

MARICO LIMITED V. ABHIJEET BHANSALI (2020) BOMBAY HIGH COURT

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Abstract

Social media has played a crucial part in everyone's lives in the digital era, whether it is related to the growth of the business, exercise one's right to free speech, or pursues personal interests. "The people with a significant number of following on social media and a high level of credibility in their field or their line of work are considered as the social media influencers". Social media influencers play a significant role in attempting to influence those people who use social media and, as a result, can influence consumer choices. In the recent decision of "Marico Ltd v. Abhijeet Bhansali", Bombay High Court in the judgement granted Marico Ltd. interim relief against Abhijeet Bhansali's video which was on the issue of Parachute oil (one of Marico Ltd.'s products). This particular case involves disparagement, which is illegal under the Trade Marks Act. Thus, disparagement would be an infringement of a trademark, which would also fall under the category of unfair trade practises.

Keywords: Social Media, Free Speech, Disparagement, Trade Marks Act, Unfair Trade Practice.

1. Introduction

The challenge of striking a balance between the right to reputation and the right to free speech and expression has grown as a result of the increased availability of platforms for expressing one's ideas and ideologies. On various platforms, one can express one's opinion in a number of different ways. The conflict arises when the right to reputation is compared to the freedom of speech and expression. The right to free speech and expression is more than what it is and this frequently infringes on the right to reputation when it is exercised outside of the boundaries that are allowed. The right to reputation includes both the maintenance of one's sense of worth in society and one's own sense of personal dignity. But, Right to reputation has a different meaning when we look at it commercially. A product generates its own market goodwill through different and

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multiple management methods, and such products are typically trademark protected. However, the question still stands: are all these products immune to risks such as the damage to the reputation? This risk is known as product disparagement in legal parlance. Numerous rules have been implemented as a result of the frequent occurrence of such issues in court.

This is the particular case where the “Bombay High Court faced the scenario which involves the party which is a social media influencer which has the similar issue that concerns the scope of freedom of speech and expression through online platforms. Content on social media platforms such as Facebook, Instagram, and YouTube includes product reviews from ‘Social Media Influencers.’ This issue and this area of topic was thoroughly addressed in the case of *Marico Ltd. v. Abhijeet Bhansali*”.¹

2. Facts

Marico Ltd is the plaintiff which is involved in the business of Fast-Moving Consumer Goods Company which basically makes and manufactures hair oil, edible oil, and other personal care products. The plaintiff company’s hair oil named Parachute, is one of its best-selling and most well-known products. The most well-known trademark of the company is Parachute. The defendant, on the other hand, is a vlogger on one of the social media platform which is recognised as Bearded Chokra. On September 1, 2018, the Defendant posted a video on his social media account titled “Is Parachute Coconut Oil 100% Pure?”

The defendant in his video reviewed the quality of the Plaintiff’s Product which is ‘Parachute coconut oil’. As per Plaintiff, the defendant’s claims and statements made by him in the video which he posted were false and misleading. The defendant’s claims were disparaging, and thus infringed on the plaintiff’s trademark. As stated earlier, the defendant had made comments about the product’s quality which includes fragrance, packaging, and so on, and also claimed that the oil was not of pure quality. Furthermore, it was identified that the defendant performed no scientific tests other than the freeze test, right after which he stated that parachute oil was of inferior quality. The main issues which were raised in this case were whether the defendant was

¹ *Marico Ltd. v Abhijeet Bhansali* 2020 (81) PTC 244 (Bom).

prima facie guilty of making baseless, harmful, or irresponsible representations to his viewers about the plaintiff's Product and the second issue which was raised that whether the plaintiff suffered any special damages.

2.1. Issues Raised

- i. Whether or not the defendant made false, malevolent, or careless statements;
- ii. Whether the plaintiff suffered any special damages

2.1.1. Arguments:

Plaintiff's Contentions

Defendant posted the video with malevolent purposes in order to attract more viewers and to gain more views on the video. The contested video as a whole is derogatory and false. In the video, the defendant's aim was to promote a competing product rather than Plaintiff's product and via his video he was trying to urge the viewers to stop using Plaintiff's oil. Defendant's actions fall into the category of business activities, as well as his intention was to attempt to solicit monetary donations from his social media handle along with the sponsors for his channel, instead of posting a general review about the product.

The defendant seems to have been completely aware of the fact that the contents of the video actually constitutes the tort of malevolent falsity, and as a result, the Defendant was offered to delete specific parts of the video (after the issuance of legal notice) in which he sought to compare and contrast as well as offered to create a completely new video following a re-evaluation of the Plaintiff's fresh product.

The actions of the Defendant are fulfilling all of the prerequisites for constituting disparagement. The term 'Special damage' does not specifically mean in terms of quantity, but rather special in the context that the loss which is generated cannot be quantified and the nature of the damage is as such that it cannot be determined.

