
ROLE OF INDIAN JUDICIARY IN SHAPING TRADEMARK LAWS IN SPECIAL REFERENCE TO TELE ADS

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ABSTRACT

With liberalisation and globalisation extending its tentacles all over the world, it has had an effect on the world order in a variety of ways, including the economy; it has resulted in economic globalisation, which represents a significant transformational shift. Because of the rapid rise in the manufacture of products and services, the methods of production and manufacturing are evolving. The advertiser's primary goal is to increase the selling of his product or service and to educate the customer about its efficiency, but the rival with whom the goods are compared is concerned with the manner, in which the products are compared, as well as the prestige and goodwill of both parties. When a company uses promotional strategies to implement a marketing and promotion plan, there is a chance that an Intellectual Property dispute will arise. The primary goal of trade mark law is to identify products and differentiate one person's goods and services from those of another. The trademark establishes a connection between the products and their source of origin. The law regulating false advertising and unfair competition regulates a company's potential liability in the event of false advertising. The author of this research paper will investigate under what conditions advertising based on a competitor's name, symbol, or emblem is deemed actionable, as defined by the laws of various countries. In light of trademark laws in India, the Author has analysed the judicial precedents set by the Indian judiciary in shaping advertising.

Key words: Advertisement, Trademark Law, Advertisement and Role of Indian Judiciary

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1. INTRODUCTION

Advertising is a message designed by the manufacturers to persuade the customers to buy his products or services. There are different types of advertisements that channelize through different medium with the ultimate goal of suggesting the consumers and spread awareness about the products available in market. It has become one of the most important tools of marketing. The aim of business is profit maximization which can be achieved by the selling of goods and services to the prospective consumers. A consumer shall opt for the product or services when he/she is well acquainted with its existence. In the market full of competition there are thousands of competitors who are selling similar products. But, advertising has become a necessary evil for product promotion because even if one cannot monitor the exact effect of an advertisement on consumers that influence them to make purchases but one has to spend a huge of amount so that the manufacturer does not leave any stone unturned in product promotion. Advertising is an important that fosters the Consumer's Right to Choice. The consumer has the basic right to have access to variety of goods and services so that the consumers make informed choice. The Consumer may say that they are irritated every time there is a commercial popping up in the mid of television serial or while surfing the internet, but it cannot be denied that advertisements does influence consumer's buying decisions. Advertising stresses on the quality and prices and it indirectly forms a guarantee to the consumers of the quality and prices. It also provides an opportunity to the consumers to compare the merits and demerits of various substitute products. Through advertisements the usefulness of the product is portrayed that can help the consumer in identifying the use in their daily life from a variety of choices. Moreover, the advertisements like 'jaago grahak jaago', the advertisements that informs the consumer to buy products having ISI mark that certifies that a particular product conforms to the Indian Standards or the advertisements that are issued in public interest, provides important information to the consumers and creates awareness. Trade mark is an important for any business organization and it guarantees various rights and carries out important functions as it identifies the source of the product and enhances the goodwill and reputation of the manufacturers. It is important for consumers as it guarantees the quality of the product as well as assists the consumers in differentiating one product from another. The capacity or role of trade marks to distinguish the source of a product or service is referred to as this function. With the rise of industrial development, the legal defence of trademarks for this purpose became more important, as manufacturers were divided from customers by a distribution chain involving a number of traders. The producers were unable to retain reasonable control over his distribution chain in order to ensure that no third party can falsely exploit the trademarks to market their own products, necessitating the need for legal control. The Trade Mark law ensures that the producers could indicate the consumers that they are the producers of particular goods and service and no one else by mainly prohibiting the use of confusing trademarks. The trade marks enable the customers to differentiate between products that purport to sell goods and services of similar nature. It not only distinguishes the trade mark but also but also enables a consumer to associate the product characteristics with a particular trademark. This is important with regard to subsequent purchases of a consumer that can be based on the previous experience of the product. In case of Nicholson Application, it was viewed that trademark serves the purpose of assuring the consumers satisfaction with regard to the make and quality of the article he or she is buying. Perhaps the mark helps the consumer in identifying the right and suitable product for his or her purpose. Alongside, it ensures expected quality to the consumer while guaranteeing about the make and the maker of the goods which are being purchased. In case of Sumat Prasad v. Sheojanan Prasad, it was observed by the Court that a trademark tells the person who is about to buy that; what is presented to him is either what he has known before under the similar name as coming from a particular source. One of the important functions of trademark is that it guarantees a certain amount of quality associated

