IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

I.A. G.A. NO. 1 of 2021

in

C.S. NO. 232 of 2021

DABUR INDIA LIMITED
Versus
SHREE BAIDYANATH AYURVED BHAWAN PVT. LTD.

For the Plaintiff/Petitioner	: Mr. Sudipta Sarkar, Senior Advocate Mr. Jawahar Lal, Advocate Mr. Debnath Ghosh, Advocate Mr. Anuj Garg, Advocate Mr. Sudhakar Prasad, Advocate Mr. Pradipta Bose, Advocate
For the Defendant/Respondent	: Mr. Manish Biala, Advocate Ms. Amrita Panja Moulick, Advocate Mr. Ashutosh Upadhaya, Advocate Mr. Devesh Ratan, Advocate

Heard on : November 25, 2021, December 01, 2021, December 22, 2021, January 18, 2022, January 25, 2022, January 27, 2022, February 02, 2022 and February 04, 2022

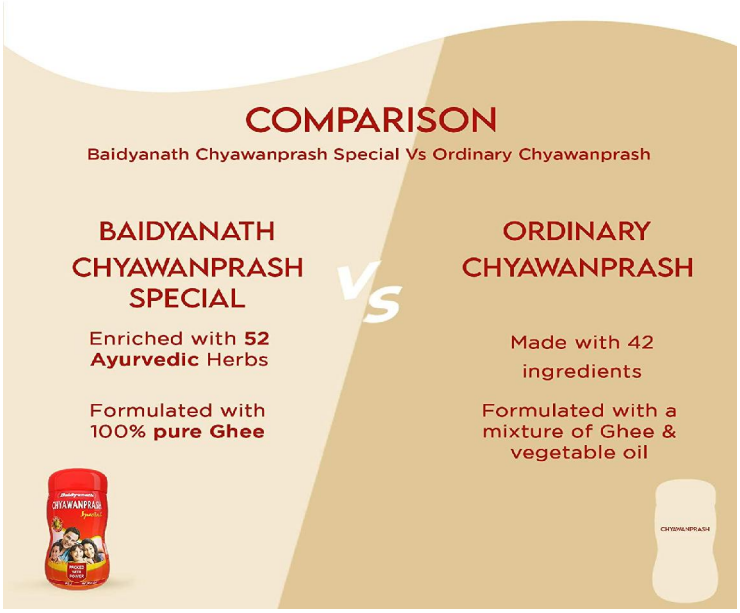
Judgment on : February 08, 2022

Shekhar B. Saraf, J.:

Facts:

1. The plaintiff/petitioner has filed the present suit against an advertising campaign containing five impugned advertisements issued by the defendant/respondent one after the other during October and November 2021 in relation to its product "Baidhyanath Chyawanprash Special". Details of the impugned advertisements are as follows:

a) Impugned Advertisement No. 1 (hereinafter referred to as "Annexure I") was released by the defendant on its official website (https://www.baidyanath.com/chyawanprash-special.html) and was also available for viewership on the websites of various e-commerce platforms like Amazon, Flipkart and others. The same has been removed by the defendant/respondent on November 25, 2021 based on an order passed by this court on the same date. In this advertisement the defendant/respondent had published a comparative chart describing the qualities of its product with other rival products in the market. The respondent had claimed that its Chyawanprash has '52 herbs' whereas its rivals have only '42 ingredients'. Thereafter, the advertisement mentions that respondent's product is made from '100% pure ghee' whereas its rivals have a 'mixture of vegetable oil and ghee'. The pictorial representation of this impugned advertisement is extracted below:



b) Impugned Advertisement No. 2 or Print Advertisement-1 (hereinafter referred to as "Annexure-J") was released by the defendant in print media in a national daily newspaper Dainik Jagran on October 17, 2021. It was circulated only in the month of October, 2021 in the State of Uttar Pradesh. In this advertisement the respondent/defendant asks a question to the viewer as to whether their Chyawanprash is complete. Thereafter, the respondent highlights in the advertisement that its own product is complete and contains 52 ingredients. The advertisement conveys that while other Chyawanprash uses a 'mixture of oil and ghee' in their preparation, Baidyanath Chywanprash contains only '100% Pure Desi Ghee'. The advertisement further elucidates that other Chyawanprash which contains only '42 Ingredients', Baidyanath Chywanprash has the power of 'complete 52 Ayurvedic Ingredients' with benefits of fresh Amla and Saffron which gives you better immunity, more energy and sharp mind. The pictorial representation of this impugned advertisement is extracted below:

c) Impugned Advertisement No. 3 or Print Advertisement-2 (hereinafter referred to as "Annexure-K") was released by the defendant in print media in national daily newspaper Amar Ujala on November 12, 2021. It was circulated in the month of November, 2021 in the State of Uttar

