"QUA VADIS ADVERTISING?": THE EMERGING PROBLEM OF GENERIC DISPARAGEMENT AND TRADEMARK INFRINGEMENT

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ABSTRACT

The high growth in disposable income and general buoyancy in consumer sentiments have contributed to the trend of reduced seasonality. The consumer is tempted to ask for branded items being advertised. Maturity of markets is related to maturity of consumers as well as producers where entire set of right and relevant information about the product is available to the consumer. In India, this does not happen, as neither the consumer protests nor the producer protects the interest of the consumer and intervenes to educate the consumer on right lines. An ad for Heinz shows a mother worrying about her son being teased by his friends as "half ticket" because he is short in height. In Maharashtra FDA has filed a charge sheet against Complan's advertising claim that it can add two inches to Children's height i.e. an exaggerated advertising claim. The competition for shelf space and ultimately the mind space has lead

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to infringement of trademark, design, and packaging besides the comparative advertisements.

Competitive strategies employed by firms range from ethical business practices that reflect simple marketing rivalry to hostile posturing against competitors. A particularly malign form of competitive interaction involves predatory conduct by reducing the competitive viability of actual or potential competitors. This form of competitive interaction involves a firm's attempts to benefit and advance in the market at the direct expense of its rivals through unethical intent and product disparagement. The cases of generic disparagement have drawn the attention of legal luminaries for quite some time.

The present article critically analysis the various aberrations in the field of advertising which involve law violation. It also gauges the efficacy of various legal instruments in our country. It concludes giving suggestions has to how the unethical practices can be curbed.

I. GENERIC DISPARAGEMENT IN THE FIELD OF ADVERTISING

Advertising is potent promotional tool for specific product and a cost effective way to disseminate messages for the consumers. Higher

advertising expenditures reduce the total cost of selling as well as buyer's price sensitivity. In the backdrop of the cut throat competition, companies set their promotion budget to achieve share of voice parity with their competitors. These aggressive promotion wars many times transform into commercial aberrations manifested through neglect of message creativity and business ethics. This problem has manifested itself in various forms such as passing off, ambush marketing, infringement of the trademarks, comparative advertisement etc where the advertisers are resorting to red ocean strategy where persuasion is going undetected. Consumer goods giants Hindustan Unilever, Procter and Gamble, ITC, Godrej, Philip Morris, Coca-Cola and Nestle are among those who have all figured or continue to feature in the list of firms fighting over brands in courts.

Five of the Brand Wars being fought in Indian Courts

ITC	Philip Morris
The Coca-cola company Limited	Bisleri Intl.
Societe Des Produits Nestle S.A.	Saif Ali Khan
Dabur India	Booty Pharma
Unilever Australasia	Shinger Cosmetics
	Source: LLS (Lall Lahiri & Salhotra)

As defined in Black's Law Dictionary, disparagement is "A false and injurious statement that discredits or detracts from the reputation of another's property, product, or business. To recover in tort for disparagement, the plaintiff must prove that the statement caused a third party to take some action resulting in specific pecuniary loss to the plaintiff."

Disparagement of goods is thus defined as "A statement about a competitor's goods which is untrue or misleading and is made to

influence or tends to influence the public not to buy." It is false and injurious statement that discredits or detracts from the reputation of another's property, product or business.

II. GENERIC DISPARAGEMENT VIS-À-VIS THE CONSTITUTION OF INDIA

Article 19(1) (a) guarantees to all citizens the right to "freedom of speech and expression." Under article 19(2), "reasonable restriction can be imposed on the exercise of this right for certain purposes." i.e. to say that the freedom of speech under article 19(1)(a) includes the right to express one's views and opinions at nay issue through any medium e.g., by words of mouth, writing, painting, pictures, film, movies etc. It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being imposed under art 19(2).

In *Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd & Godrej Sara Lee (DHC)*[1] it was held that if an advertiser extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would not have the benefit of article 19(1)(a) of the constitution of India.

