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CASE STUDY ON HORLICKS LIMITED &Anr. vs ZYDUS WELLNESS PRODUCTS LIMITED, 2020- Swetalika Das¹**ABSTRACT**

Comparative advertisement has become a present-day method of advertising where one tries to show their products as best by comparing with other products. Why is it a present-day method of advertising? It is because the concept of the comparative advertisement has evaded the earlier methods of advertisement. This is an evolving method that has been seen to get adopted by many advertisers while promoting their products to increase consumer information and knowledge of a particular product. However, it has been seen that this method of advertising has led to many issues like disparagement, unfair trade practices, and trademark infringement.

INTRODUCTION

Simply put, a misleading advertisement may be defined as a kind of promotion, propaganda, marketing, etc of the products by causing misconception in the minds of the viewers through the media whether print or electronic. Print media includes newspapers, banners, and posters, whereas, electronic media includes Television, Radio, and Social media channels through sponsorships or promotions to falsely portray the product misleadingly and delude the consumer's choice. Even after the enactment of several laws in relation to the protection of consumer rights and goods, there are many advertisements that are used as a means to mislead the public in a large manner which consequently provides false information about the product to the public. In many advertisements, it is observed that two products are compared to prove the

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advertiser's product is the most effective one, these types of advertisements are known as comparative advertisements.

Comparative advertisement is simply a way of representing a product or service that the other product is not. Over time, the marketing strategies of many advertisements have changed. Claiming their product as the best over the other has become the common marketing strategy of many advertisers. In such cases, comparative advertisements have become a great way to attract more consumers which also provides the consumers with detailed information about the product and the progress of a brand. In India, there are no such laws for comparative advertisement unlike other countries like the US, UK, and Australia. However, the Monopolies of Restrictive Trade Practices Act, 1984 (MRTP) and the Trademark Act 1999 talk about the concept of comparative advertisement. Advertising is considered commercial speech. Therefore, it is a part of Freedom of Speech which is included under Article 19(1)(a) of the Constitution of India.

FACTS OF THE CASE

Plaintiff adopted the trademark "HORLICKS" in the year 1943 which was extensively marketed and sold whereas the defendant as a competitor of the plaintiff was mainly engaged in manufacturing and selling a nutritional drink under the trademark "Zydus wellness Products ltd". Both Plaintiff and Defendant are engaged in selling and manufacturing the nutritional drinks named "HORLICKS" and "COMPLAN". In the year 2019, the plaintiff noticed a TV commercial advertisement which is a comparison-based advertisement with their product "HORLICKS". The TV commercial was being telecasted on various channels and in various languages such as English, Tamil, and Bengali. The conflicting factor of the advertisement is that it said that one cup of complan drink is equal to two cups of Horlicks drink. Therefore, Plaintiff filed a suit against the defendant for permanent injunction and sought to restrain from telecasting an impugned advertisement as the same amounted to, deliberate disparagement of the plaintiff's health drink HORLICK through a television commercial (TVC).

WHAT IS A MISLEADING ADVERTISEMENT?

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Misleading advertisement is when a promotion is embedded in the perceptual cycles of different audiences and the issuance of this interaction (a) the veracity of the situation is different and (b) affects the process of purchasing the product and causes damages to the purchaser. At the point when an advertisement is considered misleading by the consumer, the foremost role that should be played by the purchaser is the convictions and encounters related to the advertisement he was presented to. Morally the deceptive act of an advertisement, if the advertisement (or publicizing effort) creates an alternate view in the minds of consumers than what it used to be or if the consumer has reasonable information, and that the belief of the consumer is false or misleading, then misleading advertisement is said to exist.

ISSUES RAISED

1. Whether the disclaimer in the comparative advertisement is clearly visible and audible in the electronic medium to prevent confusion in the minds of the consumers?
2. Whether the advertisement is disparaging or not?

PLAINTIFF CONTENTIONS

- It was argued that the defendant violated the general principles and intentionally disparaged the plaintiff's product by showing the serving size of the plaintiff and defendant as the same despite knowing the fact that the serving sizes of both the health drinks are different.
- It was contended that the defendant didn't provide adequate time for consumers to notice the disclaimer written on the advertisement as there was no voiceover for the disclaimer. The clip was only for six seconds which makes it hard for any person to notice and hence, the advertisement is false and misleading.

DEFENDANT CONTENTIONS

- It was argued that the intention of the defendant was only to educate the customers by advertisement with respect to the protein content in one cup of COMPLAN since the²

²CS(COMM) 464/2019

recommended serve size of COMPLAN is 33 grams which is equal to two cups of HORLICKS as the recommended size is 27 grams per cup which is provided in both the health drink packages. Thus, the advertisement is neither misleading nor defamatory.

- It was also argued that per serving size recommended by a party is a recognized method of comparison. The same is also mentioned under Section 3 of the food safety and standard packaging and labelling regulation 2011.

JUDGMENT OF THE CASE

After hearing the arguments of both parties, the Delhi High Court stated that the main issue lies in ³whether the disclaimer put in the print advertisement is visible and audible in the electronic medium. It was observed that on playing the TVC, there was neither any voiceover nor sufficient time to read the said disclaimer. A viewer can only see the comparison of one cup of COMPLAN with two cups of HORLICKS without any reference to the serving size. According to one of the previous precedents, the electronic medium is a very powerful medium of communication. It has a far greater impact than an advertisement in the print media and leaves an enduring mark on the mind of viewers. Hence, every new person who views the advertisement can easily get misled. The Delhi High Court further stated that there was no voiceover for the disclaimer, also, the visual advertisement was only for six seconds which is insufficient time for anyone to note the disclaimer. This shows that the defendant intentionally disparaged the plaintiff's product and misled the consumer. Therefore, the court restrained the defendant from advertising the impugned television commercial in the present form.

