

## COMPARATIVE ADVERTISING – BOON OR BANE TO CONSUMER INTEREST?

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Salt and pepper to a dish, so an advertisement to a modern life. Advertisements have become so integrated in every one's life that life cannot be imagined without them. Advertisements touch every walk of life and influence every one of us. Every day, we come across varieties of advertisements. Some of them are social advertisements promoting social causes; some others are political advertisements promoting political causes; others are cultural advertisements furthering cultural causes; and yet others are economic advertisements promoting some business and trade causes of an organization or a corporation.

Advertising has a long history and has been part of the culture of USA throughout its history. The public in America, in the colonial days, relied on “commercial speech”(advertising as otherwise known) for vital information about the market. It was the practice, as it is today, that early newspapers displayed advertisements for goods or services on their front pages and town criers called out prices in public squares.<sup>1</sup> Even in twenty first century, advertising is the most powerful medium to dispense information to the public. The court of Justice of European Community in its judgment in **GB-INNO-BM V Confederation du Commerce Luxembourgois**<sup>2</sup> Asbl (case no C-362/88) also recognized the

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1 *44 Liquormart, Inc v Rhode Island*,517 U.S.484(1996); The text of the judgment also can be accessed at <http://www.rasmusin.org/zg604/lectures/26-Thomas--44Liquormartv.RhodeIsland.ht>

2 (1991) 2 CMLR 801; the case came before the Court of Justice of the European Communities as a reference from the Supreme Court of Luxembourg. A somewhat peculiar problem arose under Article 30 of the charter of EEC. GB-INNO-BM a Belgian Company operates supermarkets in Belgium including in Anon, an area close to the Belgium-Luxembourg border. In September 1986 GB-INNO-BM, distributed in Grand Duchy, leaflets advertising the promotion of sale of its products by price reduction. The leaflets stated that the price reduction would be valid for a limited period and reduced period were advertised by referring the previous prices. The advertising complied with Belgian legislation relating to unfair competition but not with the Grand Duchy's legislation in force at the time. Grand Duchy's legislation prohibited the offering of goods for retail sale at a temporarily reduced price, other than in special sale or clearance sales when those offers state their duration or refer to previous prices. Confederation du Commerce, Luxembourg (Chamber of Commerce) applied for an injunction against GB-INNO-BM restraining it from the above practice. GB-INNO-BM, after losing in lowest and court of appeals, has approached the Supreme Court of Luxembourg seeking the quashing of the order or judgment of the appellate court. The Supreme Court of Luxembourg at this stage made the reference to the Court of Justice of European Communities.

significance of free flow of information through advertising for the protection of the interests of the consumers in the Community. Court of Justice of European Communities, in the context of Community, has observed that “free movement of goods concerns not only to traders but also to individuals. It requires, particularly in frontier areas, that consumers resident in one member-State may travel freely to the territory of another member-State to shop under the same conditions as the local population. That freedom of consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30,31 and 36.”

Why do people or organizations advertise about the products or services? is a question the answer to which is not unknown to us. Advertising, as its primary objective, endeavours to influence the opinion or behavior of the people to whom it is addressed and aims at attracting attention of potential consumers and public about the brands, products or services.

Advertising so long as it espouses the qualities of a product or services, does not result in infringement of rights and as such will not give rise to any legal action. But advertiser soften, in their attempt to highlight the qualities of their product or services, compare their products or services with those of competitors. Such comparison of products or services through advertisement with that of the other is known as comparative advertising. Comparison of products or services may take place in any form; it may be explicit or implicit or may be verbal or visual or may be superior on some attributes or of parity. Lawful advertising of products or services by comparison is permissible in many judicial systems and is considered as a form of commercial advertising, which hitherto was not the case.<sup>3</sup> While comparing so, they often knowingly or unknowingly disparage the products or services of their competitors. At other times the comparison may even result in the

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3 A lawful comparative advertising is permissible throughout European Union including United Kingdom of Great Britain and the law of comparative advertising has been harmonized throughout European Union under Misleading and Comparative Advertising Directive.