Pradesh. In this advertisement the respondent states that complete Chyawanprash is the one, which is formulated as per correct formulation. Thereafter, it further communicates that Baidyanath Chyawanprash is a complete Chywanprash which is made with traditional recipe. While other Chyawanprash uses 'mixture of oil and ghee in their preparation', Baidyanath Chywanprash uses only '100% Pure Desi Ghee'. The advertisement further elucidates that other Chyawanprash which contain only 42 Ingredients, Baidyanath Chywanprash has the power of complete 52 Ayurvedic Ingredients with benefits of fresh Amla and Saffron, which gives you better immunity, more energy and sharp mind. The pictorial representation of this impugned advertisement is extracted below:

d) Impugned Advertisement No. 4 (hereinafter referred to as "Annexure-L") is a L-band TV advertisement (L-shaped advertisement played on TV along with the content program for short duration) released by the defendant on national television channels from November 12, 2021 in channels like Dabangg TV, which is available for viewership across all major cable networks, DTH and online OTT platforms. In this advertisement the respondent states that complete Chyawanprash is the one that is formulated as per correct formulation. Unlike Annexure I, J and K it does not make any claim with respect to the number of ingredients present in its product versus the product of other rivals. The picture format of this advertisement is delineated below:

e) Impugned Advertisement No. 5 (hereinafter referred to as "Annexure-M") is a full-fledged video advertisement, released by the defendant in social media on November 15, 2021, on its official YouTube channel named "Baidhyanath Chyawanprash". The contents of this

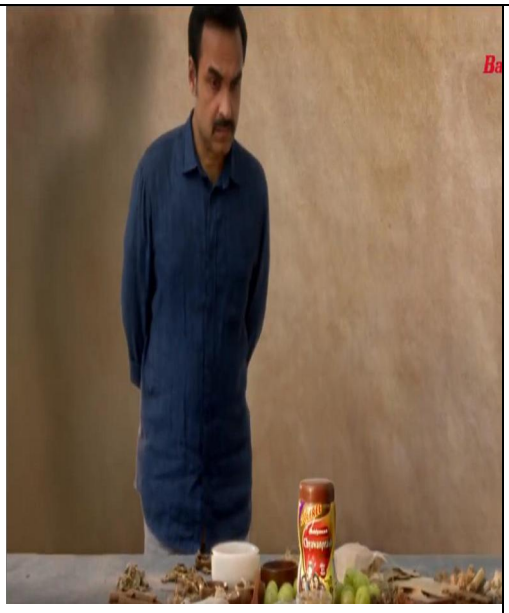
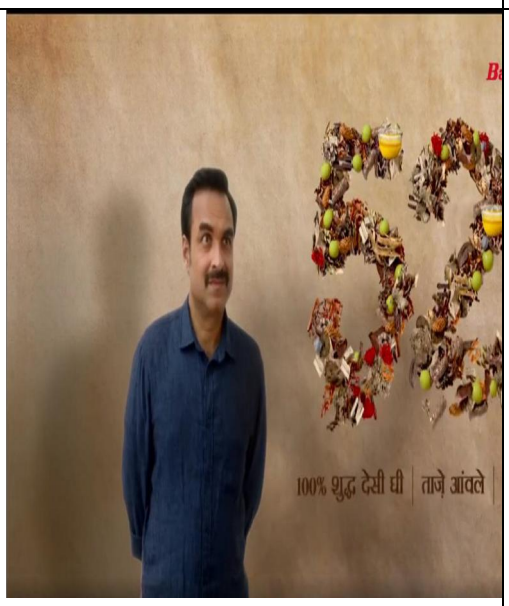
advertisement are presented below in a tabular format with the dialogues delivered by the actors engaged for such purpose:

Frame/ Visual Depiction	Description including the Voice Over
 	The advertisement opens up with a shot where husband (a celebrity actor) walks into the living room with a bag containing grocery items in his hand and places the bag on dining table. He switches on the TV and cricket commentary could be heard in the background:
	Wife takes out the bottle of Chyawanprash from the grocery bag. On the label of Chyawanprash bottle, '42 ingredients' is written.