with the product. The trade mark owners are not legally bound to maintain the quality of the product but it is in their interest to maintain so. If a product is not able to maintain the quality as it use to, then the consumers then identify the product with the trade mark used and can refrain themselves from re-purchasing the product as the consumers expects the quality to be same. The Goodwill and trade mark function of a trade mark becomes more important from the point of view of the trademark right holders. Trade Marks not only identifies a particular goods or services and convey the related information but also it endows the right holder with a bundle of goodwill. Moreover, the manufactures are also empowered to endorse their products and services by marketing it by way of advertisements. Therefore, trade mark is an important intellectual property that provides various rights to its holder. Goodwill is an intangible asset that is associated with the reputation of the company. There was Global concern for the protection of the intellectual property which was primarily reflected in the Paris Convention for the Protection of Industrial Property, 1883 administered by the World Intellectual Property Organization (WIPO). The various conventions and treaties like the Madrid Agreement, Trademark Law Treaty, Singapore Treaty and the TRIPS Agreement have dealt with various aspects of trademarks law guiding the domestic legislation in formulation of the trademark laws.

2. RESEARCH METHODOLOGY

The research work is mainly explanatory, exploratory and analytical. It is based on secondary data gathered from books, online sources, journals, magazines, newspapers, and Law reporters. Critical approach has been adopted to find the judicial pronouncements relating to trademark law in advertising in India and its legal consequences.

3. LITERATURE REVIEW

Ashwini Kumar Bansal, Law of Trade Marks in India: with Introduction to Intellectual Property, Thomson Reuters, Legal, New-Delhi, 2014.

The Books presents lucid material on important concepts of trade mark like its role and function and dealing in detail about the Trade Marks Act, 1999. The book also incorporate the emerging issues like trade mark in advertising and titles and protection of domain names. The various International conventions and treaties with regard to Trade Marks and also the position of law in foreign countries are also covered by this book.

Rama Sarma, Commentary on Intellectual Property Laws (Patents, Designs and Copyright Law with Protection of Plant Varieties and Farmer's Right): Law, Practice and Procedure with Model Agreements, Vol. 2, Lexis Nexis Butterworths Wadhwa, Nagpur, 2009.

The Book provides a comprehensive framework that answers all questions relating to Intellectual Property Rights. Volume 2 of this Book specifically covers Copyright and Trademark law. The Book covers an exhaustive work on the World Trade Mark law that presents an insight of the Trade Mark in different parts of the World. The Chapter on 'Disparagement on Trademark Laws' presents a series of case laws on disparagement in India that clarifies the judicial trend in India

Farooq Ahmad, Consumer Protection in India, APH Publishing Corporations, New-Delhi, 1999.

The Books takes into account the various aspects of consumer protection laws in India. The literature covers important concepts in detail that includes the in-depth study of unfair trade practices, the specific categories of unfair trade practice and commercial advertising. There is

also coverage of powers of the MRTP Commission and the Consumer for a vis-à-vis unfair trade practice.

V.K. Ahuja, Law Relating to Intellectual Property Rights, LexisNexis, Haryana, 2013.

The Book contains an analytical study of the laws on intellectual property rights, such as Copyright Act 1957; Designs Act 2000; Patents Act, 1970; Trade Marks Act, 1999; Geographical Indications of Goods (Registration and Protection) Act, 1999; Protection of Plant Varieties and Farmers' Rights Act, 2001; Semiconductor Integrated Circuits Layout-Design Act, 2000; and law of confidential information including trade secrets.

4. DISCUSSION & ANALYSIS

4.1 Objective of Advertising

Advertising needs investment of large capital. Still the firms are motivated to incur such huge amounts on advertisements because of its indispensable importance in marketing. As remarked earlier advertising is a communication. Through advertising the manufacturers convey information about a particular brand. The objective of advertising is manifold from the point of view of manufacturers as well as the consumers. Advertising can be said to provide an easy introduction of new products in the markets by the manufacturers. Advertisements can also work wonders through the medium of sponsoring and word of mouth because what is important is that the consumer should be attracted. A good advertising technique not only introduces a new product but it should also be capable of persuading the loyal consumers of the rival firm to shift bases. Through advertising there is establishment of direct contact between the consumers and manufacturers. Advertising can be fruitful in increasing the sales volume of the product as well as in it is important for survival in today's competitive market. In Rosser Reeves best-seller: "Reality in Advertising", the Author has evaluated the effectiveness of advertising by uncovering some advertising truths, he writes: A famous company President once said:

"Advertising, to me, is really one of the mysteries of American business, I can inventory my stock, I can calculate the cost of my factories, I can figure my taxes, estimate my depreciation, determine my sales cost, and derive my return per share. Yet, there are times when I spend as much as \$ 18, 000, (KK) a year on advertising- and have no idea what I am really getting for my money." So, why people continue to advertise? According to one writer, it is largely because of the fear of what might happen if they did not.

4.2 Role of Judiciary in protecting Trade Mark Laws against the Advertisements

The Courts have been differentiating between the concept of puffery and disparagement and these were the yardsticks in determining the cases of injunction or dismissal of claim. The general trends were that Courts have been allowing puffery even where the statement so made is not truth. The instances of disparagement and even generic disparagement have always been discouraged and the Courts have been consistent in maintaining this position for quite a long time.

