

# Few Indian Case Studies on Legal Aspects of Comparative Advertising

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## ABSTRACT

The purpose of Comparative advertising was to make the consumer aware and judicious about selection of product or service from plethora of available choices; however the market forces have lead into it the detrimental practices of product disparagement and infringement of trademarks. Consequently, there have been endemic rise in number of litigations in this regard and the judgments' regarding these issues have given so much food to thoughts that the author felt to ponder and analyze the cases. In the present work, the author discusses **four** judicial cases pronounced in India; each case exclusively. We find that the focus of these cases is to provide protection to the trademark holder's right, curb monopolies in the market, prevent unfair trade practices so that at large the interests of the consumers is protected. The study also provides the groundwork for the present legal stance towards comparative advertising in India. We could understand the working of the legal provision by studying the judgments given by several Commissions and Courts.

**Keywords:** *Comparative Advertising, Product disparagement, Trademark infringement, judicial pronouncement*

## 1. Introduction

Comparative advertising is a tool used by the market players to make the consumer feel that their service or product is better and more sought after. In their desire to grab more and more market share and bring the consumer attention towards its brand certain market players, while giving a comparative advertisement of their product or service go to a bolder extent of providing deceptive, misleading or denigrating information regarding their competitor's product or service and in some cases even do infringement of the registered trade marks for giving an impression of an existing popular brand. The author has been studying the legal aspects of comparative advertising since last decade. The study reveals that these unlawful practices lie within the broad scope of Intellectual Property Laws pertaining to the aspects of infringement of trademarks and product disparagement in the realm of comparative advertising. Previously too, the author has reported several case studies and research analyses in this regard. In the present work, the author discusses **four** judicial cases pronounced in India; discussing each case exclusively. The focus of the judicial pronouncement regarding this matter is to provide protection to the trademark holder's right, curb monopolies in the market, prevent unfair trade practices so that at large the interests of the consumers is protected. The study also provides the groundwork for the present legal stance towards comparative advertising in India. We could understand the working of the legal provision by studying the judgments given by several Commissions and Courts. The Author addresses and analyses each cases one by one in detailed manner.

## 2. Case Studies

### 2.1 Dabur India Ltd. v/s. Colgate Palmolive India Limited. (2004)

**Plaintiff :** Dabur India Ltd. manufacturer of a wide range of pharmaceuticals, toiletries and medicinal preparations including Ayurvedic medicines and formulations marketed under its registered trade mark 'Dabur'. Here manufacturer of Dabur Lal Dant Manjan Powder

**Defendant:** Colgate Palmolive India Ltd. Manufacturer of white toothpowder brand "Colgate".

**Facts of the Comparative Advertisement:** -In this case Colgate promoted an advertisement on the visual media where in a actor Sunil Shetty was seen stopping the purchasers from purchasing the tooth powder which was similar to that of Dabur by explaining the ill effects of the Lal Dant Manjan by rubbing it on a pair of spectacles. The rubbing process left marks on the spectacles, which were termed as akin to sandpapering. In addition to this Colgate advertised that their tooth powder was 16 times less abrasive and non-damaging to teeth. Hence Colgate disparaged the goods and was granted injunction by the Court.

**Plaintiff Complaint:** As Dabur had 80% share of the Ayurvedic tooth powder trade and is directly hit by this advertisement as the principal producer, by the denigration of the generic product Lal Dant Manjan would affect the plaintiff the most and hence he is entitled to ventilate its grievances.

**Defendant Arguments:** The advertisement does not refer to the Plaintiff's product and it is open to the defendant while praising its own product to point out the defects/deficiencies in the rival product.

**Verdict:** The Judge did not go into the issue, whether the product referred to in the advertisement is Plaintiff's product but relied on Dabur India Ltd. v. Emami Ltd.; 2004 (29) PTC 1 (Del) to held that *"the plaintiff is certainly entitled to complain as it is one of the largest producers of such tooth powder."* The Judge further held *"It was sought to be contended that sly against all are permissible though the same may not be permissible against one particular individual. I do not accept the same for the simple reason that while saying all are bad it was being said all and everyone is bad and anyone belittling the description of everyone is affected thereby. ...I am further of the view that generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or genrel of a product within which a complaining plaintiff falls and raise a defense that the plaintiff has not been specifically identified".* Hence the defendant was restrained from telecasting the TV commercial for "Colgate Tooth Powder".