	The wife is shocked and disappointed to see that her husband has bought ordinary 'Chyawanprash' with only '42 ingredients'. Therefore she questions the choice of her husband:- "Ye kaunsa Chyawanprash hai!" (In English - Which Chyawanprash is this!)
	Husband responds dismissively: He says - "Arrey, hai to Chyawanprash hi, bas naam alag hai, kya farak padta hai?" (In English – "Hey it is Chyawanprash only, just the name is different, how does it matter.")
	Husband gets back to watching cricket match and says "jitenge, sirf 52 run chahiye." (In English: His team has to make only 52 runs to win)

	Wife is flabbergasted with her husband's ignorance & choice of Chyawanprash, correlates the ingredients of ordinary Chyawanprash with the ongoing cricket match and poses a question: - "agar sirf 42 run banaye toh?"
	The husband with a mocking look, responds – "Yeh kaisa sawal hai? pure 52 run chahiye 42 nahi, tabhi toh jetenge na!" (In English – "What kind of question is this? Total of 52 runs is required and not 42, to win!")
	The wife says – "Vohi toh! Theek usi tarah beemariyo se bachne ke liye hume chaiye pure 52 ayurvedic tatvo ki shakti. 42 nahi. Tabhi toh jeetnge na." (In English – "That's true! Just like your cricket match, to prevent illness, we need the power of total of 52 ayurvedic ingredients are

	required and not just 42. Only then we will win.")
	Wife convinces the husband that he has made a wrong choice by buying any other Chyawanprash as the husband from his earlier statement "doesn't matter", now says – "toh farak, padta hai!" (In English - "yes, it does matter!") Both are shown happy to now found Baidyanath Chyawanprash – which is the only Chyawanprash with complete ayurvedic ingredients, made with right formulae and protects from illness and provides immunity, etc.
	Voice Over: Husband with a dazed look, ponders over the ingredients of Baidyanath Chyawanprash banta hai sadiyo purani ayurvedic vidhi se. (In English – "Baidyanath Chyawanprash is the

	one which is made with centuries old Ayurvedic recipe")
	Now the husband is convinced that only Baidyanath Chyawanprash Special is pure and as per Ayurvedic texts, and other Chyawanprash should not be purchased/consumed. He has a happy expression with his purchase decision. Ismai tail nahi, hai sirf 100% shudh desi ghee, taaze Amle , kesar aur pure 52 ayurvedic tatvo ke gun. (English - While referring to Baidyanath Chyawanprash the actor states that Baidyanath

	Chyawanpras does not contain oil. It contains only 100% pure desi ghee, fresh amle, saffron and power of complete 52 ayuryedic ingredients.)
	Jo de aapko behtar immunity, zada energy aur tez dimaag. (In English – "which gives you - better immunity, more energy and sharp mind.")
	Badiynath Chyawanprash "sahi vidhi, behtar immunity!" (In English – "correct recipe, better immunity!")

2. The existence of the impugned advertisements being Annexure 'I' to 'M' came to the knowledge of the plaintiff on November 12, 2021. For seeking remedy against the impugned advertisements the petitioner/plaintiff had moved this application, praying for an order of injunction restraining the respondent from issuing, publishing or uploading the impugned advertisements disparaging the goodwill and

reputation of the petitioner and its product 'Chyawanprash' being sold under the trademark "DABUR". The petitioner also prayed for an order of injunction directing the defendant/respondent to remove the impugned advertisements from all electronic medium, TV channels and other print media. On November 25, 2021, the Court granted ad interim ex parte order of injunction in terms of the above prayers. Thereafter, on December 1, 2021, the injunction granted on Annexure L was lifted and a direction for filing Affidavit-in-opposition was given. Both the parties have filed their respective affidavits for consideration by this court to decide the instant interlocutory application.

Arguments:

3. Mr. Sudipta Sarkar, Senior Advocate, appearing on behalf of the petitioner made the following arguments:

   a) It is admitted by the defendant/respondents that the impugned advertisements are comparative in nature, thus, such untruthful comparisons are actionable in nature. The advertisement mentions 'ordinary' Chyawanprash containing '42 ingredients' but the respondent admits that there is no 'Chyawanprash' in the market that contains 42 ingredients. Hence, the claim is untruthful, false and actionable.

   b) The petitioner's product was identified and targeted. Dabur Chyawanprash advertises with 'more than 41 Ayurvedic herbs', for this reason the reference of 42 ingredients is deliberate and malicious in nature. Further, a malicious comparison has been

made by the respondent in stating that its product is made with '100% pure ghee' whereas petitioners' product is made with a mixture of ghee plus vegetable oil spreading further misinformation and confusion because Dabur uses a mixture of til oil and pure desi ghee based on ancient ayurvedic texts. The respondent mischievously uses the term "vegetable oil" instead of "til oil". The color scheme of the bottle of red and golden is also similar to that of petitioner's product which is widely recognized and recalled by the consumers. Thus, it identifies to the petitioner's product. Further, the petitioner has 63 % of the market share, therefore, the primary target of the impugned advertisements is to persuade consumers away from Dabur Chyawanprash and shift to buying the respondent's product instead.