Defendant's Contentions

There weren't any bad intentions or real malice, and the video's only purpose was to educate viewers. Plaintiff used a tactic of showcasing a wet coconut along with its product to trick or mislead the consumers into thinking that it was made from wet coconut rather than copra.

The defendant's offer to delete or remove certain bits of the video was made as a settlement concession, not as an admission.

Defendant obtains a commission from the online website, not Plaintiff's competitors, at the time when customers purchase products after clicking on the link mentioned by the Defendant. However, in the past, Defendant's recommendations and review made in the videos were made without receiving any commission. Plaintiff uses the term "coconut oil" at the time when they were actually selling low-quality copra oil. The Defendant's statements in the disputed video are true and constitute genuine criticism. Adding on to that, the Defendant has the right to freedom of speech as a fundamental right.

Some of the statements made by the defendant, such as "the smell of the Plaintiff's product is like a dried or rotten coconut," seemed to be exaggerated or completely overblown and should not be taken as fact. Plaintiff has provided no evidence that the revenue which used to be generated have decreased since the video was uploaded and posted in the social media. Disparagement/malicious falsehood/slander of goods actions can only be brought against a trader or a competitor".²

Plaintiff's Rejoinder

If the Defendant's intention (not malafide) was to create an educational video for the consumer's safeguard and for their best interests in mind, then the Defendant should have decided to approach any independent laboratory for testing and for its own relief. "Food Safety Standards Act, 2006 in Section 40 provides for

² 2020 (81) PTC 244 (Bom).

a remedy whereby a Purchaser can have food analysed by a Food Analyst on payment of a fee”.³

Defendant's Rejoinder

The defendant's learned counsel contented that-

1. To hold that the reports or the journal in the newspapers cannot be relied on at the interim stage since they are basically hearsay means that almost no document can be forced to rely on until and unless the person who wrote this document is the deponent along with the verification of the pleadings.
2. During the interlocutory stage, the court must limit itself to the material or the content that has already been brought on record without considering whether or not it is proven.
3. To determine whether 'malice' exists in a case or not, it is necessary to determine whether the defendant was aware of the statements made by him was false regarding that product or he just made the statements knowing that it was careless disregard as to whether it is right, wrong, true or false.

3. Judgement

The court stated that because the defendant holds the position of “social media influencer,” he carries a huge burden to ensure that the truthfulness of his statement or the statements which he is about to make or made should be in the limit and has to undertake his actions and reactions at a certain position, and also has to make sure that a social media influencer is not as the same as the ordinary person and cannot deliver statements.

3.1. Whether the Defendant's Statements are False?

The review which was made in the video demonstrates that, apart from the colour of the plaintiff's oil in both liquid and frozen forms, the defendant hasn't really stated or examined any other facet of the plaintiff's product in detail. In contrast, the defendant has omitted details about the products which he used while comparing to the plaintiff's product.

³ The Food Safety Standards Act, 2006 (Act 34 of 2006), s. 40.

“The nutritional values of both Virgin Coconut oil and the plaintiff's products are strikingly similar. The defendant has not conducted any independent tests to demonstrate that the nutritional values of the products vary significantly. Under the Food Safety Standards Act of 2006, the defendant had the option of having the plaintiff's product tested. This would have demonstrated the defendant's credibility in providing accurate and truthful information about the product”⁴.

The defendant's deception on his part is also evident in the fact that the only test applied by the defendant to reach the conclusion that the plaintiff's product is of inferior quality is the test which is called ‘Freeze Test’. The plaintiff's product is unrefined pressed coconut oil rather than virgin coconut oil. The defendant has used the words ‘organic coconut oil’ for the other oil used in the video.

The defendant, on the other hand, compared the 'virgin coconut oil' to the plaintiff's product in the video. If the two oils used by the defendant for the 'freeze test' did not belong to the same classification or does not belong to the same category, which is namely ‘organic coconut oil’. then the specifications of colour and particulate matter applied by the defendant and eventually the result would not only be inaccurate but also be considered as factually incorrect. The defendant intentionally and wilfully misinformed the viewers into continuing to believe that he was comparing the plaintiff's product to ‘organic coconut oil’, when in fact he was actually comparing it to ‘virgin coconut oil’.

3.2. Whether the Defendant's Statements were Malicious or Reckless?

As mentioned above, the defendant basically used many forceful statements in the contested Video, trying to portray himself as something of an expert who had undertaken thorough research and so much of analysis. The defendant's referenced literature is for determining the quality of 'Virgin Coconut Oil,' and thus is inapplicable to the current case.