Any producer under the garb of article 19(1)(a) cannot take advantage of the same and go on to increase it's sale at the cost of it's rival product. The same was held in *Eureka Forbes Ltd v. Pentair Water India Pvt. Ltd*[2] it was held that an advertiser can say that his goods are better but he cannot say that his competitor's goods are bad because it would amount to slandering or defaming competitors.

[1]Dabur IndiaLtd v. Colortek Meghalaya Pvt. Ltd & Godrej Sara Lee, (2010) 1 M.I.P.R. 195.

[2]Eureka Forbes Ltd v. Pentair Water India Pvt. Ltd., (2007) 4 Kar.L.J. 122.

A. Judicial precedents on Generic Disparagement

There have been many cases where the court has intervened and granted injunction for telecasting a commercial disparaging a particular product in the market. In *Karamchand Appliances Pvt Ltd v. Sh. Adhikari Brothers &* Ors,[3] the court held that the defendant shall not telecast the commercial advertisement in its original form. To the same effect are the decisions of the Court in *Dabur India Ltd. v. Emami Ltd.*,[4] *Dabur India Ltd. v. Colgate Palmolive India Ltd*[5]and *Dabur India Ltd. v. Colgate Palmolive India Ltd.*[6]

In Karamchand case, the defendant's commercial, which provoked the filing of the suit, showed the pluggy device of the plaintiff and dubbed the same as an obsolete 15 years old method of chasing away mosquitoes. On a comparison with its own product the defendant's advertisement claimed that it was the latest machine available in the market which chased away the mosquitoes at twice the speed. This Court's order found that advertisement to be disparaging and restrained its telecast. In appeal the Division Bench made a modification to the extent that the advertisement can go on but without disparaging the plaintiff's product. The defendant's case now was that it has modified the advertisement and instead of showing the pluggy device which resembled the plaintiff's machine, it had shown a different device which had a different design and colour combination. The plaintiff cannot, therefore, complain of any disparagement in the modified commercial which simply puffs up the plaintiff's product - something that the defendant in law is entitled to do.

Two aspects were examined in that backdrop as had been contested by Ram Jeth Malani. The first is whether the altered design of the pluggy device makes any material difference in the matter of

[3]Karamchand Appliances Pvt Ltd v. Sh. Adhikari Brothers &Ors., (2005) 31 P.T.C. 1 (Del.).
[4]Dabur India Ltd. v. Emami Ltd., (2004) 112 D.L.T. 73.
[5]Dabur India Ltd. v. Colgate Palmolive India Ltd., (2004) 29 P.T.C. 401.
[6]Dabur India Ltd. v. Colgate Palmolive India Ltd., (2004) 115 D.L.T. 667.

conveying the message which the commercial intends to convey to the viewers. The second aspect is whether a disparagement of a general concept is actionable in law, if such disparagement is otherwise unsustainable on the touchstone of any technological advantage, which the defendant's product may be enjoying over the product that is, disparaged. Eventually the court held that the commercial will not be telecast either in its original form or in its modified form.

In *Reckitt &Colman of India Ltd. v. M.P. Ramachandran and Anr*. 1999 (19) PTC 741, the facts were that the plaintiff was the manufacturer of blue whitener under the name and style of "Robin Blue". The defendant had also started manufacturing blue whitener and with a view to promote their products they issued an advertisement allegedly making disparaging representations to the plaintiff's Robin Liquid Blue. The defendants had depicted the product of the petitioner showing the container in which the product of the petitioner was sold and in regard to which the petitioner had a registered design. It was further shown in the advertisement that the product contained in the said container was priced at Rs.10.00. By giving the price, the respondent had in no uncertain terms identified the product of the petitioner since the only blue whitener sold in the market at the relevant time priced at around Rs.10.00 was the product of the petitioner. It was contended in the advertisement that the said blue was uneconomical and it was then contended that at Rs.10.00 the average blue is the most expensive to whiten the clothes. Thereafter it was added "What is more, you have to use lots of blue per wash". By making this comment the container of the petitioner had been shown upside-down and had been further shown that the liquid was gushing out. The object was obviously to show that the product of the petitioner priced at Rs.10.00 gushed out as a squirt and not in drips while being-used and, therefore, it was expensive way to whiten the clothes.

