

Comparative Advertising and Product Disparagement *vis-à-vis* Trademark Law

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Comparative advertising by means of using another's trademark is permissible, however while doing so the advertiser cannot disparage the goods or services of another. Any such act disparaging the goods or services of another shall not only be an act constituting infringement of the trademark, but shall also be an act constituting product disparagement.

This paper analyses the trite law on comparative advertising and product disparagement, in relation to trademark law; in the light of Sections 29(8) and 30(1), of The Trademarks Act, 1999. Section 29(8) enunciates situations, where use of another's mark in advertising can amount to infringement, if such use does not comply with the conditions laid down under the section. At the same time, Section 30(1) makes such use, an exception, if it is in accordance with the conditions provided under this section. The conditions given under these two legal provisions are identical. The intent of the legislature in enacting the aforementioned provisions is quite apparent: To impose the leniencies of permitted comparative advertising over the stringencies of trademark protection.

Keywords: Comparative advertising, product disparagement

“Comparative advertising is a part of people's nature... Some of the most effective advertising is comparative, but it is not without risks. Effective advertising delivers a message that is remembered. It can change the way the world views a product or service and can generate sales. If the market for a service or product is well-defined, comparative advertising can hold the product or service distinguish itself from the competition. Nothing seems to do this more efficiently than comparative advertising.”¹

‘Comparative advertising’ is the term used to describe advertisements where the goods or services of one trader are compared with the goods and services of another trader.² A survey of advertisements conducted in US reveals that there are three categories into which all advertisements fall:

- (i) Non comparative advertisements-advertisements that do not refer to a competing product either directly or indirectly.
- (ii) Indirectly comparative advertisements-advertisements that refer to a competing product in an indirect manner.
- (iii) Directly comparative advertisements-advertisements in which a competing

product is specifically named or recognizably presented.³

Advertising falling into the last two categories could be referred to as comparative advertising. While in some countries one or both kinds of comparative advertisements are allowed, some countries do not allow either of the two kinds. Accordingly, the well known tag line in the UK (which allows both forms of comparative advertising with certain restrictions) in advertisements for Carlsberg lager- ‘Probably the best lager in the world’, cannot be used in Germany (which does not allow comparative advertising at all), as it would lead to an implication that all other lager are inferior to Carlsberg, thereby falling into the category of indirectly comparative advertisements.⁴

Comparative advertising benefits the consumer as it usually compares the price, value, quality or other merits of different products, thereby enhancing the awareness of a consumer. However there is an important proviso attached to this: The improvement of consumers’ knowledge can only be achieved for long as the advertising does not contain misinformation, which is always a risk if the education of consumers is entrusted to entities with vested interests.⁵ Thereby legally speaking, comparative advertising is allowed to the extent: A trader is entitled to compare his goods with the goods of another trader and to establish superiority of his

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goods over that of others, but while doing so he cannot say that the goods of his competitor are inferior, bad, or undesirable. In case he makes any such statement it would be an act constituting 'product disparagement'. Such comparison leading to disparagement of a rival's product is not allowed.

Product Disparagement

According to Black's Law Dictionary the word 'disparage' means to connect unequally; or to dishonour (something or someone) by comparison; or to unjustly discredit or detract from the reputation of (another's property, product or business); or a false and injurious statement that discredits or detracts from the reputation of another's property, product or business.⁶ That implies, 'disparagement' is a false and injurious statement that discredits or detracts from the reputation of another's property, product or business.⁷

Comparative advertising is often supported on the basis of the argument that advertising is commercial speech and is therefore protected by Article 19 (1) (a) of the Constitution.⁸ However, freedom of speech and expression does not permit defamation and it would be a little far-fetched to say that an advertiser has the liberty to disparage the product of his competitor without any check, under the garb of freedom of speech.⁹ The irony remains, that although it is one thing to say that your product is better than that of a rival and it is another thing to say that his product is inferior to your product, still while asserting the latter, the hidden message may be the former, but that is inevitable in the case of a comparison. While comparing two products, the advertised product will, but naturally, have to be shown as better.⁹

Product disparagement is not limited to comparative advertising. Even an act on the part of a third party could constitute product disparagement e.g. a newspaper article criticizes a particular good and in the process disparages it.¹⁰ Disparagement by a third party is not an uncommon phenomenon. In fact, instances of product specific disparagements, such as food products disparagement, have become so common that, in the US, thirteen states have enacted statutes aimed specifically at restricting the disparagement of food products.¹¹ These statutes generally authorize food producers to sue anyone who disparages a food product with information unsupported by reliable scientific data.¹² However, in such cases the issue does not pertain to comparative advertising, as the goods or services are not used in

comparison or comparative advertising, and may not be used in advertising, at all.

