

The background of the cover features a close-up, high-angle view of several books and stacks of papers. The books have various colored spines, including blue and black. The pages are mostly off-white or cream-colored, showing some signs of age. The lighting is dramatic, with strong highlights and deep shadows, creating a sense of depth and texture. The overall composition is centered and balanced, with the text overlaid on a dark, semi-transparent rectangular area.

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## COMPARATIVE ADVERTISEMENT AND PRODUCT DISPARAGEMENT

## TÊTÊ-À- TÊTÊ TRADEMARK LAW IN INDIA

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*Competition brings out the best in products and the worst in people.**- David Sarnoff*

*“Comparative Advertising” is the term used to describe advertisements where the goods or services of one trader are compared with the goods and services of another trader. The purpose of Comparative advertising is to make the consumer aware and judicious about selection of product or service from plethora of available choices. It also helps to show one’s goods are best in the world by comparing it with others. However, while doing so the advertiser cannot disparage the goods or services of another as there is a fine line of distinction between disparagement and comparative advertising. Disparagement has been defined as an injurious or false statement that tends to question the quality of a competitor’s goods or services, any such act of disparaging the goods or services of another shall not only be an act constituting infringement of the trademark, but shall also be an act constituting product disparagement. Therefore, this article mainly emphasis on the explaining the concept of comparative advertisement, product disparagement and when such advertising results into infringement of trademark. It further illustrates the existing legal mechanisms and judicial developments regarding the same in India in the light of Sections 29(8) and 30(1) of The Trademarks Act’1999.*

**INTRODUCTION**

The last decade has witnessed a remarkable change in the marketing industry; various strategies and methods have been adopted by the companies to compete among themselves. The advertisement has played a key role in that as society attaches a great value with them. We are presently living in a global village where companies are trying to have a dominant position in the market by promoting their brand and claiming their products to be superior than others in the market.

From multi-millionaire MNC’s to a local vendor on the street everyone is trying to use different ways of advertising their goods and services. Posters, pamphlets, posts on social media, ads on websites etc., are some of the ways that indicate how advertising has evolved in the last decade. It has become a glamorous tool which is helping the companies to become a multi-billion-dollar

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business. The actual motive behind such marketing is not only to create a new consumer demand but to also increase the existing demand, which would ultimately help in more sales henceforth more profit, like a chain reaction.

Psychologically, advertisements have a deep impact on the consumers as it informs them about the quality of a particular product and its appeal to the human eye. As brands have cut-throat competition in the industry thereby, they try to compete with each other by top-notch marketing /advertising techniques. Therefore, now it is not only described as the lifeblood of free media<sup>1</sup> but now it has also been described as the lifeblood of competition in the market. It helps in creating a brand image and reinforce it time and again. Brand advertising on a large scale by manufacturers supplement goodwill and thereby increases the commercial significance of the trademark around which it revolves.<sup>2</sup>

The court of Justice of European Community in its judgment in *GB-INNO-BM v. Confederation du Commerce Asbl (case no C-362/88)*<sup>3</sup> also recognized the significance of the free flow of information through advertising for the protection of the interests of the consumers in the Community.

If the market for a service or product is well-defined, it helps in holding the product or service distinguishing itself from the competition. Nothing seems to do this more efficiently than comparative advertising.”<sup>4</sup> The legal framework for comparative advertising has placed the consumers in the position to act as a judge in the market and to decide whether the comparison is providing truthful facts or not. Hence, it provides consumers with essential and valuable information regarding the product and thereby helping them in better decision making. Which also indicates that comparative advertisement also acts as an effective promotional tool<sup>5</sup> for the advertiser.

The increase in competition between companies has also increased the number of comparative advertisements. Hence, the companies are tempted to compare the benefits of their goods with the goods of others to but the main question in this scenario is that while doing that would the company be allowed to say that the competitor’s goods are not better or worse? Another question one should ponder upon is whether using of competitor's trademark in an advertisement while comparing its advantages would constitute trademark infringement? This paper seeks to analyze

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<sup>1</sup> *Tata Press Ltd v. Mahanagar Telephone Nigam Ltd & Ors*, AIR, 1995, SC, p. 2438.

<sup>2</sup> W Cornish and D Lewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*, (6<sup>th</sup> edition, Thomson Sweet & Maxwell, London, 2008), p. 610.