It was in these circumstances that the Court held that the assertion made in the advertisement was clearly related to the product of the petitioner in that case and was made with a view to disparage and defame the petitioner's product. The Court had based its decision mainly on the fact that the price of the container shown in the advertisement was Rs.10.00 and no other blue whitener except that of the petitioner was at the relevant time priced at. Rs.10.00 and it, therefore, held that the advertisement was directly related to the product of the petitioner. The Court, therefore, in that case restrained the respondent from issuing the advertisement in question.

Similarly, in *Reckitt Benckiser (India) Ltd v. HLL* (DHC): the court passed a decree of injunction in favor of plaintiff and restraining the defendant from issuing or telecasting the impugned advertisement of Lifebuoy product.

In *Dabur India Ltd. v. Colgate Palmolive India Ltd*[7] the defendant's advertisement claimed that Lal Dant Manjan was harmful for the teeth. The plaintiff who manufactured Lal Dant Manjan successfully complained to the Court who found the statement and the comparison disparaging. The plaintiff was granted an injunction against the defendant as the plaintiff held 85% of the share of the market in that product. The disparagement was considered generic for a class of goods or services as a whole.

Similar cases as *Reckitt & Colomen of India v. Kiwi TTK Ltd,*[8] *Pepsico Inc. and ors vs. Hindustan Cococola Ltd and Anr*[9]*, Dabur India Ltd vs. Emami Ltd,*[10] *Dabur India Ltd vs. Wipro Lts* CS(OS) no. 18 of 2006 decided on 27.3.2006 reveal that following elements shall have to be proved for an action of product disparagement.

a. false or misleading statement about the product

[7]Reckitt Benckiser (India) Ltd v. HLL (DHC), (2004) 115 D.L.T. 667.
[8]Reckitt & Colomen of India v. Kiwi TTK Ltd., (1996) 63 D.L.T. 29.
[9]Pepsico Inc. and ors v. Hindustan Cococola Ltd. and Anr., (2003) 27 P.T.C. 305 [*hereinafter* Pepsico Inc].
[10]Dabur India Ltd. vs. Emami Ltd., (2004) 29 P.T.C. 1.

b. Statement has the capacity to deceive the potential customers
c. The deception is likely to influence the consumer's purchasing decision

Interestingly, in *Colgate-Palmolive (India) Limited v Anchor Health & Beauty Care Private Limited*,[11] a judge at the High Court of Madras held that false claims by traders about the superiority of their products, either directly or by comparing them against the products of their rivals, were not permissible. The Court held that it was ultimately to the benefit of consumers to allow truthful "exposures" and to restrain traders from making "false representations, incorrect representations, misleading representations or issuing unintended warranties (as defined as 'unfair trade practice' under the Consumer Protection Act)."
This balancing of trader interests with consumer interests means that an advertisement which makes false claims, whether comparative or not, may be subject to an injunction or restraining orders from a court. The Madras High Court further observed that:

"*Recognizing the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's products, would be to 'de-recognize' the rights of the consumers guaranteed under the Consumer Protection Act 1986.*"[12]

[11]Colgate-Palmolive (India) Limited v. Anchor Health & Beauty Care Private Ltd., (2008) 7 M.L.J. 1119.
[12]Ameet Datta, Comparative advertising in India -Puff under scrutiny, LUTHRA & LUTHRA LAW OFFICES (2009).

III. GENERIC DISPARAGEMENT VIS-À-VIS COMPETITION ACT (REPEALED MRTP ACT)

MRTP Act has acted as in effective tool in curbing this activity of disparagement and as assisted courts to decipher the meaning of disparagement.

In *Lakhanpal National Ltd. v. M.R.T.P. Commission and Anr,*[13] the expression "unfair trade practice" has been defined in Section 36-A as a trade practice which adopts any or more of the practices enumerated in the section. Section 36A defines unfair trade practice as under:
'Unfair trade Practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise namely:

(1) The practice of making any statement, whether orally or in writing or by visible representation which-
(i) Falsely represents that the goods are of a particular standard, quality, grade, composition, style or model; ----------

(V) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have.