- The case of *Reckitt and Colman of India Limited v. M.P. Ramachandran and Anr.* is leading judgment on this point and the subsequent Courts ruling have been guided by the principles evolved in this case. The part of puffery as a segment of near publicizing was considerably contemplated upon by the Indian Courts without precedent for this case. For this situation the offended party is the producer of a whitener sold under the brand-name 'Robin Blue'. The respondent is likewise occupied with assembling comparative item under the brand-name 'Ujala'. The respondent in a notice was claimed to have made demonizing portrayals to the offended party item. The ad showed that

holder like that of the offended party was estimated at Rs. 10. The respondent had straightforwardly pointed the offended party, as no other whitener item is accessible in market for Rs.10. Additionally, the litigant claimed that the result of the offended party is uneconomical and it was a costly item to brighten the garments. From there on, it was added that "Likewise, you need to utilize bunches of blue per wash" and by offering this remark the holder of the offended party had been shown topsy turvy and further shown that the fluid was spouting out portraying that the fluid doesn't dribble gradually and spouts out and subsequently the fluid is costly. Consequently, the offended party has brought the suit for order. The Court was of the view that in such cases it must be seen whether the notice is only puffing the result of the sponsor or in the attire of doing as such, straightforwardly or by implication, battled that the result of the other broker is sub-par and in the concerned promotion blue was expressed of mediocre quality. The Court said that the facts confirm that one can flaunt about the mechanical prevalence his item and keeping in mind that doing there can be examination with other item based on advantage. He can say that the innovation of the other accessible item in the market is old and his is new and undeniably more better than the known innovation however in doing so he can't say that the realized innovation is awful or hurtful or item produced using realized innovation is unsafe. Also, the object of the promotion was to pass on to the clients that the blue including that of offended party's that assuming you utilize blue to brighten the washed garments, there will be patches of blue on the washed garments and this is impossible and the respondent was controlled from giving the advertisement. In this case, the Court laid down five principles to decide whether a party is entitled to injunctions. These are "firstly, A tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue; Secondly, He can also say that my goods are better than his competitors', even though such statement is untrue; thirdly, For the purpose of saying that his goods are the best in the world or his goods are better than his competitors he can even compare the advantages of his goods over the goods of others; Fourthly, He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible; Fifthly, If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation".

- In case of *Reckitt and Coleman of India Ltd. v. Kiwi TTK Ltd* the principle evolved in *Ramachandran case* was considered and reiterated in deciding the permissibility of the comparative advertising cases. For this situation the offended party organization was occupied with assembling of fluid shoe clean made under the name "Cherry Bloom Fluid Wax Shoe Clean". The litigant is likewise occupied with assembling "KIWI" brand of fluid clean. The respondent in a promotion had showed that a jug of KIWI from which the word KIWI is composed on the white surface which doesn't trickle as against other container portrayed as "OTHERS" which dribbles. The item which is appeared to have been moving from the container of "OTHERS" is from a jug which was set apart as "Brand X" and purportedly seemed as though the jug of the fluid shoe clean of the offended party which was an enrolled plan. The offended party documented a suit based on trashing brought about by the said ad and furthermore for order restraining the litigant from showing the denounced promotion. The Court held that "A maker is qualified for say something that his great are the awesome likewise offer a few expressions for puffing of his products and a similar won't give a reason for activity to different dealers or fabricates of comparable merchandise to found procedures as there is no vilification

or maligning of the merchandise of the producer so doing. Notwithstanding, a maker isn't qualified for say that his rival's merchandise are awful to puff and advance his products. It is, hence, creates the impression that if an activity lies for maligning a directive might be conceded." The Court tracked down that after the expulsion of the red mass from the jug of "Brand X", the equivalent can't be connected to the result of the offended party and thus, there won't be any inquiry of deriding or criticizing the result of the offended party.