Interface between Comparative Advertising & Product Disparagement

The advocates of comparative advertising often argue that trade rivalries and economic battles should remain confined to marketplaces; however the courts have been reluctant to accept this proposition.¹³ The courts have in fact also condemned acts of 'generic disparagement', where an advertiser may not disparage the goods or services of a particular proprietor, but the class of goods or services as a whole.¹⁴

It is comprehensible that market forces and fierce competition make comparative advertising indispensable, however, the ambit of comparative advertising cannot be stretched too far, so as to include product disparagement within its ambit.

Initially comparative advertising was perceived as free riding on the other trader's goodwill and thereby was treated as an infringement upon the owner's rights.¹⁵ However, under the present statute comparative advertising is permitted within certain limitations.¹⁶ The law on 'Comparative advertising and product disparagement' could be summarized as:

- (a) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.
- (b) He can also say that his goods are better than his competitors', even though such statement is untrue.
- (c) 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.
- (d) He, however, cannot, while saying that his goods are 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.
- (e) If there is no defamation to the goods or to the manufacture 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.¹⁷

In order to succeed in an action of product disparagement, the plaintiff has to establish the following key elements:

- (i) A false or misleading statement of fact has been made about his product;
- (ii) That the statement either deceived, or has the capacity to deceive, substantial segment of potential consumer, and
- (iii) The deception is material, in that it is likely to influence consumers' purchasing decisions.¹⁸

Moreover, the Court while deciding whether the impugned advertisement disparages the plaintiff's product or not, should bear in mind the intent of the advertisement; its manner; and the theme of advertisement. Out of these, 'manner of the advertisement' is of primary importance because, if the manner is such that it ridicules or condemns the product of the competitor, then it would amount to disparagement. But, if the manner is only to show one's product better or best without derogating other's product then that is not actionable.¹⁹

Trademark Law and Comparative Advertising

Relationship with Trademark Law

The primary purpose of a trademark is to 'distinguish the goods of one person from another'¹⁹ Therefore a trademark enables a consumer to identify the goods and their origin. Hence in case, if an advertiser uses a competitor's trademark to make a comparison between his goods and those of his competitor, and in the process disparages them, then such an act on the part of the advertiser would not only invoke issues related to comparative advertising and product disparagement, but would also invoke issues related to trademark infringement.²⁰

In the case of comparative advertising and product disparagement, trademark issues arise only when a competitor's trademark is used e.g. in *Duracell International Ltd v Ever Ready Ltd*²¹ the advertisement in question had referred to the corporate name of the competitor, *Duracell Batteries Ltd* while depicting the appearance of a distinctive *Duracell* battery and without mentioning the brand name. It was held that the defendant had not infringed the trademark of the plaintiff. Furthermore, although

Duracell had registered its battery as a trademark, it was in copper and black colours, while colours used in the plaintiff's advertisement were white and black. Hence it was held that the defendant had also not infringed that trademark.

Anatomy and Analysis of Statutory Provisions

The law on comparative advertising and product disparagement, in relation to trademarks, in India, is based upon the law as laid down in *Irving's Yeast Vite Ltd v FA Horse-nail*.²²

Section 29 (8) of The Trademarks Act, 1999 enunciates situations, when the use of a trademark in advertising can constitute infringement. It says that any advertising which is not in accordance with honest practices; or is detrimental to the distinctive character, or to the repute of the mark, shall be an act constituting infringement.²³ At the same time Section 30 (1) makes comparative advertising an exception, to acts constituting infringement under Section 29. It provides that any advertising which is in accordance with honest practices, and does not cause detriment to the distinctive character or to the repute of the trademark will be permissible and will not constitute infringement.²⁴