In the above case, u/s 36 A and 55 of Monopolies and Restrictive Trade Practices Act, 1962 respondent commission instituted proceeding to inquire whether appellant company was indulging in unfair trade practices prejudicial to public interest, appellant denied to have made any wrong representation and impugned advertisements

[13]Lakhanpal National Ltd. v. M.R.T.P. Commission and Anr., A.I.R. 1989 S.C. 1692.

not capable of causing any loss or injury to consumers. Hence the proceeding instituted by respondent was quashed.

In *Pepsi Co. Inc and Ors. v. Hindustan Coca Cola Ltd. and Anr*,[14] the defendants' commercial, said that Pepsi was for children because children like sweet things. The Court found that statement disparaging, and therefore, restrained the telecast of the advertisement.

In *Paras Pharmaceuticals Ltd v. Ranbaxy Laboratories Ltd,* (2008) 38 PTC 658 (Guj), The court solved the legal battle between Moov and Volini for using a particular colour falling within the ambit of section 29(8)(a) of Act. The court applied reasonable man's test and accordingly Ranbaxy was directed to use some other colour.

On the basis of the recommendation put forth by the Raghavan committee, the MRTP Act, 1969 was repealed and was replaced by Competition Act 2009. It was held that cases relating to giving false or misleading facts disparaging the goods, services or trade of another person under the MRTP Act: All such pending cases shall be transferred to the Competition Appellate Tribunal which will be dealt in accordance with the provisions of repealed MRTP Act.

Interestingly, the definition of "unfair trade practice" used by the now repealed Monopolies and Restrictive Trade Practices Act is found with a substantially similar meaning in the Consumer Protection Act 1986. This act protects two key rights, namely:

> a. the right of the consumer to be informed about the quantity, potency, purity, standards and price of goods to guard against unfair trade practices; and
> b. the right to consumer education.

[14]Pepsi Co. Inc., supra note 10.

The pending UTP cases in the MRTP Commission may be transferred to the concerned consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP Cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.

IV. TRADEMARK INFRINGEMENT

It's surprising to note that the government permitted the use of a competitor's trademark in comparative advertising in 1990 in its White Paper on the Reform of Trade Marks. However it was warned that the advertisers should still not be free to ride on the back of the competitor's trademark. This came in form of section 10(6) of the Trademarks Act, 1994. In landmark cases such as *Barclay's Bank plc v. RBC Advanta*,[15] Laddie J stated that to succeed under this section the onus was on the one who was alleging (Barclays) to show that the use complained of was:

1. Not in accordance with honest practices; and
2. Without due cause took unfair advantage of, or was detrimental to, the distinctive character or to the repute of the trademark.

India enacted its new Trademarks Act 1999 (the TM Act) and the Trademarks Rules 2002, with effect from 15th September 2003, to ensure adequate protection to domestic and international brand owners, in compliance with the TRIPs Agreement. Section 29(8) of the Trademarks Act, 1999 prescribes above two conditions which constitute TM infringement in advertising. Section 30(1) makes

[15]Barclay's Bank plc v. RBC Advanta., (1996) R.P.C. 307 [*hereinafter* Barclay's Bank].

exceptions to acts constitution infringement under section 29. Now the question arises whether a particular advertisement is in accordance with honest practices or not? In *Pepsi Co. Inc* and *Ors. v. Hindustan Coca Cola Ltd. and Anr.,* the court observed that mere puffing is not dishonest and mere poking fun at a competitor is a normal practice of comparative advertisement and is acceptable in the market. McCarthy says puffing is exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely upon and is not actionable.[16]

However, the advertisement has to be sufficiently misleading or materially false in order to be dishonest.[17] Unfortunately the burden of proof lies on trademark owner that the trademark has been utilized dishonestly.

In a subsequent case of Vodafone Group v Orange,[18] it was held that the use of complained of was not honest it went without saying that it "takes unfair advantage of" or is "detrimental to" the distinctive character of the repute of the mark.