In Canada, comparative advertising, depending on the content, shall be governed by the common law tort of injurious falsehood, competition Act and copyright Act.

In United States of America, prior to 1970 comparative advertising was considered illegal. The Supreme Court in *Central Hudson Gas & Electricity Corp V Public Service Commission of New York* ruled that the “commercial speech”, if truthful and non-misleading deserves the protection of First Amendment and State has to justify the restrictions on commercial speech.

vilification of the competitor in person. The comparison, however, brings to fore a potential conflict between the rights of the manufacturers or traders who advertise, rights of the competitors with whose products or services comparison is made and rights of the consumer. The conflicting situation gives rise to several fundamentally interesting questions like whether or not the comparison of products or services is permissible under law? If so, to what extent is it permissible? Do the advertisers have any right or liberty to compare their products or services with the products or services of their competitor? If the advertisers exceed the limits set by law, what is legal recourse available to the competitor? Under which law, is the recourse available? Does comparison of products or services have any effect on the interest of the consumers? If so, what its effect is? What legal recourse is available to the consumers? Under which law?

The rights of the advertisers and their competitors are well settled in the major judicial systems under trademark law and other relevant laws. The courts consistently have been holding that “commercial speech”(otherwise known as advertising) is part of the free speech and free flow of information is essential for the proper functioning of the economic democracy. The U S Supreme Court is in the forefront in widening the ambit of the First Amendment<sup>4</sup> so as to bring “commercial speech” into its fold.

But the issue of effect of comparative advertising on consumers’ interest is not thoroughly examined, nonetheless of the general consensus that comparative advertising should be beneficial to consumers and should increase consumer’s chances of better decision making. As a consequence the rights of the consumers till date remain unsettled. Apart from this, apathy, lack of education and weak consumer movements all over are some of the factors contributed to a confusing situation which is already confounded. It is from this perspective of the rights of the consumer this article aims at examining the limits of comparative advertising and conduct of the courts in protecting the interest of the consumer.

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4 First Amendment of U S Constitution states that Congress shall make no law respecting an establishment of religion, or prohibiting the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## **Advertising vis- a- vis rights of the Consumers**

### **USA**

First Amendment of the American Constitution, Federal and State statutes governing trademarks, marketing and advertising regulations etc., are some of the codes and laws in force in United States of America governing the advertising commonly known as “commercial speech”.

In United States, legal actions for false advertising are permissible under Lanham Act which is major federal legislation. Section 43 (a) of Lanham Act<sup>5</sup> permits the legal actions for false advertising. But Lanham Act debars individuals from bringing action under the Act as the power to bring action has been vested in the Federal Trade Commission(FTC) with the authority to act as a watchdog of consumers’ interest to prevent consumers from filing frivolous actions.

Many states in USA, in addition to Lanham Act, have legislated consumer protection laws<sup>6</sup> which encompass corporate tort liability for making untrue statements or representation about a product or a service. The state consumer laws enable the individuals to bring legal actions for false advertising which is not possible under Lanham Act.

The Supreme Court of United States, though ruled in *Valentine VC hrestensen*<sup>7</sup> in 1942 that purely commercial Speech did not deserve

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5 Legal action under Section 43 (a) of the Lanham Act is permissible if (1) the defendant makes false statements about its own product by the use of affirmatively misleading statements, partially correct statements, or by a failure to disclose material facts; (2) the advertisement actually deceives or has the tendency to deceive a substantial segment of their audiences (3) the deception is material that it influences the purchasing decision (4) defendant causes falsely advertised goods to enter interstate commerce and (5) the plaintiff has been or is likely to be injured as result of the foregoing, either by direct diversions of sales from plaintiff to defendant or by lessening of the goodwill which its products enjoy with the buying public.