<sup>3</sup> *GB-INNO-BM v. Confederation du Commerce Luxembourgeois Asbl (case no C-362/88)*, (1991), 2 CMLR, p. 801.

<sup>4</sup> *Pepsi Co Inc. and Ors v Hindustan Coca Cola Ltd and Anr*, 2003, (27), PTC, p.305.

<sup>5</sup> Matthew Murphy, *Legal Aspects of Comparative Advertising and a Strategy for Its Use*, 64 Queensland U. Tech. L.J, 41 1996.

the concept of comparative advertising and product disparagement. Further, this paper will also explain the relationship between trademark and comparative advertisement in India and the Indian Jurisprudence so far on it.

### **COMPARATIVE ADVERTISEMENT**

***Meaning of Comparative Advertisement:*** We have constantly seen that humans tend to compare themselves with other humans. Through this people get a sense of self-gratification, validity and cognitive clarity. The main aim behind this comparison is generally to believe that he/she or his/her products are as good as the other or is the best or at least better than the rest in the market.

“Comparative Advertising” is the term used to describe advertisements where the goods or services of one trader are compared with the goods and services of another trader.<sup>6</sup> It plays a very important role in the market as it objectively and truthfully increases the awareness of the customers by informing them about the various aspects of markets, which ultimately leads to promoting transparency of the market.

All of this happens in the interest of public as due to comparative advertising the competition and anti-competitive activities in the market get improved, which keeps a check on unfair prices and improves the quality/standards of products available. Further, it helps in stimulating the competition between suppliers of goods and services which ultimately work to the consumer’s advantage<sup>7</sup>

***Types of Comparative Advertisement:*** Broadly speaking comparative advertisement is of following two types- (i) Indirect Comparative Advertisements in which a company compare features of its product favorably with all the other brands having streamlined products in the market through a generic or an indirect manner and (ii) Direct Comparative Advertisements in which a company compares features of its product with a competing product which can be specifically named and recognized.<sup>8</sup>

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<sup>6</sup> Council Directive ,84/450/EEC, 10 September 1984 *concerning misleading and comparative advertising* (as amended by Council Directive 97/55 of the European Parliament and of Council Amending Directive 84/550 Concerning Misleading Advertising as to Include Comparative Advertising).

<sup>7</sup> Péter Iskolczi-Bodnár, *Definition of Comparative Advertising*,3 EUROPEAN INTEGRATION STUDIES, 25 (2004).

<sup>8</sup> MA of Ryder Rodney D, *The Development of a Contingency Model of Comparative Advertising*’, Working Paper No. 90-108, Marketing Science Institute, Cambridge, Brands, Advertisements and Advertising (LexisNexis Butterworths, New Delhi) 2003, p 326.

### **COMPARATIVE ADVERTISING CAN ALSO FURTHER BE DIVIDED INTO TWO SUBCATEGORIES**

**Positive comparative advertisement:** -In this type of advertisement company tries to depict features and attributes of the other products in a favorable/beneficial manner which helps them gain advantage and benefit from the association.

**Negative comparative advertisement:** -In this type of advertisement company tries to depict unfair practices of competitors and tries to promote their product by downgrading the quality and the value system of both the products and services of the competitors.<sup>9</sup>

The courts have allowed comparative advertising to a certain extent, which can be seen from the case of *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd.*<sup>10</sup> where the court 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, for example, exaggerated expressions relating to its product and does not show the product of the competitor in a bad light to mislead consumers”.

### **ESSENTIALS ELEMENTS OF COMPARATIVE ADVERTISEMENT**

The Hon'ble Delhi High Court in the case of *Havells India Ltd. v. Amritanshu Khaitan & Ors*<sup>11</sup> has 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; and **Secondly**, because of its deceptive nature, such advertisement should be likely to affect the consumer behavior of the public to whom it is addressed or harm a competitor of the advertiser.

These two essentials were first laid down in the decision of *Lidl SNC v Verizon Distribution*<sup>12</sup> and were further referred in the above decision of the Hon'ble Delhi High Court.

<sup>9</sup> Solicitors, L., “*Comparative Advertising and Trademark Infringement. Law society of England and Wales*” ,(2013), Website available at <[http://www.lawdit.co.uk/reading\\_room/room/view\\_article.asp](http://www.lawdit.co.uk/reading_room/room/view_article.asp)>, accessed on 10 July 2020.