**Analysis :-** The same reasoning was followed in this case.

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Dabur India Ltd v. Colgate Palmolive India Ltd., 2004 (29) P.T.C. 401

## 2.2 Dabur India Ltd.v. Wipro Ltd., Bangalore, 2006

**Plaintiff:** Manufacturer of a wide range of pharmaceuticals, toiletries and medicinal preparations including Ayurvedic medicines and formulations marketed under its registered trade mark 'Dabur'. One of its product is Dabur Honey.

**Defendant:** Manufacturer and markets honey under brand Wipro Sanjivani.

**Facts of the Comparative Advertisement:** The Defendant started airing a TV commercial in respect of its product in which a lady (Mrs. Paradkar) is shown holding a bottle of honey which resembles the Plaintiff's bottle but is without the label and the voice over is to the effect that the bottle was bought two years back but it has remained the original one (jaisi ki waisi). In comparison one Mrs. Rao purchased Wipro Sanjivani Honey, which got consumed almost immediately.

**Plaintiff Complaint:** The Plaintiff submitted that a consumer will recognise the bottle of honey with Mrs. Paradkar as that of his because of its distinctive shape and size for which it holds a design registration. Consequently, an unwary consumer watching the TV commercial is likely to be misled to see and believe his product in poor light.

**Defendant Arguments:** Learned counsel for the Defendant refuted the submissions of learned Counsel for the Plaintiff.

**Verdict:** The Court stated that the commercial clearly intends to say (and so it does) that as compared to the product of the Plaintiff, the product of the Defendant is far better. The hidden message in this may be that the product of the Plaintiff is inferior to that of the Defendant but that will always happen in a case of comparison. While comparing two products, the advertised product will but naturally have to be shown as better. The law, as accepted by this Court, is that it is permissible for an advertiser to proclaim that its product is the best. In the present case, the overall audio-visual impact does not leave an impression that the story line of the commercial and the message that is sought to be conveyed by it is that Dabur Honey is being denigrated, but rather that Wipro Sanjivani Honey is better. So it does not constitute a case of product disparagement.

**Analysis:** The intent of the commercial is to suggest that Wipro Sanjivani Honey is superior to Dabur Honey. While doing so, the commercial does not denigrate or disparage the product of the Plaintiff rather it merely compares the two brands of honey and proclaims that its product is superior. It is one thing to say that his product is better than the competitor's and it is another thing to say that the competitor's product is inferior to his products. In comparative advertising, a consumer may look at a commercial from a particular point of view and come to a conclusion that one product is superior to the other, while another consumer may look at the same commercial from another point of view and come to a conclusion that one product is inferior to the other. Disparagement of a product should tantamount to defamation.

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Dabur India Ltd.v. Wipro Ltd., Bangalore, 2006 (32) P.T.C. 677

### 2.3' Glaxo Smith Kline Consumer Health Care Limited v. Heinz India Private Limited & Ors (2007)

**Plaintiff:** Manufacturer of the reputed nutritional drinks 'Horlicks'

**Defendant:** Manufacturer of the reputed nutritional drinks 'Complan'

**Facts of the Comparative Advertisement:** The first half of the advertisement had shown a young boy hanging on the central bar of a school bus, apparently in a desperate bid to gain some height. Thereafter, another boy approaches and advises him to start consuming the brand 'Complan', which he says is necessary for growing tall. The advertisement proceeded in its second half to show the same boy who had previously been hanging on the bar having had a considerable increase in his height, with him declaring that he was now a consumer of the defendant's brand. The broadcast ended on a visual note declaring that the defendant's brand 'Complan' had 'extra growing power'.

**Plaintiff Complaint:** In addition to allegations of implied disparagement, it was contended by the plaintiff that the advertisement had attributed certain qualities to the defendant's product in an imprecise and untruthful manner. The plaintiff argued that the said portrayal was enhancing the utility of the defendant's product in an untruthful manner, with there being no substantive basis to the defendant's assertion that its brand ensured an increase in height. It was contended that the consumption of nutritional drinks was not the only factor contributing to the growth of children, with genetic potential, physical activity and various environmental circumstances being equally determinant. Such incorrect portrayal was argued to be an attempt to misguide consumers with regard to the utility of the defendant's product, resulting in the plaintiff suffering extensive economic losses.