The phrase 'detrimental to its distinctive character' as given under the aforementioned sections, could be perceived as a situation where a registered trademark is being used by a competitor for the purpose of indicating the origin of the goods as being his, and thereby causing confusion about its origin. However, this is generally not the concern of product disparagement (but may give rise to issues related to comparative advertising).²⁵

The advertiser, while using a competitor's trademark, may or may not make a reference to the source or origin of the competing goods, but would certainly not relate such goods, which he is disparaging or disapproving, to himself. Thus, the issues to be addressed from the viewpoint of product disparagement under the aforementioned sections are, 'in accordance with honest practices' and 'is not such as to detrimental to repute of the trademark.'

Use should be 'in Accordance with Honest Practices' and should not be 'Detrimental to the Repute of the Trademark'

The phrase 'in accordance with honest practices' as used under Section 29 (8) and Section 30 (1) of The Trademarks Act, 1999, cannot have a perfect test to construe its meaning. One of the propositions is that, it may be interpreted in reference to particular practices or codes of conduct developed in different

trades. However, the courts have rejected this proposition, as it would lead to disparity in standards, as infringement would be harder to avoid in highly regulated trades than in others.²⁶ The courts, while admitting that the first part of the section was to give legal sanctity to comparative advertising, the proviso was referred to as 'mess'.²⁷

The meanings of the expressions 'in accordance with honest practices' and 'is not such as to be detrimental to repute of the trademark' appear to be intertwined: Any comparison, which causes detriment to the reputation of a trademark owner, should be dishonest. On the same hand, while making a comparison a trader cannot say that the goods of a competitor are undesirable or bad because that would amount to slandering or defaming the competitor and his goods, which would not be in accordance with honest practices, as it would be detrimental to the reputation of a trademark.²⁸

Further, the question whether a particular advertisement is 'honest or not' is greatly open ended, and is to be decided from the perspective of a reasonable consumer i.e. whether a reasonable consumer presumed to ignore claims that are considered to be exaggerated, hyperbole, would be likely to say that the advertisement is honest.²⁹ Moreover, in order to decide the question of disparagement the Court has to come to the conclusion as to how many customers would be influenced by the comparative advertisement and would not purchase the plaintiff's product. Still, the question which remains unanswered is: What would happen in a situation when an advertisement taking unfair advantage of the reputation or of the distinctive character of the mark (which should be considered dishonest), would be perceived as an honest practice by the consumers?³⁰

In case, if no derogatory reference has been made, no action lies against the advertiser,⁹ even if the advertisement does not compare like with like and is untrue, as an advertisement has to be 'significantly misleading' in order to be dishonest.²⁷ Thereby in case, the substance of the comparison remains true, the fact that representation is 'literally false' will not render the advertisement dishonest.³¹ On the other hand if, it were 'materially false', it would be dishonest.³²

Furthermore, the burden of proof remains upon the trademark owner that the unauthorized use of his mark is not honest, and not upon the user of the

mark.³² Where the advertisement bears more than one meaning the trademark owner in order to succeed has to prove that out of them, only one is dishonest.³³

The Settled Law on Trademark and Product Disparagement

The law on 'comparative advertising and use of a competitor's trademark could be summarized as:

- (a) The primary objective of Section 29 (8) and Section 30 (1) of The Trademarks Act, 1999, is to permit comparative advertising.
- (b) As long as the use of a competitor's mark is honest, there is nothing wrong in telling the merits of competing goods or services and using registered trademarks to identify them.
- (c) The onus is on the registered proprietor to show that the factors indicated in the proviso to the section are applicable.
- (d) There will be no infringement unless the use of the mark is not in accordance with honest practices.
- (e) The test is objective: Would a reasonable reader be likely to say, upon being given the advertisement that it is honest.
- (f) Statutory or industry agreed codes of conduct are not sufficient guide as to whether a practice is honest for the purposes of Section 29 (8) and Section 30 (1). Honesty has to be gauged against as what is reasonable for the relevant public of advertisements for the goods or services in use.
- (g) It should be borne in mind that general public are used to these ways of advertising.
- (h) The Act does not impose on the courts an obligation to try and enforce through the legislation a more puritanical standard than the general public would expect from an advertisement.
- (i) An advertisement, which is significantly misleading is not honest for the purposes of Section 29 (8) and Section 30 (1).
- (j) The advertisement should be considered as whole.
- (k) If the background of an advertisement, as a whole, justifies the description then even if it is misleading for interlocutory purposes, it should be permitted.