6 For example, California Consumer Law provides for actions for false advertising by consumer. The actions include (1) passing off goods or services as those of another(2) misrepresenting the source, sponsorship, approval or certification of goods or services(3) Using deceptive representations, or designations geographic origin in connection with goods or services (4) representing that goods or services have sponsorship, approval ,characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation or connection which he or she does not have (5) advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

7 316 US 52(1942); the summary judgment of the case can also be accessed at <http://supreme.justia.com/us/316/52/case.html>This suit was brought by the Respondent challenging the New York city municipal ordinance which prohibited the distribution in streets handbills bearing commercial advertising matter. The Respondent requested the District Court of New York to enjoin the

protection under First Amendment, but extended the protection of First Amendment in all subsequent cases<sup>8</sup> up to *Lorillard Tobacco V Reilly*<sup>9</sup> in 2001. The Supreme Court of US in those cases upheld the validity of the commercial speech, the rights of the advertisers and their competitors and struck down the statues which attempted to interfere or attempted with the freedom of “commercial speech”.

The US Supreme Court in 1976 in *Virginia Board of Pharmacy v Virginia Citizens Consumer Council*<sup>10</sup> for the first time found an opportunity to examine the effect of the “commercial speech” on the rights and interest of the consumer. The Court observed that “as to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. Appellees’ case in this

petitioner(New York Police) from interfering with the distribution of handbills containing his offer to sell his submarine. District Court of New York granted interim injunction and later passed the decree of permanent injunction and later the circuit court of Appeals affirmed the decree of District Court. The Respondent preferred Appeal to the Supreme Court of America contending that the New York municipal ordinance abridged his freedom of speech and violated First Amendment. The Supreme Court, on hearing the contentions of the both the parties, held that there cannot be a constitutional right to distribute in the streets handbills containing commercial advertising matter in contravention of the New York municipal ordinance. Supreme Court further held that a constitutional right cannot be acquired by adding to the handbills a matter of possible public interest which is added with an intention of evading the prohibition of the ordinance with respect to advertising matter.

8 *New York Times v Sullivan* (1964), *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* (1976), *Central Hudson Gas and Electric v Public Service Commission of New York* (1980), and *44 Liquormart v Rhode Island*(1996) .

9 533 US 525(2001)

10 425 US 748(1976). The appellees were individual consumers and consumer groups of prescription drugs. The brought a suit in the District Court, Virginia against Virginia State Board of Pharmacy and its individual members challenging the validity of the Virginia statue under First and Fourteenth Amendment. Virginia statute has prohibited pharmacists from advertising prescription drug prices and those who advertised drug prices would be guilty of “unprofessional conduct” A three-judge District court declared the statute void and enjoined the appellants from enforcing it. The District Court held that (1) any Amendment protection enjoyed by Advertisers seeking to disseminate prescription drug price is also enjoyed, and thus may be asserted, by appellees as recipients of such information (2) “Commercial Speech” is not wholly outside the protection of the first and Fourteenth Amendments and Virginia Statue, therefore, is invalid (2)(a) that the Advertisers interest in a commercial advertisement is purely economic does not disqualify him from protection under the First and Fourteenth Amendments. Both the individual consumer and society in general may have strong interests in the free flow of commercial information(2)(b) the ban on advertising prescription drug prices cannot be justified on the basis of the State’s interest in maintaining the professionalism of its licensed Pharmacists, but State is free to require whatever professional standards it wishes of its pharmacists..... but it may not do so by keeping the public in ignorance of the lawful terms that competing pharmacists are offering. The Federal Court, while dismissing the appeal of the Virginia Board of Pharmacy, recognized the right of the individual consumers and consumer groups to bring action. The court also recognized the right of the audiences or spectators to receive information, would deserve protection. Court also recognized that First Amendment protection would be available to “purely commercial speech”, consumer and Society’s interest in free flow of commercial information. It also simultaneously recognized the government’s power to ban false, misleading, deceptive advertisements and illegal products or services and government’s power to regulate time, place and manner.

respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs. Yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drugs prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.” The Court further observed that “generalizing, society also may have a strong interest in the free flow of commercial information. Even as an individual advertisement, though entirely, “commercial” may be of general public interest.”