<sup>10</sup> *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd*, 2014, (57) PTC, p. 47.

<sup>11</sup> *Havells India Ltd. v. Amritanshu Khaitan & Ors*, 2015, (62) PTC, p. 64.

<sup>12</sup> *Lidl SNC v Verizon Distribution*, SA, [2011], E.T.M.R.

The Advertising Standard Council of India (“ASCI”), which is a self-regulating association that provides guidelines for advertising, has also stated in its code that advertisement must not denigrate, attack or discredit other products.<sup>13</sup>

Therefore, we can conclude that “advertisements shall neither misstate nor distort facts by all means”. The companies while Comparing their products with that of rival products should present factual or true information, capable of substantiation and they shouldn't present facts in a distorted manner, which could change the customer's behavior with respect to the advertised product or with the one it is compared.

### **DISPARAGEMENT**

According to the Black's Law Dictionary “*when the reputation of another person's or companies' property, product or business is discredited or impacted due to false and injurious statement made by another person or company then it is referred as disparagement.*”<sup>14</sup>

Even the act done by the third party could be constituted as product disparagement and can be actionable. To simplify, it means that an act can be restrained even if it is done by a party who manufactures or trades in that class of goods<sup>15</sup> e.g. a magazine, article criticizing a product of a company and in the process disparages it.

Broadly speaking there are no specific statutes which provide with the definition of disparagement of goods.<sup>16</sup> However, the Oxford Dictionary defines disparage as, “*to bring discrediting or reproach upon; dishonor Disparagement shows whether the goods of a trader or manufacturer are disparaged would depend upon the facts and circumstances of each case*”<sup>17</sup>.

Commercial Disparagement is a concept which relates to defamation under the common law of tort. It has been defined as an injurious or false statement that in tends to question the quality of a competitor's goods or services with the ultimate purpose of inflicting pecuniary damage.<sup>18</sup> A comparative advertisement is treated as defamatory only when it is strongly worded to such an

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<sup>13</sup> ASCI Code for Self-Regulation in Advertising, (2007). Id., Chapter IV.

<sup>14</sup> Black's Law Dictionary, *Definition of Disparagement*, 10 edition., 2014.

<sup>15</sup> *Eureka Forbes Ltd. v. Pentair Water India Pvt Ltd*, 2007(4), Kar LJ, p.122.

<sup>16</sup> Shrutti S Mathew, *Comparative Advertisement and Trademark Infringement- Study of Indian And UK Laws*.

<sup>17</sup> *Colgate Palmolive v. Hill*, AIR, 1999, SC, p. 3105.

<sup>18</sup> *Forbes Inc v. Granada Biosciences Inc*, 124 S.W.3d 167, 170 (Tex. 2003).

extent that it not only threatens to cause injury not only to the product but also the goodwill/reputation of the competitors.<sup>19</sup>

As mentioned in the beginning, comparative advertising is a strategy by which companies showcase or show that their product is better or superior in comparison to their competitor. But one of the most important things to be noted here is that if in a comparative advertisement a company states or show something misleading or derogatory, it changes over into what is referred to as product disparagement. This indicates, there is a fine line between the two concepts, that has to be maintained by the companies.

### **DISPARAGEMENT VS. COMPARATIVE ADVERTISEMENT**

While talking about both the concepts ‘Comparative Advertising and Product Disparagement’ together the courts in various judgements have pointed out certain points that have to be kept in mind by a company before advertising are as follows: -

- (i) A statement can be made by a company or tradesmen in their advertisement even though it is untrue stating that his/her goods are the best in the world or his/her goods are better than their competitor.
- (ii) It must be kept in mind by the tradesmen that while comparing and stating that his goods are of superior or better than its competitor, he can state the advantages of his goods over the goods of others.
- (iii) However, the most important thing to be kept in mind while doing comparative advertising is that the tradesmen should refrain from saying that his competitors' goods are bad. If he says so, he crosses the fine line between comparative advertisement and product disparagement, eventually defames his competitors and their goods, which is not permissible.
- (iv) Then if the matter reaches the court of law, it has to decide whether there has been any defamation or not, if the court believes that defamation has been done by the respective