- (l) A minute textual examination is not something, which a reasonable reader of an advertisement embarks upon.
- (m) The court should therefore not encourage a microscopic approach to the construction of an advertisement on a motion of interlocutory relief.³⁴

Conclusion

Section 29 (8) and Section 30 (1) of the Trademarks Act, are adequate to address issues related to trademark infringement, made in the garb of comparative advertising. Judicial pronouncements on the issue have also made it clear that there is no harm in comparing your goods with those of a competitor, but the comparison should be fair and should not bring disrepute to the competitor's products or trademark, i.e. comparative advertising is permissible, but comparative advertising leading to product disparagement is not permissible. The position is more or less the same in almost all the countries, which allow use of another's trademark in comparative advertising.

No doubt that comparative advertising is beneficial as it increases consumer awareness and therefore, it should be allowed. Moreover, it enables an advertiser to establish his brand in the market by stating his superiority over the established brands. But, at the same time there have to be regulations, to check abuses. If the courts had accepted the proposition that trade rivalries should be settled in the market (as the courts are not equipped to decide which product is better), it would have caused great prejudice to public interest; as the question is not of deciding which product is better, but of public awareness. Because, as we say that comparative advertising increases public awareness, misleading and disparaging advertisement should not mislead the public.

References

- 1 As observed in *Pepsi Co Inc and Ors v Hindustan Coca Cola Ltd and Anr* 2003 (27) PTC 305.
- 2 Although the term 'comparative advertising' is missing from all the major provisions of international trademark law, it does however appear in Council Directive 84/450/EEC of 10 September, 1984 concerning misleading and comparative advertising (as amended by Council Directive 97/55 of the European Parliament and of Council Amending Directive 84/550 Concerning Misleading Advertising as to Include Comparative Advertising).
- 3 This categorization or classification is based upon a recent content analysis of television advertisements conducted in the US. The analysis found that about 6 percent of the advertisements contained indirect comparative claims, 20 percent contained direct comparative claims, and 20 percent contained no comparative claims- Pechmann and Stewart, 'The Development of a Contingency Model of Comparative Advertising', Working Paper No. 90-108, Marketing Science Institute, Cambridge, MA cf. Ryder Rodney D, Brands, Advertisements and Advertising (LexisNexis Butterworths, New Delhi) 2003, p 326.
- 4 Ryder Rodney D, *Brands, Advertisements and Advertising* (LexisNexis Butterworths, New Delhi) 2003, p 326.
- 5 Phillips Jeremy, *Trademark Law- A Practical Anatomy*, 1st edn (Oxford, London) 2003, 8.93.
- 6 Garner Bryan, *A Black's Law Dictionary*, 7th edn (West Group, Minnesota) 1999.
- 7 Meaning of 'disparagement', as given under Black's Law Dictionary, Garner Bryan A, *Black's Law Dictionary*, 7th edn (West Group, Minnesota) 1999.
- 8 *Tata Press Ltd v Mahanagar Telephone Nigam Ltd* AIR 1995 SC 2438.
- 9 *Dabur India Ltd v Wipro Limited* CS (OS) No 18 of 2006, decided on 27th March, 2006 (Delhi High Court).
- 10 In *Suzuki Motor Corp v Consumers Union of United States Inc*, 292 F.3d 1192 (9th Cir 2002), a Federal Appeals Court in allowed a product disparagement lawsuit brought by Suzuki Motor Corporation to proceed against the publisher of Consumer Reports magazine. The court found that there was sufficient evidence for a jury to find that the magazine rigged the results of automobile tests to give the Suzuki Samurai a "not acceptable" rating. However a dissenting judge said the ruling created a standard for consumer reporting that intrudes on free expression.
- 11 The states with product disparagement statutes in US are: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota and Texas.
- 12 *Texas Beef Group v Winfrey*, 11 F Supp 2d 858 (ND Tex 1998), aff'd 201 F.3d 680 (5th Cir 2000) wherein Texas's food disparagement law was used in a highly publicized case brought against "The Oprah Winfrey Show" in 1998. The plaintiffs in the case, Texas feed yard owners claimed Winfrey caused a decrease in beef sales when she said she would never eat a hamburger again for fear of mad cow disease, however, Winfrey won the suit; see also *Agricultural General Co v Ohio Public Interest Research Group*, No 97 CVC07-7367 (Ohio Ct of CP, filed July 31, 1997); and *Burleson Enters Inc v American Honda Motor Co Inc*, No 2:97-CV-98-J (ND Tex, filed 22nd October, 1997).
- 13 The proposition that 'trade rivalries and economic battles should remain confined to market places' was proposed in *Erven Warnink BV and Anr v J Townend & Sons* (Hull) Limited and Anr 1980 RPC 31; also see *White v Mellin* 1895 AC 154 where it was observed, "...The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure -whether a particular article of food was in this respect or that better than another. Indeed, the Courts of law would be turned into machinery for advertising rival productions by obtaining a judicial determination which of the two was the better." However, this proposition was rejected in *Pepsi Co Inc and Ors v Hindustan Coca Cola Ltd and Anr* 2003 (27) PTC 305.

