, the presentation of objective information is not the primary consideration, it's an by-product achieved with the activity itself. The core motivation is to convince or persuade the consumer to buy a specific brand/product. As a result, in general, only that information which helps in achieving this goal is utilized in advertising a product.

Advertising can be thus characterized as promotion technique for a product with selective use of factual data represented with an ulterior intention. Media advertising informs consumers of the existence, characteristics and quality of the products and services available on the market, which may influence their choice of a specific brand. For this reason, advertising is considered indispensable to the success of companies at both national and international levels, moving billions of dollars annually around the world. Advertising allows companies to demonstrate the benefits of a product or service bearing a specific trademark, in order to persuade consumers to buy that product or service. The consumers become familiar to the effectiveness and utility of the existing products and future products. It helps the consumer in taking right decision and it is an art of communication technique by which the Trademark or brand of the product or service is made known to the people.

Meaning of Comparative Advertising

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 and Stimulating Free Competition.

The history of comparative advertising dates back to the beginning of commerce itself. It has always been normal for a trader to attempt to enjoy pecuniary benefits by drawing a comparison between the qualities of his products/services and a competitor's. While comparative advertising was initially restricted to puffery-where a trader list facts about the product, or makes vague claims which cannot be proved or disproved-some traders, in the name of comparative advertising, have started disparaging competitor's goods, forcing the law to intervene. Puffery and disparagement can therefore be considered as the two fundamental facets of comparative advertising ^[2].

Comparative Advertising is to compare is to see the difference between two things; in the commercial world, the unique qualities and features of one product are often best demonstrated by comparing it to another. It is therefore not unusual for advertisers to use comparative advertisements to highlight their products unique aspects. Comparative advertising is the practice of either directly or indirectly naming competitor in an ad or comparing one or more specific attributes. Advertisers use comparative advertising primarily to promote their product at the expense of another in terms of price, quality, features, performance etc. It is beneficial for consumer since they receive better product information that can help in making rational purchase decisions. Comparative advertisements are more attention grabbing and have high recall rate than non-comparative advertisements. It is a matter of concern for the competitors whose products are compared since it affects their goodwill and reputation. Comparative advertisements are useful for the brands having less market share to position itself against the more established brand and to promote its distinctive advantage. Comparative advertisements are not much effective in response

The general conceived definition of comparative advertising is as explained by De Jager and Smith ^[3] according to whom:

"Comparative advertising is a technique of advertising which contains displayed pictorial, audio or printed material, which has the effect of making direct or indirect comparison between product or services of identified competitors or non-competitors as to the price, qualities, attributes or characteristics of these products or services."

The concept of comparative advertising has been a conventional phenomenon in the world of advertising since the nineteenth century. The comparison is made with a view to augment the sales of the brand advertiser, either by claiming that the advertised product is of similar or a better quality to that of the compared product or by mortifying the characteristics of the compared product.

So, Comparative advertising can be described as advertising where one party advertises its products or services by comparing them with those of other party. Usually his competitor or the market leader of that product or service constitutes to be the other party. In most of the countries, comparative advertising is termed to those advertisements, which are based on the following features:

- Comparison of two or more brands of a product /service by specifically naming them or demonstrating them recognizably.
- One or more characteristics and attributes of the goods/services are compared.
- It is alleged or implied that the displayed information is on the basis of comparative claims.

For Instance

Comparative advertising according to the FTC in the US is defined as ^[4] “Advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information”.

OR

Comparative advertising in the EU is defined as ‘Any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.’

Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace.

Existing Statutory Provisions to Regulate Comparative Advertisement

The study in this direction reveals that no statutory mechanism is consecrated completely to regulate the dissemination of misleading or disparaging information or material through comparative advertising in India and the onus of regulating such advertising is taken up by a wide array of governmental authorities and tribunals. Primarily, matters related to deceptive and misleading trade practices including advertising were adjudicated upon by the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). Subsequently, this Act got repealed, yet another statute §66 of the Competition Act, 1986 provides the power to enquire into complaints of unfair trade practices. In context of “comparative advertising” the parties are firms (whose products are endorsed by the advertisements), and they do not come in the ambit of “consumers” to approach the consumer forum.