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<sup>19</sup> Stewart E. Sterk, *The Law of Comparative Advertising: How Much Worse is "Better" Than "Great"*, 76 COLUMBIA LAW REVIEW, P. 80, (1976).

act then an action lies. The court thereby can order or grant an order of injunction restraining and can even order recovery of damages respectively.<sup>20</sup>

Three factors that the court keep in mind while deciding whether the particular commercial can be considered as disparagement or not are- the intent of the commercial; manner of the commercial; and the storyline and the message sought to be conveyed by the commercial.<sup>21</sup>

Out of the above 3 factors, “the manner of commercial” is very important because every consumer has a different perspective to look at a commercial. Some customers may conclude that one product is superior to the other, while another consumer may look at the same commercial from another viewpoint and come to the conclusion that one product is inferior to the other.<sup>22</sup>

If the manner in which the commercial is presented is discrediting or condemning the goods of the competitor then it amounts to disparaging, but, if the advertisement only shows that a company’s product is better or the best by showing its advantages in comparison with other, then that is not actionable.<sup>23</sup> The matter regarding the truthfulness of the content of advertising has to be considered (if it at all arises) at the stage of the trial.

The Hon’ble High Court also in the case of *S.C. Johnson & Son, Inc. v. Buchanan Group Pty Ltd.* while restraining the defendants from using the impugned advertisement, held that:

“Every comparison does not necessarily amount to disparagement. Consequently, what is required to be answered is: whether there is a denigration of plaintiff’s Product”<sup>24</sup>

Therefore, we can eventually conclude that to succeed in an action of product disparagement, the plaintiff has to establish the following key elements:

- In an advertisement, a misleading or false statement had been made by the defendants regarding the plaintiff’s products.
- By the information provided in the statement, there is a possibility that a certain number of customers would be deceived.

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<sup>20</sup> *Reckitt & Colman of India Ltd v M P Ramchandran and Anr*, 1999, PTC (19), p. 741; followed in *Rickett & Coloman of India Ltd v Kivi TTK Ltd*, 63 (1996), DLT, p. 29.

<sup>21</sup> *Pepsi Co. Inc and Ors v. Hindustan Coca Cola Ltd*, 2001, (21) PTC, p.722.

<sup>22</sup> *Dabur India Ltd v. Wipro Limited*, 2006, (32) PTC, p.677 (Del).

<sup>23</sup> *Pepsico Inc v. Hindustan Coca Cola*, 2003, (27) PTC, p. 305 (Del-DB)

<sup>24</sup> *S.C. Johnson & Son, Inc. v. Buchanan Group Pty Ltd*, 2010, (42) PTC, (Del).



- Which would ultimately influence consumers purchasing decisions, the reputation of the company and affect the profitability of the company.

### **RELATION BETWEEN TRADEMARK AND COMPARATIVE ADVERTISEMENT IN INDIA**

Generally, while using comparative advertisement the producer in order to draw prospective consumers towards their product tries to use the power of the symbol/mark to draw them. What happens is that the producer tries to sell the brand name or the trademark, because of which consumers start to associate the product shown in the advertisement with the respective trademark. It is through the advertisement of the mark that the desirability of the commodity is conveyed to the minds of the potential customers. Therefore, we can say that both the concepts (trademark and comparative advertisement) are intertwined and to better understand the relation between the two concepts we first need to understand the concept of trademark, infringement of trademark and remedies available on infringement of the trademark.

***Concept and Evolution of Trademark in India:*** A trademark is a sign or combinations of signs which is used to distinguish goods of one company or persons from others<sup>25</sup>. It includes - logo, numerical, personal names, letters or any symbol etc. Therefore, we can say that a trademark is used as a tool of communication by the producers to attract consumers. But two things that a company or person should keep in mind before creating a trademark and getting it registered is that the mark should be distinctive (should-not be generic) and should not be deceptive.

The primary function is to help the consumers in identification of the products associated with the particular trademark. The secondary function is signifying quality, advertising the product and provide information to the budding consumers.

The first legislation regarding trademark was introduced in India in the form of Indian Merchandise Act' 1889. But even after this legislation the matters relating to infringement of trademark or passing off were dealt under the Specific Relief Act'1887 (as per section 54) and matters regarding registration of a trademark and related problems were dealt under the Registration Act'1908.