It was finally held that to show that the advertising is misleading; they will be able to take action to prevent us of their marks.[19] This again is subject to the CAD.[20] However, a comparative advertisement which

[16]J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 27-66 (4th ed., Thomson, West Misesotta, 2005).
[17] Barclay's Bank, supra note 16; DSG Retail Ltd (t/a currys) v. Cornet Group Plc, (2002) F.S.R. 899.
[18]Vodafone Group plc & Anr. v. Orange Personal Communications Services Ltd., (1997) F.S.R. 34, Jacob J. referred to a virtual moratorium in the motor industry on the enforcemnt of claims under § 4(1)(b) TMA 1938.
[19]Emaco Ltd and Akriebolagte Electrolux v. Dyson Appliances Ltd, Pat. C. 26 Jan. 1999.
[20] Directive, 97/55/EC.

satisfies all the conditions set out in Article 3a (1) of the Comparative Advertising Directive will be protected from Article 5(1).[21]

However if the trademark is not registered and even then the claims of malicious falsehood or passing off are proved then the original trademark owner can get remedy.

Malicious Falsehood: To succeed in a action for malicious falsehood the plaintiff must show

1. The words complained of were false
2. They were published maliciously
3. They were calculated to cause the plaintiff pecuniary damage.

In cases of *Vodafone v. Orange*, Compaq case[22] and *De Beers Abrasive Products Ltd International v. General Electric Co. of New York Ltd*[23] to avoid an action for malicious falsehood, the creator of a comparative advertisement should take all reasonable steps to verify the accuracy of the material that is to be published, and ensure that products that are identified as "equivalent" of basically the same are for all practical purposes equivalent or else to specify the distinction.

In the case of *Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd*, the court viewed that impugned advertisement of Goodnight cream against ODOMAS cream does not fall prima facie within the tort of malicious falsehood.

Passing off: It can be defined when the customer's are deceived into believing as a consequence of the advertisement that both brands emanate from the same manufacturer. The same happened in the case

[21] L'Oréal and Ors v. Bellure and Ors., C-487/07 E.C.J. (First Chamber) (18.06.2009).
[22]Compaq Computer Corpn v. Dell Computer Corpn Ltd., (1992) F.S.R. 93.
[23]De Beers Abrasive Products Ltd International v. General Electric Co. of New York Ltd., (1975) 2 ALL E.R. 599.

of *Mc Donald's Hamburgers Ltd v Burger King (UK) Ltd*[24] where the court held that consumers were unlikely to read the small print of the advertisement (given the positioning of the advertisement inside the underground trains) and the remainder of the text unclear. The case of *Ciba Geigy v. Parke Davis*[25] is another case of passing off. In any comparison of competing brands using unregistered trademarks should leave the consumer in no doubt as to the origin of each product or an action for passing off may follow.

V. DESIGN INFRINGEMENT

Recently Reckitt Benckiser the maker of Dettol antiseptic soap and Cherry blossom shoe polish has served a legal notice to Bharti Wal-Mart demanding that the cash-and-carry joint venture company withdraws its great value toilet cleaner as it infringes upon bottle design and cap of Reckitt's Harpic brand, the domestic market leader in this category holding 75% plus share. Great value is top selling market brand of Wal-Mart. The brand was launched 17 years ago to offer price sensitive consumers cheaper products compared to national brands. In this era of globalization, the private brands of organized retailers are increasingly challenging the existing national brands. In such cases the advantage is with the IP rights holder subject to specific jurisdiction.

Thus it can be inferred that:

(i) Puffery is permissible even though it results in extolling the virtues of ones own goods- which may not be quite in accord with reality. A trader cannot most certainly denigrate a rival

[24]Mc Donald's Hamburgers Ltd v. Burger King (UK) Ltd., (1994) F.S.R. 45.
[25]Ciba Geigy v. Parke Davis., (1994) F.S.R. 8.

trader's goods. [See Reckitt & Colman of India ltd v. M.P. Ramachandran & Anr, 1999 PTC (19) 741 (Cal)].