c) If it is assumed that no direct reference is made to Dabur, there still exists a generic disparagement to the entire class of Chyawanprash thus giving a cause of action to the petitioner as a manufacturer of the product. The relevant judgments relied on by the petitioner to support the above arguments are ***Dabur India Limited –v. Emami Limited*** reported in ***2004 (75) DRJ 356*** and ***Dabur India Limited –v. Colgate Palmolive India Ltd.*** reported in ***2004 (77) DRJ 415***.

d) A 'Serious' comparison, false and misleading impugned advertisements are not mere puff. The respondent has made an untruthful comparison by exploiting the lack of knowledge of the ordinary consumers. The respondent's advertisement using

"ordinary" or "aam" (hindi) is misleading because under Section 3(a) of the Drugs & Cosmetic Act, there cannot be an 'ordinary Chyawanprash' because no Chyawanprash in the market contains only 42 ingredients, and therefore, this amounts to disparaging the entire class of 'Chyawanprash'. The First Schedule to the Drugs and Cosmetics Act, 1940 provides for various ayurvedic texts that may be followed to manufacture Chyawanprash and in none of these texts a Chyawanprash can be made with 42 ingredients. In fact, the minimum number required is 47 ingredients. Ergo, the reference to '42' is false and consequently amounts to disparagement. Relevant judgment relied on by the petitioner is ***Hindustan Unilever Ltd. –v. Reckitt Benckiser (India) Ltd.*** reported in ***2014 (2) CHN (Cal) 1.***

e) The respondent has admitted that ayurvedic texts have different formulations and merely because it has less than 52 ingredients does not make the formulation incomplete or insufficient. Such admission is contrary to the respondent's claim that they were just giving mere imagery to the consumers to actively start questioning the number of ingredients in the Chyawanprash they buy. Ergo, the intent and the manner of representation in the impugned advertisements are false and misleading. According to the petitioner unfair or deceptive advertising is not protected under commercial speech as laid down in Article 19 (1) (a) of the Constitution of India but hits Article 19(2). Hence, it is impermissible.

f) The respondent misleadingly implies that the respondent's Chyawanprash is complete where as other Chyawanprash are incomplete. The question posed in Annexure "J" as to 'whether your Chyawanprash is complete?' which clearly creates doubt in the minds of consumers that the Chyawanprash they consume is not complete. The impugned advertisements mention that unlike other Chyawanprash which have 42 ingredients, Baidyanath Chywanprash has the complete power of 52 ayurvedic ingredients. It implies that the respondent's product is made with the correct recipe/formula where as other products in the same class of products are not. Message being conveyed is that other Chyawanprash are insufficient and therefore not Chyawanprash at all. Relevant judgment relied on for this argument is ***Reckitt Benckiser Health Care (India) Pvt. Ltd. –v- Emami Ltd. & Ors.*** reported in ***2015 (4) CHN (CAL) 19.***

g) False statements have been made before the Court by the respondent. The respondent says 42 ingredients have been used in the advertisements because it rhymes with 52 but the advertisement is released in Hindi and 'baavan' and 'bayalees' do not rhyme and hence, it is a false claim. The intent and manner of advertisements is to convey a message that other Chyawanprash in the market are 'ordinary' or 'deficient' as they contain only 42 ingredients and are not manufactured as per correct text, hence are deficient and do not provide health benefits. Further, it is submitted by the petitioner that the reference to "42 ingredients" in

the impugned advertisements clearly identifies and targets 'Dabur' Chyawanprash' as the plaintiff through its website advertises that its Chyawanprash contains more than "41 Ayurvedic herbs".

4. Mr. Manish Biala, Counsel appearing for the Defendant/Respondent, made the following arguments:

a) The defendant's advertisement and right to commercial speech is a part of freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution. It is settled law that any restraint or curtailment of advertisements would affect the fundamental right under Article 19 (1) (a). The purpose of advertising is dissemination of information regarding the product advertised and public at large is benefitted by the information disseminated. Free flow of commercial information is indispensable in a democracy, and the economic system in a democracy will be handicapped without the freedom of commercial speech. Thus, the defendant has the right to advertise its products as part of its right to "commercial speech" which is a part of freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution. Furthermore, the protection under article 19(1) (a) is also available to the recipient of the speech, and it also protects the rights of an individual to listen, read and receive the said speech. In the present context, it is the rights and interest of the consumers which is getting affected if the defendant's advertisement is restrained from informing them about the benefits of the product. He places reliance on ***Tata Press Ltd. –***

v- MTNL & Ors reported in ***(1995) 5 SCC 139*** to make the above argument.