Eventually, a new act i.e. 'Trademark Act' 1940 was been enacted to specifically deal with matters relating to trademark. However, on 17th October in the year 1958, The Trade and Merchandise

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<sup>25</sup> Article 15.1 TRIPS AGREEMENT.

Marks Act'1958 was adopted which repealed the Indian Merchandise Act'1889 and Trademark Act' 1940.

Ultimately in the year 1999 and 2002, Trademark Act'1999 and the Trademarks Rules'2002 were enacted which repealed all the previous acts. The main reason for this enactment was to provide conformity with the TRIPS agreement which would help in providing not only domestic but also international protection to the trademark holders. The Act finally came into force on 15th September 2003.

***Infringement of Trademark:*** As per the present Act in India (Trademark Act, 1999) infringement of a trademark is been considered by a person when it tries to exploits, use or resemble a registered trademark, as part of his trade name, or name of his business or part of the name of his business dealing in goods or services without the proper authority or permission of the registered owner of that registered trademarks.

In case of any infringement by a company or a person, the court or the concerned authority will firstly look into whether the concerned mark was a Registered Trademark or an Unregistered Trademark. If in case of a comparative advertisement the producer infringes an unregistered trademark then there can be a risk of an action for passing off.<sup>26</sup> The Trademark Act'1999 deals with unregistered trademark as per Section 27 of the act. In an action of passing off, it is very important to establish goodwill and to further show the possible harm that could be caused to the goodwill. The scenario in the case of infringement of a registered trademark in the comparative advertisement is different, as in this case Section 29 of the Trademarks Act'1999 would apply.

***Remedies available against Infringement of Trademark:*** Any court whether it is High court or a District court having proper jurisdiction can grant a relief in a suit of infringement and passing off trademark a permanent or temporary injunction in use of the infringing mark or damages or compensation for any kind of loss that has been suffered by the infringed party or for any kind of profits that has been earned by the infringing party.

However, it is very important to note that the burden of proof always lies upon the trademark owner and not upon the user, who alleges that there has been unauthorized use of his mark.<sup>27</sup>

<sup>26</sup> Narayana P, *Law of Trademark & Passing Off*, 42, 6 edition, Eastern Law House, 2006.

<sup>27</sup> *Aktiebolaget Volvo v. Heritage (Leicester) Ltd*, F.S. R (2000), p. 253.

*“To succeed in an action of slander of goods, the plaintiff has to allege and prove that the statement complained of was made concerning his goods and that it must be with the direct object of injuring his business”<sup>28</sup>*

The case of *M/s South India Beverages Pvt. Ltd. v. General Mills Marketing Inc. & Anr*<sup>29</sup> is a perfect example of trademark infringement: -An appeal was being filed at the Hon’ble Delhi High Court by the respondents (General mill marketing) for seeking an interim injunction against the appellants south India beverages over the use of two allegedly similar marks “HAAGEN DAZS” and D“DAAZS. Both the parties were engaged in the business of the selling ice-creams and related dairy products. To which the respondent alleged that the use of a similar mark by the appellant will create confusion in the mind of consumers making them believe that products of both belong to one company having a set standard and quality. After considering the arguments of both the parties the Court ultimately, in this case, upheld the order of the Single Judge granting an interim injunction against use of the latter mark by the appellant-defendant.

**Law Relating to Trademark and Comparative Advertisement in India:** Specifically speaking Section 29(8) of the Trademarks Act’1999 deal with the situations relating to infringement of trademark by another company or producer in an advertisement. However, at the same time Section 30(1) provides an escape route from the action of infringement as section 30(1) acts as an exception to section Section 29(8) of The Trademarks Act.

According to Section 29(8), a registered trademark is considered as infringed where an advertisement: is considered to be contrary to the honest practice in industrial or commercial matters; or is considered detrimental to the trademark's distinctive character or causes harm to the trademark's reputation and producers goodwill.

Section 30(1) provides exceptions to the rule stated under Section 29(8) if comparative advertising is accordingly done with honest practice in industrial or commercial matters, doesn't take unfair advantage of or does not cause detrimental to the distinctive character or repute of the trademark. Such advertising will not invite a suit for infringement of trademark as per the respective provisions of the act.