Section 29(8) of Trademark Act 1999 enunciates situations, where use of another’s mark in advertising can amount to infringement, if such use does not comply with the conditions laid down under the section. At the same time, Section 30(1) makes such use, an exception, if it is in accordance with the conditions provided under this section. Nevertheless, the judicial pronouncements are playing an important role to determine the extent of disparagement and infringement of trademarks in comparative advertising.

The Indian Constitution

Though there is no specific provision in the constitution that is explicitly devoted to advertising, the right to advertise is implicitly provided for under Article 19(1) (a) of the Constitution which guarantees the fundamental right to freedom of speech and expressions.

Article 19 (1) (a) of the Constitution of India ^[5] renders all its citizens the right to freedom of speech and expression for public speaking, radio, television and press. “Advertisement” is a form of commercial speech.

We need to analyze that can it be thus protected under Article 19(1) (a) of the Indian Constitution i.e. can an advertiser seek any defense under it regarding his comparative representation. A meticulous study suggests that the freedom of speech and expression granted by Article 19 (1) (a) 2 has certain limitations imposed reasonably by the state under article 19 (2) of the Constitution.

Article 19 (2) states clearly, that the freedom of speech and expression of a citizen granted by Article 19 (1) (a) is unchallengeable by any other law, but permits the state to limit this freedom in those cases when it injures the sovereignty and integrity of the country, or the security of the State or friendly relations with foreign States or public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Can an advertisement being a “commercial speech” seek protection of fundamental right under Article 19 (1) (a). In this light, we see the changes that occurred with regards to interpretation by the Supreme Court of the provision given by the Article. Initially, advertising was excluded from the ambit of the provision, as can be understood from the Supreme Court ruling in the case *Hamdard Dawakhana v. Union of India* ^[6] in which it stated that although advertisements constituted a form of speech, but they were not constitutive of the concept of “free speech” as they were guided by the object of commercial gain in order to promote trade and commerce.

However, the subsequent process of economic liberalization brought substantive shift in the constitutional position. This is evidenced in the answer of Supreme Court to the question raised to it in case of *Tata Press Ltd. vs. Mahanagar Telephone Nigam Ltd.*, In this light, the Supreme Court held that “commercial speech cannot be denied the protection of Article 19(1) (a) of the Constitution merely because the same are issued by businessmen”, while answering the question that can an advertisement being a “commercial speech” seek protection of fundamental right under Article 19 (1) (a). It further observed that advertisements were beneficial to consumers as it facilitated the free dissemination of information, resulting in greater public awareness in a free market economy. The Court referred it to be the life blood of the free media as it contributes substantially to print and electronic media organizations.

Supreme Court reversed the position as adopted in *Hamdard Dawakhana Case*, maintained that the public at large has a right to receive the commercial speech. It interpreted the Article 19(1) (a) as the fundamental right which not only guarantees freedom of speech and expression; but also protects the rights of an individual to listen, read, and receive the said speech.

From the interpretation of Article 19 (1) (a) provided by the Supreme Court in this case, we can infer that advertising as a “commercial speech” is not merely a commercial transaction as it appears from commercial viewpoint, but it also serves as a means of dissemination of information regarding the available product or service. In a country like ours, free circulation of commercial information is crucial and the masses at large can get educated by the information made available through the advertisement. The economic system in a democracy would be handicapped without there being freedom of commercial speech.

Thus the Supreme Court verdict that a party has a right to advertise its product making commendation about its quality is significant. We can infer from this that advertisement being a commercial speech forms a part of the freedom of speech guaranteed under article 19(1) (a) of the Constitution restricted under Article 19 (2) if it does not fulfils its elements. Further as stated by D.P. Mittal ^[7], any commercial speech which is deceptive, unfair, misleading and untruthful is hit by Article 19(2) and so can be regulated / prohibited by the state

Thus at present constitutionally, advertising is considered as a form of “commercial speech” and therefore lies within the ambit of constitutional protection conferred by Art. 19(1) (a).

MRTP Act:

In the legal framework governing comparative advertising, there has been a shift from curbing monopolies to encouraging competition. The basic legal structure has been laid down by the Monopolies and Restrictive Trade Practices Act, 1984 (M.R.T.P Act) and the Trade Marks Act, 1999 (T.M.A.)

The Monopolies and Restrictive Trade Practices (MRTP) Act started its life in 1969. Major amendments were made to the MRTP Act in 1984; the thrust thereof is on curbing Monopolistic, Restrictive and Unfair Trade Practices with a view to maintain competition in the economy and safeguarding the interest of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices [8]. To understand the working of the law on unfair trade practices, we would need to examine specific provisions of the present Act.