b) The plaintiff ought not to be hyper-sensitive about the defendant's advertisement. It is settled law that comparison between products is allowed, and it is permissible for an advertiser to proclaim that its product is the best. However, the said implication is natural and allowed, as one consumer may look at the advertisement and conclude that one product is superior while some other consumer may look at it from another point and think that the other product is inferior. This does not constitute disparagement under the law, and the advertisement cannot be restrained. The counsel places reliance on ***Dabur India Ltd. –v- Wipro Ltd.*** reported in ***2006 (32) PTC 677 (Del)*** to make the above argument.

c) The plaintiff has attempted to create a monopoly in the market by abusing the process of law. It is settled law that the plaintiff cannot restrain others from advertising on the ground that the plaintiff has major market share for a particular product and thus, it is the obvious target of any advertisement. Such claims have been dismissed by the courts as the sub-text of such claims is an intention to create monopoly in the market or to entrench a monopoly in the market that the plaintiff claims to already have. Furthermore, it has been held that if such claims of the plaintiff were to be accepted, then no other manufacturer would be able to advertise its product, because in doing so, it would necessarily mean that the plaintiff's product is being targeted. Reliance on the

judgement passed in ***Dabur India Ltd. –v- M/s Colortek Meghalaya Pvt. Ltd. & Ors*** reported in ***ILR 2010 (IV) Del 489*** has been placed to buttress the above submission.

d) The defendant's advertisements make the public at large aware of the beneficial knowledge for consumers. The defendant, through its advertisements, has given the true and correct knowledge to the consumers, and made the public at large, aware about the truth as well as the benefits of its own product, which contains all necessary ingredients. The plaintiff is aware of the aforesaid, and it is scared that such fact might come out in the public domain when the public at large starts questioning the product that they buy or consume. To make this averment, reliance has been placed on ***Reckit Benckiser (India) Ltd. –v- Naga Ltd. & Ors*** reported in ***ILR (2003) 1 Delhi 325.***

e) It is settled law that comparative advertising is permissible under the law. Furthermore, in the present matter, the defendant's advertisement is not comparative in the strict sense as the defendant's advertisement only compares the defendant's product with an unnamed fictitious product. When the main thrust of the advertisement is to showcase the benefit of the defendant's product, the same must be allowed. To buttress this averment reliance has been placed on ***Dabur India Ltd. –v- Emami Ltd.*** reported in ***2019 (79) PTC 299 (Del).***

f) The defendants' product is as per the approved Ayurvedic texts. The plaintiff's entire claim is based on the fact that a Chyawanprash

has at least 47 ingredients as per the approved textbooks of Ayurveda. The plaintiff has itself stated therein that a Chyawanprash can have any number of ingredients above 47. Furthermore, the plaintiff has not denied that the defendant's product contains 52 ingredients as per the approved ayurvedic texts. Thus, it is evident that there is no misrepresentation or untruthful statement by the defendant for its product, and the plaintiff has falsely claimed that there has been any misrepresentation by the defendant in its advertisement.

g) It is an admitted case of the plaintiff that its own Dabur Chyawanprash or any other Chyawanprash for that matter does not have 42 ingredients. However, on the other hand, the plaintiff has claimed that any reference to a Chyawanprash having 42 ingredients is a direct reference to the plaintiff's product "Dabur Chyawanprash". Thus, the plaintiff has itself made self-contradictory claims. The defendant's advertisements do not refer to the plaintiff's product at all. The terminology, the number, and the representation of an unnamed fictitious product in the defendant's advertisements has no reference whatsoever to the plaintiff or its product Dabur Chyawanprash. The plaintiff cannot claim its rights over any number and restrain the defendant from using it.

h) Defendant/Respondent states that a bare perusal of the defendant's advertisements reveals that it neither mentions the plaintiff or its product. It is further stated that the figure 42 was

used by the advertisement creators for the reason that it rhymes with 52, and it is also a round figure (less by 10) which will make an impact in the minds of the consumers. Furthermore, the said fictitious number was used by the defendant as none of the Chyawanprash manufacturers, including the plaintiff, use 42 ingredients for their product, and thus, no disparagement could take place by using the said fictitious number. The said figure of 42 is a mere indicator and figurehead of an unnamed fictional Chyawanprash brand with 42 ingredients. It is submitted that the defendant was simply giving model imagery to the consumers to actively start questioning the number of ingredients in the Chyawanprash.

i) Finally, it is argued by the defendant/respondent that the intent of the defendant's commercial is to suggest that the product of the defendant is better than others. While doing so, the commercial does not denigrate or disparage the product of the plaintiff which is allowed as per settled law.