**Defendant Arguments:** The defendant contended that the assertions made were understood by consumers to be an attempt at puffery, with there being no requirement of warranty or accountability with regard to the same



**Verdict:** The Court herein adhered to the principles as had been stated in Case of *Ujala vs Robin Blue* holding that an advertiser was at liberty to engage in puffery so long as the product of a competitor was not slandered in any manner. In his order, Justice Bhat finds one of the advertisements as disparaging and beyond the realm of permissible puffing. Remaining second and third are held within realm of puffery. The primary reason for this is that the repeated use of the word ‘cheap’ & ‘compromise’ along with the remaining insinuations would definitely harm the reputation of Horlicks.

**Analysis:** The judgment draws a distinction between advertisements in different mediums i.e. print and television. The reasoning stated is television advertisements is a visual which unlike print advertisements make an instant impact across consumers and the level & extent of impact is much greater than a print one where each word has to be read, analysed and understood.

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Glaxo Smith Kline Consumer Health Care Limited v. Heinz India Private Limited and Ors., 2007 (2) CHN 44.

## 2.4 Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd (2009)

**Plaintiff:** Manufacturer of dental care products including toothpaste brand Colgate

**Defendant:** Manufacturer of dental care products including toothpaste brand Anchor

**Facts of the Comparative Advertisement:** In the advertisement the defendant had stated that its product ‘Anchor’ was the ‘only’ one that contained three ingredients, namely calcium, fluoride and triclosan; also claimed that ‘Anchor’ was the ‘first’ toothpaste that could provide ‘all round protection’.

**Plaintiff Complaint:** The plaintiff objected to the first assertion as being false on the basis that even its products contained all of the three named ingredients. Having established itself as a pioneer in the market for dental care products, it argued that an assertion on part of the defendant that ‘Anchor’ was the ‘first’ product to provide ‘all round protection’ was an act of denigrating the competing product in an implied manner. The plaintiff contended that the defendant’s assertions were both false and disparaging, with the same exceeding the tolerable limits of puffery.

**Defendant Arguments:** The defendant replied to the same arguing that its use of the word ‘only’ was intended to mean that its product was the only one containing the three ingredients within the specific range of white toothpastes. Further, with regard to the usage of the word ‘first’, it argued that it related to the adoption of the slogan ‘all round protection’, and not the utility of the brand.

**Verdict:** The Court held that the advertisement sent a misleading message to the consumers and a average reasonable consumer would believe that ‘Anchor’ was in fact the ‘only’ product containing the said ingredients, and that it was the ‘first’ to provide optimal protection. The Court accepted that there had been no active disparagement of the plaintiff’s product but considered the use of the terms ‘only’ and ‘first’ to be in an untruthful and misleading manner constitutive of an unfair trade practice. Hence, the Court restrained the defendant from the usage of the words ‘first’ and ‘only’ in the said manner.

**Analysis:** A significant evolution of the law on false and imprecise puffery was seen in this case as the Court considered the element of consumer protection in the law regulating puffery. With consumers being the often gullible targets of advertising campaigns, the protection of their interests was required while establishing a substantive mechanism to regulate comparative advertising. Hence, the right that had been conferred on advertisers to make untrue statements regarding the utility of the product was extinguished.

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Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd, 2009 (40) PTC 653

### 3. Conclusion:

There are a significant number of comparative advertising cases decided by the courts in India as well as in other Countries. This work addresses four judicial cases pronounced in India that provides protection to the trademark holder's right, curb monopolies in the market, prevents unfair trade practices so that at large the interests of the consumers is protected. This study also lays the groundwork for the present legal stance towards comparative advertising in India. One can understand the working of the legal provision by studying the judgments given by several Commissions and Courts. This analysis also serves to understand the various facets of comparative advertising and when it turns from puffery to denigration and how and when the use of trademarks of a competitor is termed as infringement.

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