- In *Hindustan Lever Ltd. v. Colgate Palmolive (India) Ltd.* the Supreme Court refused to interfere with the decree, arguing that the Commission's interlocutory order was merely a discretionary order. However, the Supreme Court did not go into great depth about the legal issue in that case.
- Later on, in case of *Pepsi Co. Inc. and others v. Hindustan Coca Cola Ltd. and others* the Court has laid down important guidelines in determining the question of disparagement. The Court was of the view that denigrating the product of the rival cannot be such a 'poking fun'. In *Pepsi Co. Inc. and others v. Hindustan Coca Cola Ltd. and others* the plaintiff is the Pepsi Organization Fuse alongside Pepsi Co (India) Possessions Ltd. furthermore, Pepsi Food varieties Restricted recorded a suit against Hindustan Coca Cola. The offended party is an enlisted proprietor of the imprint "PEPSI", "PEPSI COLA" and "Worldwide Gadget" and furthermore claims to be the proprietor of the duplicate right in the words "Yeh Dil Maange More", which is an exchange characteristic of the appellants and the offended party asserted for criticizing something very similar and furthermore encroachment of the exchange imprint and copyright and furthermore replicated the crazy ride business of the offended party. In the Commercial, there was bottle on which the word 'PAPPI' was written and from the visual it can be understood that the bottle is 'PEPSI'. In the advertisement a kid was called by a leading actor and was asked to give his preference for the cold drink, he muttered Pepsi in muted manner but it could be understood that he said 'Pepsi'. Then the lead actor asked the kid to taste the two sample of cold drinks after hiding the identity and he ask question from the kid as to "Bacchon Ko konsi pasand aayegi?" (The kids will like which drink?) After style the boy points bent on one drink and says that that drink would be likeable by the youngsters as a result of it's sweet. In his words he says. "Who meethi hain, Bacchon Ko meethi chese pasand hai". He discredited the drink one that in step with him incorporates a sweet style. He most popular the opposite drink that in step with him tastes robust which big up individuals would favor constant. At that time, the lead actor lifts the lid from each the bottles and therefore the one that is claimed to be robust style reveals to be "Thums Up", and one that is nice, word "PAPPI" is written on the bottle with a globe device and therefore the color that of the "PEPSI". within the advertizing, on realizing that he had at the initial stage given his preference for "PEPSI" and after finding it to be a drink for teenagers, the boy felt embarrassed. This embarrassment gesture he depicts by swing his hands on his head. In another industrial, on similar lines on the selection of the boy for Peppi i.e. Pepsi the lead actor mockingly says, "Wrong alternative Baby" which the "Thums Up" may be a right alternative. the old saying of the lead actor "Kyo Dil Maange No More" in truth depict the merchandise of the appellant in poor and inferior kind as contended by complainant. The Court in order to decide the question of disparagement laid down the following factors to be kept in mind that, "firstly, Intent of the Commercial; secondly, Manner of the Commercial; Thirdly, Story Line of the Commercial and the message sought to be conveyed". The court also held that "If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to

show one's product better or best without derogating other's product then that is not actionable”.

- In *Dabur India Ltd. v. Emami Ltd.* The litigant is that the leading manufacturer of huge vary of pharmaceutical merchandise and is producing and selling its product underneath the name 'Dabar' and manufactures within the course of business Dabur Chayawanprash and claimed that it's market share of sixty three of the full market of Chayawanprash throughout Bharat. Chayawanprash, that is AN Ayurvedic formation, is primarily a health tonic that has therapeutic qualities for enhancing immunity against diseases. The suspect is additionally engaged in producing Chayawanprash underneath the name 'Himani Sona-Chani Chayawanprash and suspect had launched a brand new product within the market particularly 'Himani Sona-Chandi Amritprash'. within the industrial there was a well-liked movie star Sunny Deol dressed up in a military outfit walking in an exceedingly course at the side of another officer. On account of excess heat the military officer fainted and also the hero(Sunny Deol) reclaimed the officer by golf shot American state on his shoulder and reached the camp. The hero was seen holding a bottle of Himani Sona-Chandi Amritprash in the commercial. Towards the end of the commercial the hero while holding the bottle of Himani Amritprash in his hand declares “GARMION MEIN CHYAWANPRASH BHOOL JAO, HIMANI SONA-CHANDI AMRITPRASH KHAO.”(“FORGET CHYAWANPRASH IN SUMMERS, EAT Amritprash INSTEAD”. The plaintiff contended that advertisement is deceptive and malafide attempt to do negative campaigning and bringing in insinuating advertisement campaign against the plaintiff. The Court held 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 Chayawanprash in its generic sense, even in those circumstances disparagement is possible.” The Court issued a temporary injunction in favour of plaintiff restraining the defendant from telecasting the impugned advertisement.
- In the case of *Dabur India Limited v. Colgate Palmolive India Ltd.* Dabur India Ltd., the plaintiff, is the manufacturer of 'Dabar Lal Dant Manjan Powder,' and Colgate Palmolive India Ltd., the defendant, is the manufacturer of 'Colgate Tooth Powder.' On the basis of an advertising, the plaintiff has filed a suit for an interim injunction. The defendant's advertising on visual media portrayed a Cinestar Sunil Shetty preventing the purchasing of Lal dant manjan powders. He also alerts customers about the harmful effects of using such Lal dant manjan powder by rubbing it on their spectacles, which leaves marks similar to sandpapering. He also argues that the defendant tooth powder is 16 times less abrasive and does not affect spectacles. He is overheard telling the buyer that changing the spectacles is easy, but changing the teeth is not. The Court determined that a visual media advertisement campaign has an immediate effect on the minds of viewers and potential buyers, especially when a well-known movie star endorses it. As a result, where the defendant does not dispute that its campaign has pointed out the negative effects of Lal Dant Manjan Powder, a prima facie case of comparative power in favour of the plaintiff can be made out. The balance of convenience also favours the plaintiff because the effect of advertising cannot be easily repaired, and the defendant's right to warn customers of the powder's harmful effects cannot tilt the balance of convenience in his favour, particularly as the plaintiff also attempts to rely on studies commissioned by it to back up the merits of its product. As a result, the Court determined that failure to issue an interim injunction would cause irreparable harm to the plaintiff that would not be compensable in damages, and the plaintiff was found to be entitled to an injunction. Justice Mukul Mudgal observed that: “Generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product