(ii) Comparative advertisement is permissible as long as it does not attain negative overtones; [see Godrej Sara Lee Ltd v. Reckitt Benckiser (I) Ltd, 128 (2006) DLT 81 and Dabur India Ltd v. Wipro Ltd 129 (2006) DLT 265].

(iii) Generic disparagement being tortuous, it makes no difference whether it is overt' or covert' for it to be held as tortuous. In that sense, generic disparagement falls foul of the law and can be injuncted. [See Dabur India Ltd. Vs. Colgate Palmolive India Ltd. 2004 (29) PTC 401(Del.), Dabur India Ltd. Vs. Emami Ltd. 2004 (29) PTC 1 (Del.) and Karamchand Appliances Pvt. Ltd. vs Sri Adhikari Bros. & Ors. 2005 (31) PTC 1 (Del)].

(iv) Truth is a complete defence to a charge of tort of defamation or slander of goods; (v) advertising is a form a commercial speech and hence, protected under the provisions of Article 19(1) (a) of the Constitution; which will have to adhere reasonable restrictions.[26]

VI. POSITION IN OTHER COUNTRIES

House of Lords in White v. Melin,[27] first examined the situations in which an action would lie against a tradesman for an advertisement campaign considered objectionable by his rivals. The Court held that the plaintiff would not be entitled to an injunction unless he

[26]Tata Press Ltd. v. Mahanagar Telephone Nigam Limited, A.I.R. 1995 S.C. 2438.
[27]House of Lords in White v. Melin, (1895) A.C. 154.

established that a tort had been committed and that merely puffing up one's goods by saying that the same are the best, would not amount to a disparagement of the goods of the rival. The law was pithily summarized by their Lordships in the following words: "But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are".

Finally the position was made clear through the following judicial precedents which have been time and again been used by the Indian courts to decipher the true meaning of actionable wrong under such kind of practices.

White v. Mellin (1895) AC 154 HL, *The Royal Baking Powder Company v. Wright Crosssley & Co.* (1901) 18 R.P.C. 9595 (where it was enumerated that three main ingredients should be included in a malicious prosecution, namely, the impugned statement in untrue, the statement is made maliciously, without just cause or excuse and that the plaintiffs have suffered special damage thereby) and *De Beers Abrasive Products Ltd. & Ors. v. International General Electric Co. of New York Ltd.* (1975) 2 ALL ER 599, seem to in nut shell lay down the following principles:

> (i) Trader is entitled to say his goods are best in the world. In doing so, he can compare his goods with another.
>
> (ii) While saying that his goods are better than those of the rival traders he can say that his goods are better in this or that or other respect.

(iii) Whether the impugned statements made to disparage the rival trader's goods, is one which would be taken seriously 'by a reasonable man'. A possible alternative to this test would be whether the defendant has pointed out the specific defect or demerit in the plaintiff's goods.

(iv) A statement by the defendant puffing his own goods is not actionable.

A falsehood that tends to denigrate the goods or services of another party is actionable in a common law suit for disparagement. The same conduct is also actionable under certain state statutes and can form the basis for an F.T.C (Federal Trade Commission) complaint in USA. There is no private federal cause of action for disparagement under the Lanham Act (U.S. Trademark Act)." However, section 43(a)[28] of the Lamhan Act is the federal law used for asserting claims in private litigation against two types of unfair competition (i) infringement of unregistered trademarks, trade names and trade dress, and (ii) false advertising and product disparagement. A survey[29] reveals that there are two kinds of advertisement ways:

1. Non-Comparative Advertisement (NCA)

[28]§ 43(a)(1): Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[29]The Development of a contingency Model of Comparative Advertising, Working paper No 90-108, Marketing Science Institute, Cambridge, MA.