Section 36 A of the Act lists unfair trade practices in comparative advertisement include any endorsement of goods or services that deceives or gives false information concerning the goods or services of another individual. Other instances of unfair trade practices comprise the acceptance of any unfair or misleading methods or practices in the representation of goods and services. The intact notion of ‘disparagement of goods of another person’ thus runs from the MRTP Act.

The MRTP creates a judicial body also called the Monopolies and Restrictive Trade Practices Commission (MRTPC). The Commission, after evaluating the practice to be an unfair trade practice, could order the aberrant party to cease and stop the practice. The commission decided many cases related to unfair trade practices in the realm of advertising before the repeal of the MRTP Act. The commission was the authority to decide and provide for relief in case of disparagement and unfair practices indulged in advertising by a competitor.

The commission in course of deciding cases evolved certain standards as to what would constitute unfair trade practice and amount to disparagement. The principle, thus, emerged that a case of disparagement arises only if the product in question is identifiable. Identification could be explicit or from the facts and circumstances.

Thus MRTP Act in its ultimate truncated shape was dealing with only three aspects of the market, namely, monopolistic, restrictive and unfair trade practices. All these aspects are fully reflected by the packed-up four sections¹² of the competition law¹³. The experience in administering the MRTP Act, for about three decades since 1969, the deficiencies noted in the said Act, the difficulties that arose out of different interpretations and judgments of the MRTP Commission and the superior Courts of Law and the new and changing economic milieu spurred by the LPG paradigm and the economic reforms of 1991 (and thereafter) impelled the need for a new competition law. The need for a new law has its origin in Finance Minister’s budget speech in February, 1999:

“The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing

monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions.”

Hence the act now stand repealed but its provision still continue to persuade the court of law. The new law that came into being was the Competition Act, 2000. The modern competition law seeks to protect the process of free market competition in order to ensure efficient allocation of economic resources. It is commonly believed that competition law is ultimately concerned with the interest of the consumers.

The Competition Act, 2002:

Articles 38 and 39 of the Constitution of India trigger competition Law for India. These Articles are a part of the Directive Principles of State Policy. They mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing it. The Competition Act, 2002 seeks, inter alia:

- To promote and sustain competition in markets,
- Protect the interest of consumers
- Ensures freedom of trade carried on by other participants in market.

The provisions laid down in this Act are

- That the ownership and control of material resources of the community are so distributed as the best to sub serve the common good; and
- That the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment.

The philosophy of the Competition Act is reflected in provisions laid down in Section 4 of this Act wherein it is enjoined that no enterprise shall abuse its dominant position. Here, it has been made clear that a situation of monopoly per se is not against public policy but, rather, the use of the monopoly status such that it operates to the detriment of potential and actual competitors.

The Act therefore targets the abuse of dominance and not dominance per se and steps towards a truly global and liberal economy.

The Consumer Protection Act 1986

The Consumer Protection Act 1986 is a social welfare legislation which was enacted as a result of widespread consumer protection movement [9]. The main object of the legislature in the enactment of this act is to provide for the better protection of the interests of the consumer and to make provisions for establishment of consumer councils and other authorities for settlement of consumer disputes and matter therewith connected [10]. While the consumer forums have adjudicated large number of cases on ‘defect in good’ or ‘deficiency in service’, the provisions on unfair trade practice have almost never been taken before the Consumer forums. These cases and investigations were taken by the MRTP Commission. The provisions on Unfair Trade Practices, in the way of being imitated from the MRTP Act into the arrangement of the Protection Act, have obtained a new meaning. Within the Consumer Protection Act, a

'consumer' ^[11] 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 choice available is to bring it to the notice of a consumer association or represent to the Central or State government. These are merely slanting course of seeking justice. Even if a firm were to succeed in getting an advertisement blocked through this route, as it is not a party to the case, it would not get any damages for loss of profit. Thus, in actual fact, the ground of comparative representation has become unfettered.