Analysis:

5. I have heard the counsels appearing for both the parties. The sole issue for consideration before this court is that whether the impugned advertisements published by the defendant/respondent amount to disparagement or not. For adequate settlement of this issue it is pertinent to discuss some of the relevant case laws cited by both the parties on the issue of disparagement.

6. In the case of ***Hindustan Unilever Ltd. –v- Reckitt Benckiser (India) Ltd.*** reported in ***2014 (2) CHN (Cal) 1***, I.P. Mukerji J. subsequent to discussing a plethora of precedents came to the conclusion that comparing the qualities of one's product with those of another is only permitted if it is in the nature of a puff, but a trader should not be permitted to advertise facts, data, figures and deficiencies of the products of another, especially a rival, directly or indirectly by an innuendo. Relevant paragraph of the judgment is extracted below:

> "57. It follows that comparing the qualities of one's product with those of another is only permitted, if it is in the nature of a "puff". This is so because while making a serious comparison of the qualities of a rival product, one may directly or indirectly denigrate another product:
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> > "Counsel for the plaintiffs, on the other hand, accepts that a mere puff by any trader of his own products is not actionable, but says that the matter becomes quite different if the trader descends to particularize precisely why his product is better than his rival's or his rival's is worse than his; and, he says, fairly read, what Tech-Data/I in the present case is doing is to say in substance not merely that MBS-70 is superior to DEBDUST, but that DEBDUST is not proper for its purpose." (De Beers Case)
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> 58. Hence, a trader should not be permitted to advertise facts, data, figures, deficiencies etc. of the products of another, especially a rival, directly or indirectly by an innuendo. This is so, because, one must presume a constant bias in the mind of such a trader towards his rival. When one presumes this constant bias, one would expect that the representations that are made, seriously about a rival's product are bound to be false, misleading, unfair or deceptive. This is more so because one is not in a proper position to make an impartial appraisal of a rival's product."

The court further examined the argument in relation to whether comparative advertisements can be supported by the right to freedom enshrined in the Article 19 (1) (a) of the Constitution of India, and after discussing several case laws held as follows:

"75. But I find nothing, in the existing law to permit, a serious comparison by a trader of his product with the product of another. This would invariably result in the denigration of the latter product or in the consumer being prejudiced by it against the other product, as held earlier. When this happens, immediately the "commercial speech" becomes unfair. In fact, the Division Bench of Delhi High Court in *Dabur India Ltd.* v. *M/s. Colortek Mekhalaya Pvt. Ltd.* decided on 2nd February, 2010 approved a passage from Anson's Law of Contract (27th Edn.) that commendatory expressions regarding a product are not to be taken as serious representations of fact. In other words advertisements lauding a product are not to be taken as a representation of fact with regard to the product at all. Hence, an action for misrepresentation would not lie. It follows, as stated in the De Beers case that generally advertisements are not taken seriously by the people. This was reiterated by another Division Bench of the Delhi High Court in the case of *Pepsi Co. Inc.* v. *Hindustan Coca-cola Ltd.* reported in 2003 (27) PTC 305 (Del).

76. In my judgment comparison should not be more than a "puff". Serious comparison invariably tends to denigrate another product and is not permitted. Otherwise, the Courts would be reduced to, "a machinery for advertising rival productions by obtaining a judicial determination which of the two was better", as rightly observed in *White* v. *Mellin* about 120 years ago."

7. In the case of ***Reckitt Benckiser (India) Ltd. –v- Hindustan Unilever Ltd.*** decided in ***A.P.O. No. 352 of 2013*** on ***March 14, 2014*** it was held by a Division Bench, comprising of Ashim Kumar Banerjee, J. & Arijit Banerjee, J., of this Hon'ble Court that comparison should not be more than a puff and the use of rival trademark must be in accordance with the honest practice without taking unfair advantage or being detrimental to the distinctive character or repute of the other mark. Relevant paragraph of the judgement is extracted below:

"We have given a close look to the judgment and order impugned. His Lordship dealt with all the precedents cited at the bar and summarized the proposition of law very correctly, we would produce as hereunder:

"The principles of law governing disparagement of goods seem to be well entrenched and only need to be elucidated.