2. Comparative Advertisement (CA) which can be further sub divided into:
    a. Indirectly Comparative Advertisement (ICA)
    b. Directly Comparative Advertisement (DCA)

The UK is an example of European country that allows both (ICAs and DCAs, within limits) whereas Germany is an example for one that allows neither. In UK, the legal position concerning comparative advertising is complex. It is regulated by matrix of statutory regulation, torts, and regulation codes of practice. Comparative advertisement is permitted in UK to the extent that a third party is allowed to use trademark to refer to the goods and services of that trademark owner. However, any such use otherwise than in accordance with honest practices in industrial or commercial matters would be treated as infringing the registered trademark if the use without due course rakes unfair advantage of or is detrimental to, the distinctive character or repute of the trademark. Also, for plaintiffs, statutory trade mark law offers a less cumbersome option. In contrast, courts in India have indulged tortious disparagement claims and shown a greater willingness to infer malicious intent. Indian judges have also allowed claims alleging generic disparagement, ie the disparagement of a broad group of unspecified traders rather than a specified trader.

In developing a tort of generic disparagement, Indian courts have ignored English precedents. Judges have stressed on the need to protect consumers from misleading statements, even if not targeted at a particular trader. Courts have also included venial puffing and commercially honest denigration within the ambit of generic disparagement. By recognizing a tort of generic disparagement, it is argued that Indian courts have unduly curbed commercial freedom of speech and opened the floodgates for frivolous litigation among rival

businesses. For these reasons, courts should not recognize this tort and permit only specific disparagement claims.[30]

U.S.A. has a separate law to deal with such a menace. Competition law is known in the United States as "antitrust law". Both the Federal Trade Commission (FTC) in the US and the Commission of the EU have expressly promoted comparative advertising on the basis that it enables consumers to reach a more informed decision. However there has been lack of evidence to substantiate the claim that comparative advertisements are effective in terms of their persuasive value.[31] The net result remains that Comparative advertisements actually result in changed purchasing decisions.

Thus product defamation, trade libel or slander of goods -- is a false statement about a product that hurts its maker. Victims of product disparagement can sue the perpetrators under both state product disparagement laws and the federal Lanham Act, the law that protects trademarks.

The EC Directive on Comparative Advertising: Comparative Advertising is only permitted when the following conditions are permitted: CAD (Comparative Advertisements Directive) which are set out in art 1(4) and can be summarized as follows

1. Good or service meeting the same needs or intends for the same purpose
2. One or more material, relevant, verifiable and representative features (which may include price); and
3. Products with the same designation of origin (where applicable)

[30]Arpan Banerjee, Comparative Advertising and the Tort of Generic Disparagement, 5 J. OF INTELLECTUAL PROPERTY L. & PRACTICE 11, 791–802 (2010).
[31]William L. Wilkie & Paul W. Farris, Comparison Advertising: Problem and Potential, 39 J. OF MARKETING 7 (1975).

It must not:

1. Mislead
2. Create confusion
3. Discredit or denigrate the goods/service, trademarks or trade name of a competitor
4. Take unfair advantage of the reputation of a trademark, or of the designation of origin of competing products; or
5. Present goods or services as imitations or replicas of goods/services bearing a protected trademark.

It will be important to state that in U.S., Comparative advertisement is not considered a distinct area of advertising law other than the tort of disparagement whereas in EU, the proposed directive would establish specialized and unique rules meriting treatment. This is because each of the EU members has contributed to the formulation of the EU rules.[32]

Producers end up mocking the rival product which eventually affects the sale and market of the competitor. This concern was shared by Economic and Social Committee of the European Parliament in its opinion on the proposed Comparative Advertising Directive, which stated that:

"… the committee considers the presentation of a product …as an imitation or replica of another is simply an unfair enticement to the consumer which seeks protection (exploit the reputation of another product while recognizing the inferior nature of the product being advertised. Such presentation should be banned, as it doesn't not respect the principles of consumer protection (the consumer would be misled) nor of the protection of the product being compared."

[32]Petty D. Ross, Public Policy and Marketing, American Marketing Association, (1997).

Laws are sufficiently toothed to curb such an act but the society at large must also be aware of its ethical standards and practice within its limits. If the CAD rules are not applied then it will result into eroding the exclusivity of the brand owners and the balance between the interests of brand owners and competing demands of a market economy.