without specifically referring to it. No one can disparage a class or genere of a product within which a complaining plaintiff falls and raise a defense that the plaintiff has not been specifically identified.” The Courts have agreed that the defendant is entitled to boast about that his product and can even say that his technology is best in the market but he cannot disparage or denigrate the trademark or product of the competitor.

- In the case of *Karamchand Appliances Pvt. Ltd. v. Sri Adhukari Brothers and Ors.* The complainant is a manufacturer and marketer of a number of household insecticides and mosquito repellents under the names ALL OUT and BAYGON. In India, the defendant corporation also manufactures mosquito repellents. The defendant in this case had put an advertisement in the newspaper. In the advert, a lady is seen using the most up-to-date household appliances, such as a tablet PC. The advertisement then shows the lady entering the plug pint, which is plugged with the plaintiff's product, the 'ALL OUT Pluggy' vaporizer and refill sets. The commercial then shows the lady approaching the apparatus, with the words 'baaki sab latest macchar bhagane ka tareeka wahi 15 saal purana' in the background (he said that everything is latest but the manner of chasing away mosquitoes is the same 15 years old). The lady in the advert then unplugs the ALL OUT pluggy, with the words 'Apnaiye new GOOD KNIGHT TURBO REFILL' playing in the background (About latest GOOD KNIGHT TURBO REFILL). The context statement changes to 'iske turbo vapours macchar bhagayein dagni teji se' after a few seconds. (Its turbo vapours chase mosquitoes away at twice the speed). The plaintiff has initiated proceedings against the defendant as it disparages the product. The plaintiff is aggrieved that the commercial depicts that the plaintiff's product is outdated in comparison to defendant's product as it was shown as 15 year old technology. In the preliminary hearing, the Court had restrained the defendant from airing the impugned commercial or any other edited version of the same. In appeal, the Division Bench had allowed the airing of the edited version of commercial which did not disparage the product. Now the case is relating to the modified version of the commercial in which there was a product that was look- a-like to plaintiff's product in the same orange colour was used. The plaintiff argued in the petition that the defendants were pursuing their disparaging campaign in a covert manner, thereby breaching the injunction issued by this Court. The Court observed that “the claim of a technological advantage over the product of the plaintiff has not been established and also the statement that the pluggy device shown in the offending advertisement is a 15 years old method or device does not appear to be factually correct”. The changed commercial's telecast has been stopped by the court because it disparages the plaintiff's product and because the defendant's assertion of a technical advantage justifying the disparagement is unsubstantiated. Justice T.S. Thakur made the following observations: “The defendant is indeed entitled to boast that its product is the latest in the market and even the best but it cannot describe either the technology or the concept used by any other manufacturer or trader in the manufacture or sale of his products as obsolete or worthless. Comparative advertisement is permissible, so long as such comparison does not disparage or denigrate the trademark or the products of a competitor. Comparison of different features of two products showing the advantages, which one product enjoy over the other is also permissible provided such comparison stops short of discrediting or denigrating the other product.” The Court have observed that in order to find in order to decide a dispute the Court shall see from the eye of an average person.
- In case of *Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd.* The plaintiff company produces and markets goods under well-known trademarks such as GOODNIGHT, JUMBO, and HIT, among others. The current case concerns the similar product 'HIT,' which is available in two versions: one for killing cockroaches in a red can and another

for killing mosquitoes in a primarily black can. The defendant is also a maker of related goods and has published a product named "Mortein" that kills both cockroaches and mosquitoes. The defendant has highlighted this feature in the advertisement i.e. tackling of both mosquito and cockroaches with same product. However, the plaintiff in the present case is aggrieved as the defendant has attempted to denigrate the plaintiff's product. In the impugned advertisement, there is an army of cockroaches and mosquito marching towards the family after a briefing by commander for targeting the family. The lady of the house shown as considering the matter and black and red cans close to morph into a Mortein spray can. the girl picks up the will and also the commander perceived the danger and alerts the insects. the girl begins her attack by spraying on the ground and also the powerful effects of Mortein shown within the style of glowing arrowheads chase the roaches to their finish. Then she aims at the swarm of mosquitoes on top of and arrowheads chase the mosquitoes and end them in no time. In this case the Court made the following observations that "There is nothing in the advertisement which is untrue or misleading. There is no attempt to say that the products of the plaintiff are of inferior quality, and, therefore, public is influenced not to buy the same. In order to succeed in an action of disparagement both these aspects are to be satisfied. In this case, the defendant boasts that its singular product can kill two insects as against the plaintiff's two products required for the same purpose, and that the requirement of an action for disparagement was not satisfied." The Court held that "while deciding a dispute it would take into account the perception of an average individual who is reasonably well informed and observant. So long as the product of the adversary/competitor is not denigration, it is left to the consumer to choose".