The expression ‘detrimental to its distinctive character’ as mentioned in the aforementioned sections, could be perceived as a situation where a producer uses a registered trademark of another in its advertisement thereby confusing it. Further, it also confuses the minds of the consumer as

<sup>28</sup> *Imperial Tobacco Company v. Albert Bonnet*, AIR ,1928, Calcutta 1(DB).

<sup>29</sup> *M/s South India Beverages Pvt. Ltd. v. General Mills Marketing Inc. & Anr*,2015, (61) PTC, p. 31 (Del).

they perceive both the goods to be of a single company having a set quality if that does not happen then it ultimately harms the reputation and goodwill of the company.

The term “honest practice” mentioned in the aforementioned sections is nowhere defined. It may vary from time to time as per the circumstances as well as the changing perceptions. According to Kerly, the term ‘*honest practices*’ is a hybrid derived originally from the Paris Convention (article 10bis), “*honest practices in industrial and commercial matters*” (and now in article 6 of the Trademarks Directive of European Union) and words found in articles 4 and 5 of the Directive: “*where the use of sign without due cause takes advantage of, or is detrimental to, the distinctive character or repute of the trademark.*”<sup>30</sup>

Thereby we can say that the expressions ‘in accordance with honest practices’ and ‘detrimental to its distinctive character’ are intertwined at the time when a trader is, making a comparison of its goods with that of another, they cannot say that the goods of a competitor are undesirable or bad because that would amount to disparagement (defaming the competitor) which would not be considered as honest practices, as it would be detrimental to the reputation of a trademark and the goodwill of the company. However, if any true or non-detrimental statement is referred to competitors’ goods then no action lies against the advertiser.

### **JUDICIAL APPROACH IN INDIA**

***Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr***<sup>31</sup>: In this case, Pepsi alleged that Coca-Cola is one of its advertisements had wrongfully used and infringed its trademark. In the particular advertisement, a kid was firstly asked by a lead actor that which was his favorite drink to which he answered mutely, but its lip movement showed that his answer was Pepsi. Secondly, the kid in the advertisement was given two samples of drink to taste without revealing their identity. After tasting both the drinks the lead actor asked the kid a question that "Bacchon Ko Konsi pasand aayegi"? after which it was revealed that the drink that the kids liked was “Thumbs up” while the other drinks name was “PAPPI” which deceptively resembled “PEPSI”. The lead actor also during the advertisement said that the "Thums Up" was the right choice, because “Kyo Dil Maange More" which completely showed that the particular advertisement was made with an attempt to damage the repute of Pepsi.

<sup>30</sup> David Keeling ET AL., *Kerely's Law of Trademark and Trade names*, 16 edition, Sweet and Maxwell, London ,2017.

<sup>31</sup> *Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr*, 2001, (21) PTC, p.722.

The court after hearing the arguments of both the parties held the registered Trademark of Pepsi had been infringed by the use of the word PAPPY which is deceptively resembled the Trademark PEPSI. The two major grounds for infringement stated by the court was that there had been disparagement by coca-cola and also due to the respective advertisement the goodwill of the Pepsi had been depreciated.

***Horlicks v. Complan***<sup>32</sup>: In this case, Heinz India Pvt. Ltd. published an advertisement in a newspaper for its product 'Complan.' Very clearly in the advertisement, Heinz had compared one cup of Complan was equivalent to two cups of Horlick's and also proclaimed that its product Complan provided twice the amount of protein as compared to Horlick's.

In response to which Horlick's filed a suit in the Delhi high court alleging that the respective advertisement of Heinz was stating misleading and untrue facts. The Horlick's also contested that advertisement also showed a tag line stating "*From now on only Complan*" which gave an impression to the consumers that they should prefer Horlick's over Complan.

The advocate while arguing for Horlick's made a contention that "Horlick's" is a registered trademark, and use of Horlick's trademark by Complan in its advertisement was violative of Section 29(8) and Section 30(1) of the Trademarks Act, 1999. In response to this allegation, the advocate on behalf of complan contended that as per the very section 30(1) of the trademark act 1999 which is an exception to section 29(8) of the Act the use of competitor's trademark in an advertisement is permissible as long as such use is honest and is stating facts.