- 14 *Dabur India Ltd v Colgate Palmolive India Ltd* IA No 5445/2004 in CS (OS) No 914/2004, decided on 9th September 2004 (Delhi High Court) wherein the court found that, although the advertisement of the defendant made a reference to the class of goods only, namely, 'red tooth powder', and did not specially referred to the plaintiff's product, still the plaintiff would be entitled to get an injunction against the defendant, as the plaintiff held 85% of the share of the market, in that product.
- 15 Section 4 (1) (b), Trademarks Act, 1938, of UK; also see *Bismag Ltd v Amblins (Chemists) Ltd* [1940] 2 ALL ER 608 wherein use of another's trademark in advertising was held to be infringement under the 1938 Act.
- 16 The Trademarks Act 1999, Section 29 (8) and Section 30 (1); also see Trademarks Act (UK) 1994, Section 10 (6), and Article 3 (a) of Council Directive 84/450/EEC of 10 September, 1984 concerning misleading and comparative advertising (as amended by Council Directive 97/55 of the European Parliament and of Council Amending Directive 84/550 Concerning Misleading Advertising as to Include Comparative Advertising).
- 17 As laid down in *Reckitt & Colman of India Ltd v M P Ramchandran and Anr* 1999 PTC (19) 741; followed in *Rickett & Coloman of India Ltd v Kiwi TTK Ltd* 63 (1996) DLT 29; *Pepsi Co Inc and Ors v Hindustan Coca Cola Ltd* and Anr 2003 (27) PTC 305; *Dabur India Ltd v Emami Ltd* 2004 (29) PTC 1; *Dabur India Ltd v Wipro Limited* CS (OS) No 18 of 2006, decided on 27th March, 2006 (Delhi High Court).
- 18 *Pepsi Co Inc and Ors v Hindustan Coca Cola Ltd* and Anr 2003 (27) PTC 305.
- 19 Definition of trademark under Section 2 (zb) of The Trademarks Act, 1999.
- 20 Section 29 (8) of The Trademarks Act, 1999 where use of a trademark in advertising could constitute an act of infringement.
- 21 (1998) FSR 87; also see *Pepsi Co Inc and Anr v Hindustan Coca Cola and Ors* 94 (2001) DLT 30, wherein it was observed, that trademark infringement occurs when two essentials are fulfilled: the defendant has used substantially a similar mark and by means of that, has passed off his own goods as that of his competitor. However in comparative advertising one or both may be absent. As it may be possible that only a reference is made to the mark and a mark which is substantially similar, has not been used. Moreover, the mark may not used to pass off the goods but just to compare them.
- 22 (1934) 51 RPC 110 wherein it was held that use of another's trademark in comparative advertising does amount to infringement, Cf *Pepsi Co Inc and Anr v Hindustan Coca Cola and Ors* 2003 (27) PTC 305.
- 23 Section 29 (8) of Trademark Act 1999.
- 24 Section 30 (1) of Trademark Act 1999.
- 25 In general, the law on this aspect of comparative advertising is that it is neither trademark infringement nor unfair competition to truthfully compare competing products in advertising, and in doing so, to identify by trademark, the competitor's goods. However, such comparative advertising will not be permitted if it is likely to confuse buyers as to exactly what they are getting i.e. 'detrimental to its distinctive character.' However, several cases have found that a disclaimer of association coupled with the comparative trademark use can prevent customer confusion.