Virginia Board of Pharmacy V Virginia Citizens Consumer Council is the first case which recognized how an advertisement as a commercial speech is significant to the welfare of the consumers and the right of the consumer to bring legal action against Government ban or prohibition of the prices of prescription drugs. It also recognized consumers’ right to receive information and Pharmacists’ rights to provide it thereby gave new dimension to right to free speech laying down it was not only the speaker, but also the receiver has got the right to receive the information.

### **European Community And United Kingdom Of Great Britain**

The court of Justice of European Community in its judgment in *GB-INNO-BM v Confederation du Commerce Luxembourgeois Asbl* (case no C-362/88), as stated above, also recognized how significant free flow of information through advertising is for the protection of the interests of the consumers in the Community. The Court in the above context pointed the close link that existed between the protecting the consumer and providing the consumer with information. The Court further pointed out that “the introduction to Second Programme of the European Economic Community for a consumer protection and information Policy” goes on stating that the purpose of the Second Programme is to continue and intensify the measures in this field and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other. To that the Programme set out five basic rights to be enjoyed by the consumer, amongst which appears the right to information and education. One of

the measures proposed in the programme is the improvement of the consumer education and information. The part of the programme which lays down the principles which must govern the protection of the economic interests of consumers includes passages which aim to ensure the accuracy of information provided to the consumer, but without refusing him access to certain information. Thus, according to one of the principles, no form of advertising should mislead the buyer; an advertiser must be able to justify by appropriate means, the validity of any claims he makes.”<sup>11</sup>

In United Kingdom of Great Britain, Misleading and Comparative Advertisement Directive (MCAD) which replaced Misleading Advertising Directive (MAD) and later Comparative Advertising Directive contains the regulations which govern the Advertising. Apart from these regulations European Convention on Human Rights concerning freedom of speech also governs the comparative advertising. Further industry codes such as Broadcast Television Advertising Standard Code also govern the advertising. The Courts in United Kingdom in a latest case *King span V Rockwool*<sup>12</sup> though upheld comparative advertising, set limits of it, but the effect of comparative advertising on consumer interest has not been raised in it. Effect of comparative advertising on consumer interest as a matter of fact has never been an issue in any case before the courts of

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11 Supra note no 2.

12 <http://www.herbertsmith.com/NR/rdonlyres/0D1BF312-F5AB-4161-...> This has been filed by Kingspan seeking declaratory and other reliefs against the Rockwool. Kingspan has been engaged in the manufacture of insulation materials made of plastic foam whereas the Rockwool in the manufacture of non-combustible stone wool which is used as insulation material. The case relates to the advertisements which demonstrated the relative performance of insulation material of both King Span and Rockwool in fire-growth tests. These advertisements have been arranged in 2007 and 2008 in the form of road shows which also include small scale fire demonstrations, marketing DVDs containing a footage of large scale fire tests carried out independently under the ISO 9705 fire test standard by SP Technical Research Institute of Sweden. As Rockwool believed that there existed some misconception in the market, it attempted through these advertisements, to demonstrate the difference between combustible and non-combustible insulation products. Kingspan initiated proceedings for malicious falsehood and trademark infringement, alleging that the road shows and DVDs falsely represented that its products were dangerous. Kingspan also sought a number of declarations alleging at the road shows and DVDs did not comply with the Misleading and Comparative Advertising Directive as implemented in the UK by the Business Protection Regulations 2008. Rockwool denied the allegations and contended that the fire tests were objective, compared like for like and formed the basis of legitimate comparative advertisements. Rockwool also contended that the use of Kingspan's trademark was permitted under the MCA Directive and was not unlawful. The High Court of Great Britain held that King spans trademarks were infringed under the Trademark Directives as the road shows presented by the Rockwool that the tests conducted showed that the performance of King Span products was misleading and false. The High Court also held that Rockwool's presentation that King Span products were unsafe under fire conditions was held to be unjustifiable.

United Kingdom of Great Britain. The issue of comparative advertising on consumer interest still remains to be determined.