VII. CONCLUSION

- Advertising as a marketing tool is being misused in the blind urge to outperform the competitors. The recent judicial pronouncements in favour of Consumers, inclusion of venial puffing and commercially honest denigration within the ambit of generic disparagement have posed new challenges. The balancing of trader interests with consumer interests means that an advertisement which makes false claims, whether comparative or not, may be subject to an injunction or restraining orders from a court. Internationally, the trend goes in favour of consumer rights protection. It is likely that the judicial pronouncements may witness some inconsistency until the Supreme Court makes a definitive ruling.
- The comparison should be made fair and should not bring disrepute to competing products, trademarks or services.[33] Though India does not make "generic disparagement" as an offence per se yet is strongly in need of provisions to be incorporated where the menace of generic disparagement should to be dealt with stringent measures. Comparative advertisement will be harmful to the consumer in particular and society at large if it consists of false,

[33]Uphar Shukla, Comparative Advertising and Product Disparagement Vis-à-vis Trademark Law, 11 J. OF INTELLECTUAL PROPERTY RIGHTS, 409-414 (2006).

wrong and concocted information. Thus, the stringent punishment should also be incorporated in the existing legislations to prevent disparaging in comparative advertisement.

- The models, the creative agencies and the companies should be prosecuted and penalized for disparagement in order to have effective check on such malicious advertising. The celebrities should enquire before endorsing a product that whether their endorsement tantamount to disparaging.
- All advertiser's claims should be monitored and extended beyond food as FMCG marketers and durable manufacturers make all kinds of unsubstantiated claims in their advertisements to woo the customers. Advertising is legalized lying. In market economy the consumers need free flow of information to make informed choices, appropriate to their needs, It sullies the industry's reputation for being irresponsible and deceitful, it also generates a fair bit of reactionary regulations. The best ads are created within the constraint of restrictions and regulations. Unfortunately, the self regulation does not work. Companies continue to use ads to get noticed in the clutter, making unsubstantiated claims. Advertising Standard Council of India (ASCI) is self regulatory body which rules out falsification, indecent, illegal and unsafe practices or unfair contraventions of ethical codes in any advertisement.
- Law can't fix greed, regulation can't instill character. The Sarbanes Oxley Act did not prevent further collapses in financial sector in US. Perhaps reaction is more regulation. We don't need regulation as it is not sufficient to stop greed and avarice. Lord Leverhume said that nothing can be greater than a business however small it may be that is governed by conscience and nothing can be more meaner than a business however large governed without honesty and brotherhood. Idealism and romance are getting tempered with age, responsibility and time. Idealism is getting replaced by pragmatism, which is euphemism

for expediency. We trade long term values with short term gains and end up with a bad bargain.

- Courts gives due consideration to intent, manner, format, frame of advertisement to assess the iota of ridicule or condemnation of other competitive product. If the manner is only to show one's product better or best without derogating others products then that is not actionable. Comparative advertising is beneficial as it increases consumer's knowledge and awareness and helps in taking the informed decision but certain regulations must be in place to put a cap on its misuse. The consumer is not aware enough to assess the dishonest intent of the advertiser. Further courts are not equipped enough to decide the dishonest/false/ disparaging remarks and verify the truth in certain technical products and services.
- Recently Supreme Court has set the timelines for the Competition Commission of India to resolve disputes on competition between the companies. The apex court ruled that every order of the commission is not appealable before Competition Appellate Tribunal (COMPAT) as it will choke the early disposal of the cases and defeat the purpose of the law under which quasi-judicial body has been established. The Competition Act, 2002 and Regulations, 2009 are suggestive of speedy and expeditious disposal of matters and concept of reasonable time is to be construed meaningfully.
- The complementarities between the Competition Act, 2002, Consumer Protection Act 1986 and Trade Marks Act, 1999 need to be identified and gaps plugged in to fructify the legislative intent. The consumer awareness needs to be enhanced by removing the marketing aberrations and unhealthy competition.

The day is not far where instead of consumer being the king; the producer would sit on the throne enslaving the consumers through the powerful medium of visual advertising. It's time for an introspection and change indeed.