Trade Marks Act, 1999

India enacted its new Trademarks Act, 1999 and the Trademarks Rules 2002, with effect from 15th September 2003, to guarantee protection to domestic and international brand owners, in conformity with the TRIPS Agreement ^[12]. It has opened a new phase in regulating unfair Trade practices in comparative advertising and preventing trademark infringement in India. The Trade Marks Act is an attempt to balance the conflicting interests of the rights of registered trade mark owners and a compelling consumer interest in informative advertising. According to the present Act a registered trademark is infringed by a person if he exploits such registered trademark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trademark is registered Section 29(8) of the Trademarks Act outlines the situations in which use of another's trademark in advertising amounts to infringement. At the same time, Section 30(1) provides an escape route for what would otherwise have been an infringing act under Section 29.

According to Section 29(8), a registered trademark is infringed where an advertisement:

- Takes unfair advantage or considered to be contrary to honest practice in industrial or commercial matters;
- Is detrimental to the trademark's distinctive character; or
- Is harmful to the trademark's reputation.

Section 30(1) provides exceptions to the rule, explaining how comparative advertising can concord with honest practice in industrial or commercial matters so as not to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark. Such advertising does not include infringement.

Section 29(8) of the Trademark act, 1999 is considered to be unification of laws of unfair competition and unfair trade practices that has set considerations for the use of trademarks in comparative advertisements ^[12].

Therefore, it follows from the above that adding the provisions related to comparative advertising into the trademarks regime has the main objective of ensuring the highest possible balance between two competent interests-competitive freedom and acting against incorrect and incomplete presentation. Although it is probable to have clearer provisions with regard to comparative advertising, however, it has not been so easy in practice. The explanation for comparative advertising on electronics media lies into their far reaching impact on the mindset of the people at large. though there is no restriction for a tradesman for

claiming his/her goods to be of the best in the world which may be an untrue claim, however, in that process disparagement of the products of the competitor is not allowed as the same will amount to infringement of competitors trademark ^[12]. In context of comparative advertising it would mean making untrue and deceptive statements about the goods of the competitors to influence the public not to buy. In order to decide the issue of disparagement, a court must come to the deduction as to how many consumers would be influenced by such advertisement and end up purchasing the advertised products rather than the competitor's product. Therefore, from the above it may be deciphered that comparative advertising may be allowed in India to the extent it does not ridicule or take any undue privilege of a competitor's trademark.

Conclusion

The entire concept of "disparagement of goods of another person" flows from the MRTP Act which leads to unfair trade practice. It is condemned even in the section 29(8) (a) of Trademark Act also which we shall discuss in subsequent sub article 3.2.5. Nevertheless, courts are relying upon the precedents and Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, to determine the extent of comparative advertising. The law on Comparative advertising and product disparagement at present are as laid down in the different judicial pronouncements referred to in the subsequent article 3.3. The following elements are required to be established to succeed in an action of product disparagement ^[15].

- i. A false or misleading statement of fact has been made about his product;
- ii. That the statement either deceived, or has the capacity to deceive a substantial segment of potential consumer, and
- iii. The deception is material, in that it is likely to influence consumers' purchasing decisions.

Thus, it can be inferred from an analysis of the legal framework governing comparative advertising in India reveals that due to absence of a concrete legislative mechanism in this matter, a largely makeshift approach has been followed, with diverse aspects of the same being determined with reference to inconsistent standards. Such an approach is insufficient on a sustainable basis, as the selective application of diverse laws leaves behind a trail of lacunae in any attempt to determine the question in a comprehensive manner.

In order to arrive at a uniform standard or level of tolerance, the twin components of simple puffery and denigration have to be addressed keeping in mind the nature of such representations. Herein, it is relevant to note that while the level of permissibility with regard to puffery has been varying, the position on denigration has been largely consistent. Further, it is essential to incorporate the interests of all the concerned stakeholders, including manufacturers, advertisers, competing parties and consumers. The Consumer Protection Act, 1986, though commonly viewed as an effective mechanism to regulate the subject, has proved insufficient as it excludes from its purview competing manufacturers and sellers.

On the other hand, the traditional view as had been adhered to by our courts for almost a decade fell short in terms of addressing the demands of consumer justice. 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.

The position of law in India in respect of disparaging advertisements of rival products is well settled. Although a tradesman is entitled to make an untrue declaration that his goods are the best, better than his competitors, and for that purpose can even compare the advantages of his goods over the goods of the others; he cannot say that his competitor's goods are bad. Further, regarding law on trademark infringement, the use of a proprietor's trademark in comparative advertising violates the first proprietor's intellectual property rights. But if a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action.

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