The law, in its most general terms, relating to disparagement of goods was laid down by the House of Lords in the above case. The House opined as follows:

a) A trader can laud his product.

b) He can even say that his product is the best in the world.

c) He can declare that his product is better than his rival's and in what respect it is better.

d) He cannot say that his rival's product is bad, injurious or deleterious or make an intentional misrepresentation to mislead customers. (Lord Shand at Page 171)

e) In order to succeed, the plaintiff has to prove special damages. To obtain an order of injunction he has to satisfy the Court that damages have been suffered or will be suffered in future. (Speech of Lord Waston)

f) Some speeches in White v. Mellins seem to suggest that in the case of downright disparagement of another's goods, without proof of actual or future damages, an action in disparagement will lie. A passage from the speech of Lord Shand suggests that in such a case even a pleading of special damage is not necessary."

His Lordship, after holding as above, observed as follows:

> "But I find nothing in the existing law to permit, a serious comparison by a trader of his product with the product of another."

"In my judgment comparison should not be more than a "puff". Here we join issue. Trade Mark Act clearly prohibits one registered mark holder to take unfair advantage of another mark holder by any advertisement detrimental to its distinctive character and reputation. Section 30 would make it clear, nothing in Section 29 would prevent identifying his own goods or service provided the use is in accordance with the honest practice and not take unfair advantage or detrimental to the distinctive character or repute of the other mark. In our considered view, if someone is in a position to justify the comparison even seriously that would not offend any statute. Be it puffery, be it serious. On other issues his Lordship's understands of the law as quoted above, is accurate subject, to our view, being expressed herein before. With this mind set in the backdrop may we proceed to decide the subject controversy.""

8. In the case of ***Dabur India Ltd. –v- Emami Limited*** reported in ***(2019) 261 DLT 474*** it was held by a Single Bench, presided by Sanjeev Narula, J., of the Hon'ble Delhi High Court that the primary consideration for the Court to discern disparagement is to go into the heart of the matter and see the impact and impression the advertisements create. It further observed that the advertisements

should be "comparison positive"; message that broadly highlights slanderous or indiscriminate "negative comparison" should be restricted by the Courts immediately. In this case Sanjeev Narulla, J. was examining the Dabur Chyawanprash product and an advertisement by a rival brand that highlighted in the advertisement that Dabur Chyawanprash contained 50 % sugar while its own product was sugar free. As the statements in the advertisement were factually true, the Court refused to injunct the advertisement. Relevant paragraphs of the judgment are highlighted below:

> "28. From the reading of the above noted judgement, it emerges that the Court has to necessarily examine the intent and overall effect of the advertisement. The "look and feel" of an advertisement and the message conveyed by the story line to an average person, are the critical factors which assist the Court to come to a right conclusion. If one were to view the proposed modified print advertisement, it can be clearly discerned that the Plaintiff's product is not the subject matter of comparison. The comparison is with Chyawanprash as a generic product. As discussed earlier the law permits comparison. While making a comparison, a competitor can declare his goods to be the best in the world even though the declaration is untrue, however, while claiming that its goods are better than his competitor, he cannot say that the competitor's goods are bad. Thus, puffery is allowed, but slander and defamation of the goods of the competitor is impermissible. The proposed Print advertisement is only making a comparison with the generic product "Chyawanprash" where a declaration is being given that the product of the Defendant does not contain sugar. The impugned advertisement in its modified version is highlighting the benefits of the sugar free variant. Plaintiff's contention that Chyawanprash has been shown to be bad or unhealthy is misplaced. The way I see it, the modified advertisement only gives the information and a choice or option to the viewers/consumers who would like to buy a product that is giving the benefit of Chyawanprash without sugar. The comparison in the present case is inevitable. The benefit of a product without sugar can be best showcased by juxtaposing with the variant that has sugar in it. The question whether the sugar free variant is indeed a healthier option, is being left for the consumer to decide. But, certainly it cannot be said that the advertisement is in any manner implying disparagement of "Chyawanprash" generically.
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> 36. The Court also has to recogonize that the framework of the advertisements is designed with the objective to sway the consumers and coax them to buying a particular product or service. Advertisements are

