Colgate v. Anchor: A new Approach to Puffing

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I. Introduction:

Comparative advertisement is a recent trend where manufacturer sells the goods and services by comparing the same with that of competitor. This comparison sometimes results into unfair trade practices. The same happened in the case where plaintiff and defendant both were the manufactures and marketeers of tooth pastes under the brand name "Colgate" and "Anchor"[3]. Both of them have been indulging in an "advertisement war" against each other for quite some time. Both the companies carry out the war through television advertisement and in courts also. It would have been better if economic battles are confined only to the market place[4]. The grievance of the plaintiff in this suit is that the defendant recently came out with a Television Commercial advertising their tooth paste "Anchor". In the advertisement, a Hindi Film actress advises her daughter that "Anchor" tooth paste is the only tooth paste containing Triclosan, Calcium and Fluoride and that it is the first tooth paste providing all round protection. Ultimately, the actress questions the viewer as to when the viewer would change over to "Anchor" tooth paste. The objection raised by the plaintiff was on following issues not at the advertisement as a whole.

(i) The first objection of the plaintiff is to the claim made in the advertisement that "Anchor" is the "ONLY" tooth paste containing all the three ingredients viz., Calcium, Fluoride and Triclosan.

(ii) The second objection of the plaintiff is to the statement in the advertisement that "Anchor" is the "FIRST" all round protection tooth paste.

(iii) The third objection of the plaintiff is to the statement that the Fluoride in "Anchor" tooth paste gives 30 per cent more cavity protection.

(iv) The fourth objection of the plaintiff is to the statement that Triclosan contained in "Anchor" tooth paste is ten times more effective in reducing bacteria.

Madras High Court has given a new approach to comparative advertisement

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3 Colgate Palmolive India Ltd. v. Anchor Health and Beauty Care Private Ltd. O.A Nos 493 and 494 of 2008 in C.S. No. 451 of 2008.

4 Quoted lord Diplock in Erven Warnink, B.V. v. Townend & Sons (Hull) Ltd, 1980 RPC 31.

keeping in mind the interest of consumers. The judgment highlighted the issue that all the decisions of High Court are following English and American decisions which are prior to development of Consumer Protection Act.

II. Recent Trends on Comparative Advertisement in United Kingdom and India:

In India we don't have specific law relating to comparative advertisement Monopolies Restrictive Trade Practice Act and Trade Marks Act, 1999 together tackle the complaints of unfair trade practice with limited extent only. After repeal of Monopolies Restrictive Trade Practice Act, the complaint for unfair trade practice stand transferred to Competition Commission under the Competition Act, 2002. Till now in all our judgments we are following the approach laid down by the English Courts in different decisions.

Timothy White v. Gustav Mellin[5], is a judgment which is often quoted by Indian courts. Lord Chancellor, Lord Watson relied upon the decision of Evans v. Harlow and laid down certain requirements for maintaining an action for disparagement[6]:

"In order to constitute disparagement which is in the sense of law injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occassioned special damage to the plaintiff. Unless each and all of these three things are established, it must be held that the defendant has acted within his rights and that the plaintiff has not suffered any legal injuria".

Three tests laid down in the aforesaid case were as follows:

(i) That the defendant's representations were made of and concerning the plaintiff's goods;

(ii) That they were in disparagement of his goods and untrue; and

(iii) That they have occasioned special damage to the plaintiff.

In De Beers Abrasive Products Ltd and Others v. International General

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5 1895 AC 154 This case was concerned with an action brought forth by the Proprietor of food products for infants. In the bottles in which the plaintiff in that case sold its products, the defendant affixed a label, containing a recommendation to the public to try another product on the ground that it was far more nutritious and healthy than any other preparation yet offered The trial Judge dismissed the action on the ground that the label was merely the puff of a rival trader and that no cause of action was disclosed However, the House of Lords also restored the decision of the trial Judge.

6 Black's Law Dictionary defines Disparagement means matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible, things or upon their quality.

Electric Co. of New York Ltd and Another[7] (1975 (2) ALL ER 599), wherein the Chancery Division followed the ratio in Evans v. Harlow and White v. Mellin considered the question as to what amounted to a mere puffery and the distinction between a mere puff and an actionable disparagement. Indian Courts followed the same principle laid down and in the M.P.Ramachandran & others 1999 PTC (19) 741 appear to have set the trend in this direction that the law and laid down five principles which are as follows:-

I) a tradesman is entitled to declare his goods to be the best in the words, 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 his goods is 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 competitors 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 restraining the repetition of such defamation.

Subsequent decisions followed more or less the same principle in India. The Madras High Court further pointed out that in United Kingdom Gustav Mellin and De beers case took a different turn with the introduction of Consumer Protection Act, 1987. Further certain other Acts and Regulations like the Control of Misleading Advertisements Regulations 1988, Consumer Protection from Unfair Trading Regulations 2008, Business Protection from Misleading Marketing Regulations 2008, the Communications Act, 2003 etc. were introduced to regulate the misleading advertisement. In India, although commercial advertisement is treated as a part of the fundamental right of freedom of speech and expression[8] and any curtailment

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7 1975 (2) ALL ER 599, In the Instant case the defendants were manufacturers of an abrasive made from synthetic diamond. The defendants issued a pamphlet purportedly containing laboratory reports for providing a comparison of the performance and qualities of both the products. On the ground that the pamphlet contained adverse comments about their product, the plaintiff sued for damages. The defendants sought an order to strike out the statement of claim on the ground that the plaint disclosed no cause of action

8 Tata Press Ltd v. Mahanagar Telephone Nigam Ltd {1995 (5) SCC 139} that "publication of advertisements is a free commercial speech" and hence protected under Article 19(1) (a) of the Constitution.

on advertisement would affect the right under Article 19(1)(a) of the Constitution[9]. The Madras High court also observed that 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 v. M.P.Ramachandran up to Godrej Sara Lee case (Delhi High Court), on the basis of English precedents, recognizes 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-recognize the rights of the consumers guaranteed under the Consumer Protection Act, 1986. To permit two 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. After all, in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit. Therefore, it is only on the touchstone of public interest that such advertisements are to be tested. This is why the Supreme Court held in Tata Press case[10] that "Public at large is benefited by the information made available through the advertisement." As a matter of fact the very basis of the law relating to Trade Marks is also the protection of public interest only, since the courts think of an unwary purchaser, who may buy a spurious product on the mistaken impression that it was brand 'x'. The same logic should form the basis for an action in respect of disparaging advertisements also.[11]

III. Conclusion:

Though Fundamental Right to freedom of speech and expression includes commercial advertisement but Madras High Court has rightly pointed out that it should be tested in the parameters of public interest. We have fooled the principle laid down under the English laws but we forgot that the consumers in United Kingdom are much more aware in comparison to India. This judgement has given a new approach to puffing in comparative advertisement.

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9 Indian Express Newspaper case {(1985) 1 SCC 641: 1985 SCC (Tax) 121: (1985) 2 SCR 287}, Sakal Paper case {AIR 1962 SC 305 : (1962) 3 SCR 842} and Bennett Coleman case {(1972) 2 SCC 788 : (1973) 2 SCR 757}

10 See Supra note 7.

11 See Supra Note 1 Pare 67. The Madras High Court restrained the respondents from using the word *only* and *First* in the offending advertisement