- In ***Glaxo Smith Kline Consumer Health Care Limited v. Heinz India Private Limited and Ors.*** The plaintiff and defendant are both nutritional drink manufacturers. The plaintiff is the 'Horlicks' manufacturer, and the defendant is the 'Complan' manufacturer. In the supposed commercial, a boy was seen hanging from the bus's central bar, seemingly in a vain effort to gain height, whilst the other children laughed at him. A bright student approaches the boy and advises him to ask his mother for Complan, which is needed for him to grow tall. Then the two cups were projected: one brown cup with the words "Brand H" written on it, and the other white cup with the words "Complan" written on it. There is a visual depiction of the Complan cup growing in height and becoming almost double the height of the Brand H cup which registers nil growth on pouring the liquid in the cup and there is a voice over which strongly and emphatically claims that Complan has 100% more milk protein than Brand H with 23 vital nutrients that give extra growing power. A bright student approaches the boy and encourages him to ask his mother for Complan, a supplement that will help him grow taller. Then came the projection of two cups: one brown with the words "Brand H" written on it, and the other white with the words "Complan" written on it. He responded affirmatively, contrasting his height gain to that of his mates, saying that he is now as tall as his friend and confidently proclaiming that he, too, is now a Complan child. The TV commercial ends with the phrase, "Complan, extra rising strength, delicious taste." The plaintiff argued that the supposedly defamatory commercial was detrimental to his image, and that such unlawful puffing is actionable. The Court held that "plaintiff has been able to make out a prima facie case of actionable slander as it is clearly shown from the story that the product of the plaintiff is sought to be projected in the mind of the consumer as inferior in quality and does not supply the adequate quantity of protein and other nutrition to help the growth of the children. There is also loss in business because of the aforesaid impression and balance of convenience is in the favour of plaintiff". The Court confirmed the interim order already passed by the Court.

- In *Colgate Palmolive (India) Ltd. v. Anchor Health and Beauty Care Private Ltd.* The plaintiff is the manufacturer of Dental Care products, including tooth paste under the Trade Mark “Colgate”. The defendant is the manufacturer of toothpaste under the brand name “Anchor”. The plaintiff has filed an application for permanent injunction restraining the defendant from telecasting the impugned television advertisement which was found disparaging and slanderous by the plaintiff. The plaintiff is not objecting the advertisement as whole but the objections is confined to the following four issues:
 - “Anchor” is the “ONLY” toothpaste containing all the 3 ingredients viz., Calcium, Fluoride and Triclosan.
 - The statement in the advertisement that “Anchor” is the “FIRST” all round protection tooth paste,
 - The statement that the Fluoride in “Anchor” tooth paste gives 30% more cavity protection.
 - The statement that Triclosan contained in “Anchor” tooth paste is 10 times more effective in reducing bacteria.

The plaintiff's first and second objections, including the use of the words "ONLY" and "FIRST" in the commercial, are based on the fact that plaintiff's product already included the three ingredients and that the plaintiff had developed itself as a leader in the field of dental care well before the defendant entered the market, resulting in a false argument. Similarly, the plaintiff's third and fourth objections to fluoride safety and Triclosan's efficacy are based on the fact that any tooth paste is required to contain 1000 ppm (particles per million) of fluoride and that fluoride content is also governed by Rule 149-A of the Drugs and Cosmetics Rules. When the ingredients in a standard tooth paste are the same, the assertion of superiority that the defendant's product would have 30% more cavity protection and be 10 times more successful in combating bacteria was clearly misleading and intended to deceive the public. Justice V. Ramasubramanian in this case remarked that: “Where the rivals are permitted to indulge in puffery, without denigrating each other’s product, it would benefit both of them but would lead the consumers helpless. If on the other hand, the falsity of the claim of a trader about the quality and utility value of his product is exposed by his rival, the consumer stands to benefit, by the knowledge derived out of such exposure. After all, in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit. Therefore, it is only on the touchstone of public interest that such advertisements are to be tested.” The Court after careful perusal of the statutory sections in India doubted that if false claims by traders, about the superiority of their products, either simplicitor or in comparison with the products of their rivals, is permissible in law and was of the view that, the law stands today does not appear to have tolerate puffing and also doubted that puffing which was permitted by Courts in England, is still having a sanction of law after the advent of advent of regulatory regime and various regulations. The Court determines that the use of the terms "ONLY" and "FIRST" constitutes Unfair Trade Practice under Section 2(1)(r)(1)(i) and (vi) of the Consumer Protection Act of 1986. The respondent's argument is tantamount to making a false representation about the goods' standard, consistency, and composition. It also equates to making false or misleading claims about the need for or utility of their products. The Court, on the other hand, did not find that the respondent's claims fell within the meaning of Unfair Trade Practice under Section 2(1) (r) (x). Because of the false or misleading facts that the advertising purports to spread, the respondent was found guilty of an Unfair Trade Practice, but not of disparagement. The complainant was found to have a prima facie argument, and it was in the public interest to

