

## **Legal Issues in ‘Comparative & Misleading Advertisements’**

### **Issue: Puffery and Generic Disparagement: Where Do Court Draw a Line?**

## Introduction

❖ **Section 36A(1)(x) of The Monopolies and Restrictive Trade Practices Act, 1969** - “*gives false or misleading facts disparaging the goods, services or trade of another person.*”

❖ **Consumer Protection Act, 1986**

❖ **Section 29(8) of The Trade Marks Act, 1999:**

*A registered trade mark is infringed by any advertising of that trademark if such advertising –*

*(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matter; or*

*(b) is detrimental to its distinctive character; or*

*(c) is against the reputation of the trade mark.*

2 ❖ **Recognition to advertisements under Article 19(1)(a) of the Constitution** - *Tata Press Limited v. Mahanagar Telephone Nigam Ltd.*, [1995 SCC (5) 139]

## Relevant Case Laws

- ❖ ***Reckitt & Colman of India Ltd. v. M P Ramachandran and Anr., [1999 PTC (19) 741]***
  - i. A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.*
  - ii. He can also say that his goods are better than his competitors', even though such statement is untrue.*
  - iii. 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.*
  - iv. He, however, cannot, while saying that 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 competitor and their goods, which is not permissible.*
  - v. 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 repetition of such defamation*

## Puffery

- ❖ ***Glaxosmithkline Consumer Healthcare Ltd. vs. Heinz India (P) Ltd., [MIPR 2010 (3) 314]***
  - *“The test is whether a reasonable man would take the claim being made, as one made seriously. The more precise and specific the claim, the more likely it was that the public would take it seriously. The Court will have to do what an ordinary man would do - take it with a large pinch of salt. ( See De Beers Abrasive Products Ltd (supra)and Vodafone Group Plc v. Orange Personal Communications Services Ltd [1997] F.S.R. 34).”*
  - *“the law is that any trader is entitled to puff his own goods even though such puff as a matter of pure logic involves the denigration of his rival's goods....Notices.. reading 'the best tailor in the world', 'the best tailor in this town' and the 'best tailor in this street' do not commit an actionable offence. Where however the situation is not that the trader is puffing his own goods but turns to denigrate the goods of his rival.. then the situation is not so clear-cut. The statement 'my goods are better than X's' is only a more dramatic presentation of what is implicit in the statement 'my goods are the best in the world' and would not be actionable. However, the statement 'my goods are better than X's because X's are absolute rubbish' would be actionable.”*

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## Relevant Case Laws (Contd.)

- ❖ ***Colgate-Palmolive (India) Limited v. Anchor Health & Beauty Care Private Ltd., [2009 (40) PTC 653 (Mad.)]***
  - *“These rights would become meaningless, if free commercial speech is clipped. The law as it developed from the decision of the Calcutta High Court in Reckitt Colman vs. M.P.Ramachandran upto Godrej Sara Lee case(Delhi High Court), on the basis of English precedents, recognises the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's product. But the recognition of this right of the producers, would be to de-recognise the rights of the consumers guaranteed under the Consumer Protection Act,1986. To permit 2 rival traders to indulge in puffery, without denigrating each other's product, would benefit both of them, but would leave the consumer 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.”*

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## Relevant Case Laws (Contd.)

### ❖ *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.*, [FAO (OS) No.625/2009]

- *“we feel that notwithstanding the impact that a telecast may have, since commercial speech is protected and an advertisement is commercial speech, an advertiser must be given enough room to play around in (the grey areas) in the advertisement brought out by it. A plaintiff (such as the appellant before us) ought not to be hypersensitive 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.”*
- *“Finally, we may mention that Reckitt and Colman of India Ltd. v. M.P. Ramchandran and Anr. 1999 (19) PTC 741...propositions...These propositions have been accepted by learned Single Judges of this Court in several cases, but 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.”*

## Generic Disparagement

- ❖ Disparagement to a class of products and not to specific product.
- ❖ ***Dabur India Ltd. v. Emami Ltd., [2004 (29) PTC1 (Del)]***
  - *“The defendant could not have taken up a plea that Chayawanprash , which is a competitor to Amritprash, is bad during the summer months and since the defendant has resorted to the same, the same is disparaging and , therefore, the case in hand calls for an action in terms of the prayer made in the injunction application. In the light of the aforesaid discussion, I allow the application filed by the plaintiff and issue a temporary injunction restraining the defendant”*

## Relevant Case Laws (Contd.)

❖ ***Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Ltd. and Ors., [2017(71)PTC396(Bom)]***

- *“It could thus be seen that, even according to the own admission of the Appellant, hydrogenated fat or Vanaspati has harmful effects on the health. If, with this knowledge, the Appellant has aired the impugned advertisement, showing that all the manufacturers of frozen desserts use Vanaspati or Vanaspati tel, there can be no manner of doubt that intent of the advertisement is to show that Frozen Desserts are manufactured by using Vanaspati and that the said products which are manufactured with the use of Vanaspati are dangerous to the health. We have no manner of doubt, to hold that TVCs have an effect of disparaging the frozen desserts in general and dissuading the class of consumers from using it. As held in catena of cases, Appellant can very well make a false claim to puff up their product. It can also make statements which are not true to its knowledge to show how its product is superior. It can even compare its products with the competitors. However, the Appellant cannot be permitted to air the advertisement which disparages the product of its competitors.”*



## Relevant Case Laws (Contd.)

❖ *Hindustan Unilever Limited v Emami Ltd.*, [CS(COMM) 1109/2018]

- *“The TV commercial no doubt seems to make fun of a male using a ladies cream. Can it be said that this advertisement on account of the said dialogue stated is false or misleading or unfair or deceptive? Does it amount to generic disparagement? The answer is in the negative.....In view of the literature that has been posted on its own website by the plaintiff, it also cannot be said that prima facie the statements made in the advertisement regarding using of women’s cream by men is false”*

# THANK YOU!

## Questions?

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