## India

In India ‘advertising’ is regulated by various statutes and code like the Constitution of India,<sup>13</sup> Trademarks Act 1999<sup>14</sup> and Consumer Protection Act<sup>15</sup> and codes of Advertising Standard Council of India (ASCI)<sup>16</sup> etc.

The Supreme Court of India in *TATA Press Ltd. v Mahanagar Telephone Nigam Ltd. and others*, before answering the question whether TATA-pages is a telephone directory within the meaning of the Rule 458 of the Indian Telegraph Rules or a buyers’ guide or trade directory outside the scope of the said rule, has found an opportunity to determine the constitutional aspect of the ‘commercial advertisement’ and held, after examining the legal position in USA, that ‘commercial advertisement’ was part of freedom of speech and expression guaranteed under Article 19(1)(a) of Constitution of India.<sup>17</sup>

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13 Article 19 of Constitution of India deals with the protection of certain rights regarding freedom of speech. Article 19(1)(a) guarantees to all citizens the right to freedom of speech and expression. This right under Article 19 (1)(a), however, may be affected by the operation of any existing law or shall not prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

14 According to Section 29 (8) of Trademarks Act 1999, a trademark is said to be infringed by any advertising of that trademark if such advertising (a) takes unfair advertisement of and is contrary to honest practices in industrial or commercial matters; or (b) is detrimental to its distinctive character; (c) is against the reputation of the trade mark.

15 As per Section 2( r ) (x), ‘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 service, gives false or misleading facts disparaging the goods, services or trade of another person. The District forum or State Commission or National Commission as the case may be after conducting the proceeding is satisfied that the allegations contained in the complaint are true, it shall issue an order to the opposite party directing him to discontinue the unfair trade practice or to pay such sum of money as may be determined by it or to issue corrective advertisement or to provide for adequate costs.

16 ASCI has been established in 1985 with an objective to protect the interest of the consumers through responsible advertising and is a self regulatory voluntary organization of the advertising industry. The code has been drawn up by people in professions and industries connected with advertising in consultation with representatives of people affected by advertising and has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising in the best interest of the consumers. The code applies to advertisers, advertising agencies and media. For more information the ASCI code may be accessed at <http://www.ascionline.org/>

17 <http://login.westlawindia.com/maf/wlin/app/documents?src=toced&docg>. Supreme court has observed that “advertising as a “commercial speech” has many facets. Advertising, which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and

Some of the leading cases like *Reckitt & Coleman of India Ltd. v Kiwi TTK Ltd.*,<sup>18</sup> *Hindustan Lever Ltd., v Colgate Palmolive (I) Ltd.*<sup>19</sup> *Godrej Sara Lee*<sup>20</sup>, *Eureka Forbes Ltd v Pentair Water India P Ltd.*,<sup>21</sup> and *Unibic Biscuits India P Ltd v Britannia Industries Ltd.*,<sup>22</sup> *Pepsi Co. Inc. and others v Hindustan Coca Cola Ltd and others*<sup>23</sup> dealt with claims between the competitors. But the issue of effect of comparative advertising on consumer interest has not been agitated in any of these cases. As such all the leading cases wherein comparative advertisement has been an issue are silent about the effect of the comparative advertising on consumer interest.

Madras High Court for the first time in *Colgate Palmolive v Anchor*<sup>24</sup> on its own has raised the issue of effect of comparative advertising on consumer interest and examined the possible effect of comparative advertising on consumer interest. The court has observed that “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 rights 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, the court observed, 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

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economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in democracy would be handicapped without there being freedom of “commercial speech”. The court further observed that “examined from another angle, the public at large has a right to receive the “commercial speech. Article 19(1)(a) not only guarantees the freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through advertisements. The protection of Article 19 (1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of “commercial speech” may be having much deeper interest in the advertisement than the business who is behind the publication. An advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may have purely a trade consideration.

18 63 (1996) DLT 29.

19 The judgment may be accessed at <http://www.indiankanoon.org/doc/226414/>

20 32(2006) PTC 307 (Del).