prevent the respondent from continuing to make such false claims. The defendant was barred from using the words "ONLY" and "FIRST" in the defamatory commercial, and the application was granted in part.

- In, *Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd.* Under the brand names "Odomos" and "Odomos Naturals," the Appellant makes a mosquito repellent cream. Under the brand name 'Good Knight Naturals,' the respondents also make a mosquito repellent cream. In the impugned advertisement there were claims that the mosquito repellent creams are problematic might cause allergies and sticky and even if not applied then also mosquitoes will trouble. The Good Knight Natural was shown to consist of ingredient like Tulsi, lavender, milk protein and the mosquitoes will leave and you will love your skin. The appellant found the advertisement disparaging and even though there is no direct or overt reference to the Appellant's product. The Court laid down certain points to decide question of disparagement. With reference to that case it also amplified and restated the following points:
 - "The intent of the advertisement - this can be understood from its story line and the message sought to be conveyed.
 - The overall effect of the advertisement - does it promote the advertiser's product or does it disparage or denigrate a rival product?
 - In this context it must be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavorable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.
 - The manner of advertising - is the comparison by and large truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible".

The Court held that "A plaintiff ought not to be hyper-sensitive as brought out in Dabur India. This is because market forces, the economic climate, the nature and quality of a product would ultimately be the deciding factors for a consumer to make a choice. It is possible that aggressive or catchy advertising may cause a partial or temporary damage to the plaintiff, but ultimately the consumer would be the final adjudicator to decide what is best for him or her." The plaintiff claim that it acquires 80 or 100% market share was not accepted because if this argument were to be accepted, then no other mosquito repellent cream manufacturer would be able to advertise its product, because in doing so, it would necessarily mean that the Appellant's product is being targeted. The Court found that there is nothing disparaging in the commercial and dismissed the appeal refusing injunction. The Court also made an important observation that the Proposition laid down in case of Ramachandran has been accepted in several cases in view of the law laid down by the Supreme Court in Tata Press that false, misleading, unfair or deceptive advertising is not protected commercial speech, we are of the opinion that propositions (a) and (b) above and the first part of proposition (c) are not good law. "While hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if does so, the advertiser must have some reasonable factual basis for the assertion made. It is not possible, therefore, for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival. It is not possible, therefore, for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival."

- In, *Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd.* The Plaintiff is the company 'Colgate (Palmolive) India Ltd.' manufacturer tooth paste under the registered

trademark of Colgate and the issue pertains to ‘Colgate Dental Cream Strong Teeth’ (‘Colgate ST’). The Defendant is the Company ‘Hindustan Unilever Limited’ and has launched its product ‘Pepsodent Germicheck Superior Power’ (‘Pepsodent GSP’) toothpaste. For the launch of this product two advertisements were launched one on television commercial and other print advertisements. In a TV commercial there was a preventive cavity test which is not known in the world of dentistry. The cavity examination is shown to have failed the "Colgate boy," while the "Pepsodent boy" passes. Colgate's Triclosan soldiers are shown in red, while Pepsodent's Triclosan soldiers are shown in blue. According to the complaint, the mother of the Colgate child appears worried and concerned, while the mother of the Pepsodent child appears calm and pleased. The Pepsodent Child's mother's expression denotes dominance, which is interpreted as a reference to Pepsodent GSP's superiority. There was a voice over at the end of the commercial which claimed that “Naya Pepsodent Germi Check Colgate Ke Mukable 130 pratishat Germ Attack Power (In comparison to Colgate New Pepsodent Germi Check has 130% Germ Attack Power)”. There was also a ‘super’ in the commercial which states that “Creative visualization of the action of Triclosan on cavity and causing germs. New Pepsodent Germicheck enhances delivery of Triclosan in the mouth. Claim based on the In-Vivo study where Germ Attack Power refers to amount of Triclosan remaining in the mouth 4 hours after brushing where Colgate Strong Teeth is indexed at 100% and Pepsodent GSP 130%. Brush Twice daily.” There was also a dispute regarding the print advertisement. The Court decided that it is critical to investigate the plot and message transmitted by the challenged TVC to an ordinary citizen who is a customer or prospective consumer of the marketed goods. The average citizen cannot be believed to be gullible or capable of dismissing puffery. The average audience, on the other hand, is more likely to consider accurate representations delivered by advertisements if they are presented as serious statements of fact rather than hyperbole. A typical audience does not evaluate an advertisement and is more likely to be open to the message it conveys. The Court found that the impugned print advertisement is prima facie disparaging of the appellant’s goodwill and its product Colgate ST and restrained the defendant from publishing the print advertisement.