The article or editorial which was published does not clearly illustrate that how the discoloration or a strong odour in ‘Coconut Oil’ is a sign of inferiority or a low quality

⁴ The Food Safety Standards Act, 2006 (Act 34 of 2006).

product. The article stated above makes no mention of the colour of unpolished oils made from copra or draw any conclusions about the colour of unrefined Coconut Oil.

When we look in the context of copra oils, the article simply states that they may contain mould which is fungus, but they are not harmful in any way or manner. As a result, the article in no way gives credibility to the findings made by the defendant.

The defendant had no grounds to suppose that the statements which he made in the particular video were true because there is evidence concerning the plaintiff's product to support such a belief. As a result, the defendant's statements were made recklessly and without taking this into regard for whether they were true or false.

3.3. Whether any Special Damages were Caused to Plaintiffs?

On account of this, the plaintiff has continued to suffer special damages in this particular instance because the Defendant's video was likely liked by two thousand five hundred (2500) people, and as we know that the effect and the influence of the video on the plaintiff's reputation/public image and along with the damage occurred to him cannot be blown out of proportion.

The defendant in this context has provided no explanation when he used the term "rotten coconuts" while reviewing the product of the plaintiff. And after this, he later implied in his video that the product of the plaintiff which he was reviewing can be made or may be made from any low quality coconuts. It basically makes no difference whether the defendant is involved in trading or not when it comes to the case of repudiation/malicious false statement/misrepresentation of the goods if the necessary ingredients are met.

Any individual's fundamental rights cannot be violated by denigrating or demonising the work of others. According to the contentions raised by the parties, the Court ordered the defendant to remove the video from YouTube or any other platform on which it was uploaded. The defendant was given a short time injunction.

4. Analysis

To “identify one person’s products from those of another”⁵ is the prime objective of a trademark. As a result, a trademark makes it easier for customers to make a distinction between products and their sources. Therefore, it is trademark infringement if someone disparages someone else while using their trademark. Comparative advertisements that use another party’s trademark are acceptable, but the advertiser is not allowed to degrade that party’s goods or services in the process. “Any behaviour that disparages the products or services of others constitutes both trademark infringement and some form of product disparagement.”⁶

Due to the defendant’s trademark infringement violation under “Section 29(4)(c)v, the plaintiff suffered damage as there more than 1,08,000 views on that particular video. The plaintiff was however entitled to special damages”.⁷ “In the case of *Hindustan Unilever Limited vs. Gujarat Co-operative Milk Marketing Federation Ltd. and Ors.*, it was decided that the following considerations should be made when deciding whether or not there has been disparagement:

- (i) Intent of Commercial
- (ii) Manner of the Commercial
- (iii) Storyline of the advertisement and the message aimed to be conveyed by the commercial”.⁸

The defendant asserted that the primary goal of his video was to raise public awareness of the substandard quality of the product and had no intention to harm the plaintiff’s reputation. In this instance, the issue was whether the defendant’s statements on social media were simply opinions or whether they were made with true malice or purpose. “According to the US Supreme Court, the plaintiff must illustrate “actual malice”, which implies that the statement was made recklessly without considering whether it was true or false or carelessly disregarding whether it was true or false”.⁹

⁵ The Trade Marks Act 1999 (Act No. 47 of 1999), s. 2(zb).

⁶ Uphar Shukla, “Comparative Advertising and Product Disparagement vis-a-vis Trademark Law” 11 *Journal of Intellectual Property Rights* 411 (2006).

⁷ Supra note 5, s. 29(4)

⁸ *Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Ltd. and Ors.* MIPR 2017 (3) 50

⁹ *New York Times Co. v. Sullivan* 376 U.S. 254 (1964)

As the defendant in this instant case lacked scientific evidence, the Bombay High Court properly concluded that he may have been aware that his allegations were fraudulent. “Additionally, it qualifies as insulting behaviour if the way is one of mockery or condemnation of the rival's product”.¹⁰ In this instant case, the defendant had created the video in such a way as to mock the plaintiff's product by equating it to other oils. The defendant asserted that the video's intended message was to inform and to help the viewers about the quality of the product.

However, the main aim of the video was to discourage the use of parachute oil and to call attention to it. This is evident from the various comments that users and viewers have left on the YouTube video.

5. Conclusion

Indian courts have indeed been involved in granting injunctions to IP rights holders in order to safeguard their intellectual property rights. The Bombay High Court in this landmark decision has provided insight into social media influencers' responsibilities and their obligation towards the society and the IP right holders.

In Today's Era, we can see that the social media is becoming an increasingly important part of everyone's social life and a part of life, so it is very much important that anything put up by the media on such websites or apps must be regulated. Despite the fact that Marico was granted interim relief, other aspects of social media and intellectual property, for example the responsibility of social media influencers who promote or advertise a competing product, were not addressed. However, the Court correctly interpreted the situation and granted interim relief.

¹⁰ *Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Ltd. and Ors.* MIPR 2017 (3) 50.