21 The judgment may be accessed at <http://www.manupatra.info/nxt/gateway.dll/highcourt1/karnataka/2001-2003ka/ka2006/3060720.htm?f=...>

22 The judgment may be accessed at <http://www.manupatra.info/nxt/gateway.dll/highcourt1/karnataka/2001-2003ka/ka2008/3080238.htm?f=...>

23 The judgment may be accessed at <http://www.indiankanoon.org/doc/924003/>

24 The judgment may be accessed at <http://www.indiankanoon.org/doc/1500699>

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 that “public at large is benefited by the information made available through the advertisements.” As a matter of fact the very basis of the law relating to Trade Marks is 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 the disparaging advertisements also.” The court, having discussed the principles laid down in the leading cases mentioned above found the emergence of the following SEVEN principles:

- (a) Publication of advertisements being free commercial speech, is protected by Article 19(1)(a) of the Constitution as per the dictum of the Apex Court in TATA Press Case.
- (b) There are few restrictions on the aforesaid right, which would satisfy the test of the reasonableness under Article 19(2). These restrictions could be traced to the definition of the term “unfair trade practice” in Section 2(1)( r ) of the Consumer Protection Act ,1986.
- (c) Therefore, only if a case of disparaging advertising falls within the definition of the term ‘unfair trade practice’, an action may lie.
- (d) An action may lie against such advertisement before a civil court both at the instance of manufacturer or marketer and *at the instance of the consumer provided that the advertisement in question contains a false representation coming within the four corners of sub-clauses (i) to (x) of clause (1) of Section 2(1)(r) of the Consumer Protection Act.*
- (e) A careful scrutiny of all the sub-clauses in section 2(1)(r) of Consumer Protection Act would show that four types representations are categorized as actionable as ‘unfair trade practices’ namely. (1) false representations falling under sub-

- clauses (i),(ii) and (iii), (2) Representations which may not necessarily be false but are nevertheless incorrect under sub-clauses (iv) and (v) (3) a Warranty or guarantee under sub-clauses (vii) and (viii) and (4) false or misleading representations that fall under sub-clauses (vi), (ix) and (x).
- (f) In the light of above statutory prescription, it is doubtful if false claims by traders, about the superiority of their product, either simplicitor or in comparison with the products of their rivals is permissible in law. In other words, the law as it stands today, does not appear to tolerate puffery anymore.
- (g) An advertisement which tends to enlighten the consumer either by exposing the falsity or misleading nature of the claim made by the trade rival or by presenting a comparison of the merits (or demerits) of their respective products, is for the public good and hence cannot be taken to be an actionable wrong, unless two tests are satisfied namely (1) that it is motivated by malice and (ii) that it is also false. This is on account of the fact that competitor is more equipped to make such exposure than anyone else and hence the benefit that would flow to the society at large on account of such exposure would always outweigh the loss of business for the person affected. If two trade rivals indulge in puffery without hitting each other, the consumer is misled by both, if both are restrained from either making false representations, incorrect representations or misleading representations or issuing unintended warranties then the consumer stands to gain. Similarly permitting two rivals to expose each other in a truthful manner, will also result in consumer education.

It is obvious from the above that the High Court of Madras, in the light of the statutory provisions especially the provisions under the Consumer Protection Act, expressed doubt on the maintainability of a false claim as to the superiority of a product and aptly commented that if the trade rivals indulge in puffery without hitting each other, the consumer is misled by both, but consumer stands benefited if the rival traders are restrained from making false, incorrect and misleading representations.

It is evident from the above that the issue of comparative advertising on consumer interest till now has not been agitated before the

Supreme Court of India either by the individual consumers or consumer organizations even if furtherance of consumer interest is the principal objective of the advertising. It may be observed that issue has not been agitated even in *Colgate Palmolive v Anchor* in High Court of Madras, but the suo motto, by obiter, made above observations. As a result, the conflict of interest between the rights of advertisers, advertised and consumer remain unsettled but hopefully the Supreme Court finds an opportunity to resolve the conflict.