

Comparative Advertisements vs. Product Disparagement: Walking the thin line

Date : February 06,2019



Siddharth Ratho (Senior Member, Nishith Desai Associates)



Puja Saha (Member)

Companies use comparative advertisements to promote, compare and highlight the superiority of its product with respect to that of the `s product improvement and innovation and can lead to lower prices in the marketplace, benefiting the consumers.^[1] Further, most of the European countries have adopted the European Directive

(2006/114/EC), on misleading and comparative advertising, which authorizes comparative advertising while establishing a number of safeguards in order to prevent unfair and misleading advertising.

The Advertising Standard Council of India ("ASCI"), established in 1985, has adopted a Code for self-regulation in advertising, amongst other things, providing guidelines for comparative advertisements. It provides that "*advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions.*" Comparison between rival products must be factual and capable of substantiation and should not distort facts or mislead customers either with respect to the advertised product or with the one it is compared. ASCI Code also states that such advertisement must not denigrate, attack or discredit other products.

In this article, we analyse past precedents and recent jurisprudence, discussing the thin yet shifting lines between comparative advertisement and product disparagement and the extent to which competitors may legally use their creativity to promote the superiority of their products without denigrating rival products based on inaccurate and misleading facts.

Precedential Back Drop

Guiding principles for comparative advertisement:

The guiding principles relating to comparative advertisement were laid down in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.*^[2] wherein it was held that (a) an advertisement is a commercial speech and is protected under Article 19(1)(a)^[3] of the Constitution of India; (b) an advertisement must not be false, misleading, unfair or deceptive; (c) there would be some grey areas but these need not necessarily be taken as serious representation of facts but only as glorifying one's product; (d) however, while glorifying its product, an advertiser must not denigrate or disparage a rival product.

In *Dabur's* case, the Delhi High Court clarified that while intent, manner, storyline and message are important factors, what is pertinent is the over-all effect of the said advertisement, whether the advertisement simply promotes the product in question or does it disparage or denigrate a rival product.

In this context it is to be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavourable comparison without necessarily 'falsely' denigrating or disparaging a rival product. If the 'comparison' is by and large truthful, such a comparison may be permissible even if it amounts to disparagement. In other words, truthful disparagement is permissible, whereas untruthful disparagement isn't^[4].

Competitors can compare but cannot mislead:

In *Havells India Ltd. v. Amritanshu Khaitan & Ors*^[5], the Delhi high court laid down two essential elements to ascertain whether an advertisement is misleading or not. Firstly, such advertisement must deceive the persons to whom it is addressed or at least, must have the potential to deceive. Secondly, because of its deceptive nature, such advertisement should be likely to affect the consumer behaviour of the public to whom it is addressed, or harm a competitor of the advertiser.

The Delhi high court in the case of *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd.*^[6] held that in comparative advertising a certain amount of disparagement is implicit, yet the same is legal and permissible as long the same is limited to puffing i.e. exaggerated expressions relating to its own product and does not show the product of the competitor in bad light for the purposes of misleading consumers.

The ordinary person test:

In *Dabur* and *Colgate*, the courts employed the 'ordinary person test' to determine whether an 'ordinary person' with reasonable intelligence is likely to get impacted by a factual representation conveyed in such advertisements. Such an ordinary person is less likely to factually analyse an advertisement and may form a view or bias against a product being disparaged.

In this context, one therefore needs to examine the impression that such advertisement may leave in mind of the ordinary person with reasonable or average intelligence. However, at the same time, an ordinary person is not assumed to be gullible and is presumed to have the ability to take the puffery exhibited in the advertisement with a pinch of salt.

Freedom of Speech

In a landmark judgment, the Supreme Court of India in the case of *Bata Press Limited v. Mahanagar Telephone Nigam Ltd*^[7]

held that commercial advertisement is protected as a form of free speech and expression which is protected under Article 19(1)(a) of the Constitution and can only be restricted in accordance with law enacted under Article 19(2)[8] of the Constitution.[9] Additionally, it also held that a corporate entity is entitled to protection under Article 19(1)(a) of the Constitution. Therefore, competitors can use their right to freedom of speech to compare and promote their products.

Recent Judgments

The Delhi and Bombay High Courts, in *Horlicks Ltd. and Anr. v. Heinz India Private Limited*[LSI-546-HC-2018(DEL)] (“**Horlicks v. Complan**”) and in *Gujarat Co-Operative Milk Marketing Federation Ltd. v. Hindustan Unilever Ltd and Ors*[10] (“**Amul v. Kwaliti**”) respectively, had occasion to revisit the concepts of comparative advertisements and product disparagement.

Complan had published an advertisement directly comparing its product to that of Horlicks by making a specific reference to the trademark, whereas Amul, in its advertisement, simply compared its product i.e. ice cream with frozen desserts in general without specifically referring to the trademark of Kwaliti. These recent judgments are discussed in further detail below.

Amul vs. Kwaliti

A single judge of the Bombay high court had earlier restrained Amul from broadcasting two particular Television Commercials (“**TVCs**”) or publishing any other advertisement of a similar nature disparaging or denigrating Kwaliti’s products in any manner.

In the said TVCs, Amul had compared its product (i.e. ice creams) with frozen desserts stating that products manufactured by it contain 100% milk whereas frozen desserts are manufactured using vanaspati i.e. hydrogenated vegetable oil.