- 26 *Barclays Bank Plc v RBS Advanta* [1996] RPC 307.
- 27 Laddie J in *Barclays Bank Plc v RBS Advanta* [1996] RPC 307, while commenting on the proviso to Section 10(6) f Trademarks Act, 1994 of UK (which is a counterpart to Section 29 (8) and Section 30 (1) of The Trademarks Act, 1999, and also uses the same phraseology) referred to it as 'mess'.
- 28 According to Kerly, the term 'honest practices' (as used under Section 10(6)) is a hybrid derived originally from the Paris Convention (Article 10 bis(2)), "honest practices in industrial and commercial matters" (and now in Article 6 of the Trademarks Directive of European Union) and words found in Articles 4 and 5 of the Directive: "where use of sign without due cause takes advantage of, or is detrimental to, the distinctive character or repute of the trademark.", David Kitchen, Kerly's Law on Trademarks and Trade Names 13th edn (Oxford, London) p 366, 13-72.
- 29 In *Pepsi Co Inc and Ors v Hindustan Coca Cola Ltd and Anr* 2003 (27) PTC 305, the court observed, "It is well known law that merely puffing is not dishonest and mere poking fun at a competitor is a normal practice of comparative advertising 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 under § 43 (a) [of Lanham Act]. Puffing may also consist of a general claim of superiority over a comparative product that is supposed to be vague, it will be understood as a mere expression of opinion." J McCarthy, McCarthy on Trademarks and Unfair Competition 4th edn (Thomson/West, Minnesota) 2005, p. 27-66, § 25:52.
- 30 In this context it is noteworthy that in *Channel v Triton Packaging Ltd* (1993) RPC 32, the defendant, included in its distributor's manual a comparison chart which incorporated various registered marks belonging to the plaintiffs for the purpose of identifying the equivalent 'smell like' fragrance. Although not in the form of an advertisement to the public sense, the use of plaintiff's trademarks was held to be an infringement. It is debatable that how Channel's case would be decided under the present law. Annand and Norman suggest that it would still be an infringement, although the Current Law Statutes annotation suggests that it would not, see Annand R and Norman H, Blackstone's Guide to Trademarks Act 1994 (Blackstone, London); however, Michales is doubtful that it would be considered an infringement, see Michales, A Practical Guide to Trademark Law 2nd edn (Sweet & Maxwell, London) 1996, p 103 Cf, Ryder Rodney D, Brands, Advertisements and Advertising (LexisNexis Butterworths, New Delhi) 2003, p. 346,351.
- 31 *British Airways Plc v Ryan Air Ltd* [2001] ETMR 235.
- 32 *DSG Retail Ltd (t/a Currys) v Comet Group plc* [2002] FSR 899 wherein sums involved were relatively small yet price comparison was termed dishonest, as it was observed to be materially false.
- 33 *Vodafone Group v Orange Personal Communication Services* [1997] EMLR 84.
- 34 As laid down in *Barclays Bank Plc v RBS Advanta* [1996] RPC 307; and in the subsequent case of *Vodafone Group v Orange Personal Communication Services Ltd* [1997] EMLR 84; and as summarized by Mr Michael Crystal (sitting as deputy judge) in *British Telecommunication Plc v AT & T Communications* (UK) [2001] ETMR 235. In these cases the issue dealt with Section 10 (6) of the Trademarks Act, 1994 of UK.