ANALYSIS

Misleading advertisements have been proven to be a hindrance to a company's growth and development. Consumers often develop misconceptions about a particular product due to the confusion created by a false advertisement. However, a comparative advertisement is slightly different from a false advertisement because, in a comparative advertisement, the competitors compare their products and show their product's effectiveness whereas a false advertisement

³CS(COMM) 464/2019

may show some false and misleading facts about the product which eventually leads to the downfall of the reputation of the targeted company. This case provided a subtle differentiation between the advertisements published in print media and electronic media. It provided that while determining those kinds of similar advertisements, it is important to have an unbiased opinion or viewpoint. Here, the Delhi High Court determined the consequences of advertising in electronic media in contrast with the digital media and additionally, observed that the viewers of those advertisements tend to create confusion between the two products. It is also observed that the Delhi High Court allowed this sort of comparative advertisement in the case of ⁴*Horlicks Ltd. and Anr. v. Heinz India Pvt. Ltd* because print media causes less confusion as compared to electronic media. The main cause behind this Judgment is because the electronic media includes both sound and visual representation which is more effective in the viewer's minds than the print media.

The term "disparagement" is not mentioned anywhere in the law but as the name suggests it is an act of speaking about someone or something without having a good opinion about them and disparagement advertising is a kind of practice that many companies use to degrade the reputation and goodwill of their competitors. Therefore, it can be deduced that the comparative advertisement with a malafide intention of causing the downfall of competitors can indeed cause a loss of fame, money, and growth. Also, consumers are also misled due to these advertisements and sometimes they tend to choose the wrong product which may or may not be very useful for them. However, the comparative advertisement is not always meant to cause damage to the reputation of the competitors. In the case of ⁵*Havells India Ltd & Anr vs Amritanshu Khaitan & Ors*, it was held that comparative advertising is legal and permissible if the advertisement is in the interests of the public and competition. According to Chapter IV of the ASCI code, it is stated that to determine the Advertisement's fairness in the competitive market, it is pertinent to determine the following points:

⁴CS(COMM) 808/2017

⁵ 2015 (62) PTC 64

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- a. The advertisement must be clear in what aspect it is being compared with the competitor's product.
- b. The comparison must be factual, accurate, and hold the capability of being distinguished.
- c. The comparison must not have any likelihood of causing misconception or confusion in the minds of the consumers.
- d. The advertisement must not unfairly degrade, or attack the competitor's product whether directly or indirectly.

PRECEDENTIAL VIEWS ON COMPARATIVE ADVERTISEMENT MENTIONED IN THE CASE

Principles for a comparative advertisement

The main principles for identifying the comparative advertisement were set down in ⁶*Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd* wherein it was held that:

- (a) an ad is a business discourse and is secured under Article 19(1)(a) of the Constitution of India;
- (b) an advertisement should not be false, deceiving, unreasonable or misleading;
- (c) there would be some areas that need re-consideration but that need not be taken as a serious representation of any product, the advertisement should glorify someone's product;
- (d) However, while doing the same, the advertiser should not disparage the product in any manner.

In Dabur's Case, the Delhi High Court explained that while intent, representation, storyline, and message are significant components, what is relevant is the general impact of the overall commercial, regardless of whether the ad just glorifies the item being referred to or it disparages the product. In this context, the main thing which should be kept in mind is that while promoting

⁶ 2010 SC Online Del 391

any product while comparing it with any other product, make any true statement, then the advertisement is permissible even if it's disparaging the product. Therefore, an advertisement should be true by any means.

Competitors can compare but cannot mislead

In ⁷*Havells India Ltd. v. Amritanshu Khaitan and Ors*, The Delhi high court set down two fundamental factors to examine whether an advertisement is misleading or not. Firstly, such advertisements should hold the capability to deceive someone or must deceive the person to whom it is addressed. Also, as a result of the misleading advertisement, it would affect the reputation of competitors or affect the behavior of consumers.

Freedom of Speech

In a landmark judgment, the Supreme Court of India in the case of ⁸*Tata Press Limited v. Mahanagar Telephone Nigam Ltd.* held that commercial advertisement is protected as a form of free speech and expression which is ensured under Article 19(1)(a) of the Constitution and must be limited as per law sanctioned under Article 19(2) of the Constitution. Additionally, it was held that an entity is permissible to protection under Article 19(1)(a) of the Constitution. Hence, the competitors can use their right to freedom of speech to compare the products.

CONCLUSION

An advertisement is a commercial speech and is protected by Article 19(1)(a) of the constitution. However, if an advertisement is false, misleading, unfair, or deceptive, it would certainly not get any benefit of protection. Also, while deciding the question of disparagement advertising, it is important to understand the intent of advertisement and the overall effect of advertisement. There is no doubt that comparative advertisement is beneficial as it helps in increasing the awareness of consumers. It also helps in developing marketing strategies adopted by many businessmen but it has to follow certain rules and must not mislead the consumers. It is also permissible according

⁷ 2015 (62) PTC 64

⁸ (1995) 5 SCC 139

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to section 29(8) and Section 30(1) of the Trademarks Act,1999 but with certain limitations with respect to unfair trade practices.



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