Although there was no specific reference to the trademark of ‘Kwaliti’ in the said TVCs, Kwaliti contended that the said TVCs had an effect of disparaging frozen desserts in general, majority of which are manufactured by it. It also contended that its products are manufactured using edible vegetable oil and not vanaspati and that both ice-creams and frozen desserts contains 90% milk. Amul contended that at least 30% of the manufacturer of the frozen desserts use vanaspati and therefore what was shown was a factual position.

Amul subsequently appealed the order before the Division bench which *inter alia* held that, to adjudicate on whether the TVCs aired by Amul amounted to disparagement, the intent, manner and storyline of the commercial, and the message sought to be conveyed would have to be considered. Given that Amul admitted that 30% of the manufacturer of the frozen desserts use Vanaspati (supposedly harmful to health) meant that 70% of the manufacturers do not use Vanaspati, it observed. Accordingly, the bench noted that by attributing negative qualities to frozen desserts in general, based on incorrect facts, the TVCs were intended to dissuade an entire class of consumers from using frozen desserts, thereby causing disparagement, which is not permissible.

Horlicks v. Complan

Heinz India Pvt. Ltd. published an advertisement for its product ‘Complan’ in a newspaper comparing one cup of Complan with two cups of Horlicks and claiming that it provided twice the amount of protein as compared to Horlicks. Horlicks Ltd. (“**Horlicks**”) filed a suit alleging that the said advertisement deliberately disparages its health food drink product based on untrue and misleading facts and that the comparison did not consider a standard parameter for both such as protein per 100 grams of each of the products. The advertisement also carried with it a tag line stating “*From now on only Complan*” which Horlicks contended sought rejection of Horlicks over Complan.

Since Complan made a direct reference to Horlicks, a registered trademark, while comparing its product, it was contended that such use of Horlick’s trademark by Complan was violative of Section 29(8) and Section 30 of the Trademarks Act, 1999 (“**TM Act**”).[11] Complan defended the advertisement stating that it was ASCI code compliant. It contended that it had to use the trademark of Horlick in order to depict the comparison of the products in the advertisement, permissible under the very same Section 30(1) of the TM Act, as long as such use is honest.

Right to privacy was held to be a fundamental right under Article 21 of the Constitution in the case *oK.S. Puttaswamy & Anr. v. Union of India*[12]. The Supreme Court held therein that Article 21 of the Constitution provides a person right to control commercial use of their identity and can prevent others from using his image, name and other aspects of the personal life and identity for commercial purposes without their consent. Horlicks used this precedent to contend that by using its trademark in its advertisement, Complan had violated its right to privacy.

The Delhi high court, having considered arguments from both sides, decided in favour Complan. Employing the ordinary person test, it held that no detriment has been caused to the distinctive character of Horlicks mark, since there is a clear distinction between both the marks and that Horlicks cannot prevent use of its trademark for identification of their product. Failure to point out a competitor’s advantages is not necessarily dishonest, it held. The Court noted that the primary objective of Sections 29(8) and 30(1) of the Trade Marks Act, 1999, is to allow comparative advertising as long as the use of a competitor’s mark is honest.

The Court held that the *Puttaswamy* case is not applicable in the present scenario since right to privacy cannot be asserted against any information which is available in the public domain. The product packaging of Horlicks freely disseminates the information that has been used by Complan in its advertisement.

Analysis

In *Amul’s* case, the court held that while Amul may exaggerate claims by highlighting the superiority of its product, it cannot air advertisements disparaging frozen desserts even if it may not have specifically used the trademark of its rival i.e. Kwaliti.

In *Complan's* case, the court found that it is open to the advertiser to highlight special feature/ characteristics of its product, which would set its product apart from its competitors while making a comparison with other products, as long as the facts used for the comparison were true, albeit presented in a manner so as to suit a particular product.

Recent precedents have shown that Courts appear to be acknowledging the flexibility that an advertiser ought to be permitted to exaggerate the strengths of a product and indulge in puffery as long as the same isn't false and misleading, unfair or deceptive, and does not derogate the competitor's product. An advertiser may use its creativity and indulge in puffery of its products and demonstrate that its product is superior in comparison to its peers. It is not important whether an advertiser depicts a competitor's trademark to compare a product. The pertinent thing to note is whether the said comparison is truthful and whether or not it falsely disparages a rival product or even a class of products.

[1] Federal Trade Commission (FTC) Policy Statement on Comparative Advertising 1969

[2] 2010 SC Online Del 391

[3] *Article 19(1)(a) of the Constitution Of India 1949 states: All citizens shall have the right to freedom of speech and expression;*

[4] Supra Note 2

[5] 2015 (62) PTC 64

[6] 2014 (57) PTC 47 [DEL(DB)]

[7] (1995) 5 SCC 139

[8] *Article 19(2) of the Constitution states Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*

[9] *Tata Press Limited v. Mahanagar Telephone Nigam Ltd*(1995) 5 SCC 139,

[10] Appeal No. 340 of 2017 dated December 13, 2018

[11] Section 29(8) and Section 30 of the TM Act lays down the circumstances when the use of a registered trademark in advertisements may be considered infringing. As per Section 29(8) infringement takes places if such advertisement: (a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or (b) is detrimental to its distinctive character; or (c) is against the reputation of the trademark. Section 30(1) of the TM Act permits usage of a registered trademark in comparative advertisements for the purpose of identifying goods or services if they are (a) in accordance with honest practices in industrial or commercial matters; and (b) do not take unfair advantage of or are detrimental to the distinctive character or repute of the trade mark.

[12] (2017) 10 SCC 1