The Hon'ble Delhi High Court after considering the arguments of both sides decided the suit in favor of Complan. It also clearly held that "*Failure to point out a competitor's advantages is not necessarily dishonest*". The Court made this statement keeping in mind 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.

***Britannia v. Unibic Biscuits India***<sup>33</sup>: In this particular case, Britannia filed a suit in the Hon'ble High Court of Karnataka alleging that unibic biscuits had infringed their Registered trademark "Good Day". Unibic biscuits India had launched a biscuit by the name "Great Day" which almost resembled that of "Good Day". Not only this unibic went further-with its tag line – "*Why have a Good Day, When you can have a Great Day!*" It was a clear comparing of its biscuit with that to

<sup>32</sup>Horlicks Ltd. and Anr. v. Heinz India Private Limited, 2019, VAD (Delhi), p. 677.

<sup>33</sup> *Unibic Biscuits India Pvt. Ltd v. Britannia Industries Ltd*, MIPR, 2008 (3), p. 347.

Britannia's Good Day biscuits. Hence Britannia contended that this tagline also gives an impression to the consumers that they should not try any other biscuit when Great Day biscuit is available.

The court after hearing all the arguments of both the sides looked at three important aspects that were laid down in the case *Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd.* which includes examining the intent, the manner the commercial and the message that has been communicated to the public. Based on these three aspects the court granted an injunction to Unibic Biscuits India for disparaging the "Good Day" biscuits of Britannia.

***Amul vs. Kwality***<sup>34</sup>: In this particular case, Amul showed two television commercials stating that its Product (frozen desserts) were manufactured by 100% milk whereas other frozen desserts of the competitors in the market were manufactured by using Vanaspati i.e. hydrogenated vegetable oil. In response to these Television commercials, Kwality filed a suit against Amul in the Hon'ble Bombay High Court.

Though Amul in its respective television commercials didn't make any specific reference to the trademark of 'Kwality', but still Kwality alleged that the respective television commercials were disparaging frozen desserts in general which would affect Kwality the most as it has the majority of customers in the respective market. Further Kwality also contended that its products were manufactured by using edible vegetable oil not Vanaspati as shown by Amul in its television commercials.

After hearing the contentions of both the parties the single judge of the Bombay high court held that Amul had disparaged the Kwality's products through its commercials and restrained Amul from further broadcasting it.

Amul subsequently appealed before the Division Bench against the order of Single Judge. The division bench also noted that the TV commercials attributed negative qualities to frozen desserts in general, based on untrue and incorrect facts, the TV commercials were intended to disparage an entire class of consumers and persuade them to not buy frozen desserts of other competitors, which amounts to disparagement, which is not permissible at all.

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<sup>34</sup>*Gujarat Co-Operative Milk Marketing Federation Ltd. v. Hindustan Unilever Ltd and Ors*, 2019, (2) ABR, p. 401.

## CONCLUSION

It can be concluded from the above research that Comparative Advertising is one of the best techniques that is used to encourage the producers of goods and services to raise their standards to meet the competition and efficiently survive in the market. But, at the same time, there must be some checks on the producers, it is not always that the consumers are being told the truth by the producers. Producers can even showcase advertisements that can be false, misleading and deceptive.

In the case of the above scenario, the only recourse available to the corporations in India is the Trademark Act for protection of infringement of trademark and common law remedies for disparagement. Honest practices under trade law are subjective. Though we have High courts Judgments regarding disparagement and comparative advertisement. What is evident from the judgments is that the court's approach has been in favor of the consumers and to protect the goodwill of the owner. Now whether comparative advertisement amounts to trademark infringement depends on the language and the communication used in the advertisement. This is to be judged by looking at the advertisement as a whole by the courts.

Although initially Comparative Advertisement was forbidden or was considered as an unfair competition but today this situation has changed dramatically and continues to change slowly. Proper representation of facts even if compared against a competitor are welcome by the courts and further transparency of data is encouraged which will help consumers in lowering their information search costs and conduct a valid buy.

Though we can see that the courts and the legislation have played an important role in stopping disparagement and providing a proper remedy to it. Still, there is always a challenge in front of different courts to draw a line between what is acceptable and what is not. If the need arises the courts and the legislators should regulate the old laws with newer laws resulting in satisfying honest trade practitioners and supporting fair trade.