- In, *Marico Limited v. Adani Wilmar Limited* The plaintiff sells cooking oil under the trademark "Saffola," which is a blended oil that comes in four separate compositions. Fortune RBO, the defendant's commodity, is said to be made entirely of RBO. The plaintiff has filed two lawsuits seeking a temporary injunction prohibiting the defendant from broadcasting, printing, or publishing advertisements for its commodity cooking oil under the brand name FORTUNE, which the plaintiff claims is disparaging the plaintiff's product SAFFOLA's goodwill and credibility. Fortune RBO is (a) the world's healthiest oil; (b) healthier than the plaintiff's saffola brand edible oil; (c) 100 percent RBO is 100 percent healthy; and (d) good not only for the heart, but also for cholesterol immunity, skin, and hormones, according to the commercial. The purpose, plot, and message sought to be transmitted by both electronic/television and print media advertising, according to the Court, is about the benefits of RBO. The plaintiff's cooking oil contains the same ingredient as the defendant's. The plaintiff's product is not even identified in the electronic/television advertising, and the plaintiff's product is named in the print media advertisement, but only to reflect its Oryzanol content and price, which is not claimed to be incorrect or false. The Court determined that the advertising was not defamatory and that the consumers were aware of the Oryzanol content and price, which was not claimed to be fraudulent.
- In, *Havells India Ltd. & Anr. v. Amritanshu Khaitan & Ors.* The Plaintiff has filed a suit for permanent injunction, for the restrain of misleading and disparagement

advertisement. In this case, in a promotional advertising of the defendant in which the defendant had compared their product i.e. 'Everready LED Bulb' with the product of plaintiff i.e. 'Havells LED Bulb'. The plaintiff contended that the same has resulted in disparagement and also mislead the consumers. On the top of the advertisement it was written "Switch to the brightest LEDs". The plaintiff stated that the statement in the advertisement that "check lumens and price before you buy" wherein the prices and lumen of other companies manufacturing LED Bulb was compared. The plaintiff contended that it was an invitation to customers to check these criteria before making buying decisions. The aim of the Trade Marks Act of 1999 and the ASCI code listing the conditions of valid comparative advertising, according to the Court, is to encourage competition between suppliers of goods and services to the benefit of consumers by allowing competitors to highlight the merits of their products while prohibiting practises that may distort competition and be harmful to consumers. The Court felt obliged to view the Act and Code in a way that favours comparative advertising while still shielding consumers from false advertising. The Court is of the opinion that it is open for the "It is open to an advertiser to highlight a special feature/characteristic of his product which sets it apart from its competitors and to make a comparison as long as it is true". The Court finds that "it is apparent that advertising campaign is not misleading and there is no denigration or disparagement of plaintiffs' mark. Further, the factors compared are material, relevant, verifiable and representative features" and dismissed the application.

5. CONCLUSION

Advertisement is an important medium of communication of information about the goods and services manufactured. As seen from the discussion advertising has been an important means of communication and information from the time of early civilization. Now the form in which we are witnessing the changing dimensions of an advertisement is remarkable. Manufacturers are spending huge capital on the promotion of the product so as to remain and survive in the competing market. Advertisement can be said be an equivalent of displayed product in a shop and unless the product is displayed, the consumer cannot exercise right of choice. Techniques of persuasion are being to influence the consumers to make purchasing decisions in favour of the product. The main aim of advertising is to create demand of the product and also create association between the consumers and manufacturers. In this era of cut throat competition, comparative advertising is becoming more prevalent where advertisers claim superiority by letting down other products. Trademark is an important intellectual property because of the growing importance to businesses in this globalized economy and competitive market structure. The Trademark has a very significant function of product identification that assists the consumer in distinguishing between two products. It serves as an important connection between the goods and the manufacturers of goods. In advertising, the trade marks connect the consumer to the goods which assist in subsequent purchasing decisions. The Treaties and Conventions relating to Trademark at International level have played a significant role in formulation of the trademark law in domestic legislations. These international instruments cover the substantive and procedural elements with regard to protection and regulation of trademarks law at global and national level. In Comparative advertising, the comparison of the goods and services of the competitor invariably strikes at the trademark also. Hence, there are several issues where there can be remedy of trademark infringement to proprietors

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