used to artistically express and convey the messages to the public. There is bound to be creativity, pun and a storyline in such messages, so that it creates an impact on the viewers or the readers. To keep the story engrossing, companies indulge in making comparisons, to claim that they are better than the rest. Some leeway has always to be given to the advertiser, but at the same time right to free speech cannot be stretched to allow them to become defamatory, disparaging or denigrating. One cannot ignore the fundamental characteristic of comparative advertisements is appraisal by contrasting the products. There will often be an element of negative or adversarial comparison. This is the natural outcome or byproduct of "comparison". Defendant has to be allowed to manifest the differentiators in the competing products and also to give justifications for encouraging the consumers to prefer its product over that of the competitors. The intent behind the comparative advertisements will invariably be to persuade the consumers to give preference to one of the competing products. Such advertisements either expressly or subtly make a claim that the product of the advertiser is a better choice. This is permissible in law. The advertisements in question do nothing more than that. The paramount consideration for the Court to discern disparagement is to go into the heart of the matter and see the impact and impression the advertisements create. This simple aspect should not be made complex. I am not suggesting that Court should take a view instinctively. Of course, in order to decide the question, the Court would have to reflect, inquire and assimilate all the relevant factors, but the crux of the matter is always the intent and effect, that I have described as "look and feel". The Courts, guided by principles enunciated in judicial precedents, should test the merits of the claims of challenge by evaluation of the message and effect of the advertisements. The comparative advertising campaign should thus be 'comparison positive'. Advertisements often contain valuable information for the consumers and can promote healthy competition in the market. If this is the message conveyed, the courts would be resilient and allow the negative derivatives of comparison. This is because the final outcome is positive. However if it can be gauged that the message broadly demonstrates slanderous or indiscriminate negative comparison or insinuation, Courts should not be slow in ensuring that such messages do not spread. If it does hurt or annoy the Plaintiff, it is nothing but display of an over sensitive approach, that can't be helped."

9. In the case of ***Reckitt Benckiser (India) Pvt. Ltd. –v- Hindustan Lever Limited*** reported in ***151 (2008) DLT 650*** it was held by a Single Bench, presided by Badar Durrez Ahmed, J, of the Hon'ble Delhi High Court that indulging in "good v. bad" comparison that denigrates and disparages the product of the plaintiff is not allowed. Further, it was observed by the court that a mere promotion of superiority of the

product will not be considered disparaging as it entails a permissible "better or best" statement. Relevant paragraph of the judgement is extracted below:

> "37. From this discussion, it is apparent that the advertisement disparages the plaintiffs soap and it is not an advertisement which seeks merely or only to promote the superiority of the defendant's LIFEBUOY soap over an ordinary antiseptic soap. As I have already pointed out, if it were a case of mere promotion of superiority of the defendant's product, alone, the plaintiff would not have had a case as that would have only entailed a permissible "better" or "best" statement. The advertisement comprises of two parts: one which denigrates and disparages the product of the plaintiff and the other which promotes the purported superiority of defendant's LIFEBUOY soap. The part that disparages does so because it indulges in the "good versus bad" comparison. The "good" being the defendant's LIFEBUOY Skin-guard and the "bad" being the orange coloured bar of soap which has been identified, as discussed under Issue No. 1, as the plaintiffs DETTOL Original soap."

10. In the case of ***Marico Limited –v- Dabur India Limited*** reported in ***(2021) 85 PTC 83*** it was observed by a Single Bench, presided by S.C. Gupte, J., of the Hon'ble Bombay High Court that if the impugned advertisement of 'Amla Hair Oil' released by the defendant portrays that other products of "Amla Hair Oil" that are priced lesser than the defendant's product and are inferior in quality or that it lead to hair fall or hair breakage then in such a situation the advertisement campaign would fall under the ambit of disparagement. The Court applied the test of reasonable/ordinary man while examining the advertisement and came to the conclusion that the advertisement did not denigrate the product of the plaintiff, and accordingly refused the injunction prayed for. Relevant paragraph of the judgment is delineated below:

> "8. First of all, this Court cannot persuade itself to believe that in substance, the impression sought to be conveyed to an ordinary man on the street or buyer of the goods in question is that all products of 'Amla Hair Oil', which are priced lesser than the Plaintiff's 'Amla Hair Oil', are

inferior in quality or that they lead to hair fall or hair breakage. That certainly, in my opinion, is not the impression meant to be conveyed or is likely to be conveyed to a reasonable man on the street or an ordinary consumer of the subject goods. The Defendant, of course, as I have noted above, may be said to have meant to use the words 'cheap oil' or *'sasta tel'* as suggestive of lesser price and not necessarily of inferior quality. It is, certainly arguable, as Mr. Tulzapurkar suggests, that the word here conveys both meanings; it may, in fact, in that sense have been used tongue in cheek; but it, by no means, suggests that what the advertisement disparages are products of lesser price as a class. What the advertisement, taken at its plain face value, conveys is that there could be products which are cheap (that is, of lesser price), but the consumers better beware-these might be cheap, not just in terms of price, but even in terms of quality; these might yet be harmful and lead to conditions such as hair fall or hair breakage. In comparison, the Plaintiff's products are shown as True Amla', that is to say, of a purer variety. There is no disparagement in this of the whole range of cheaper (in terms of price) variety of amla hair oil generally, much less of any one product in particular, or, for that matter, the Plaintiff's amla hair oil. All that this suggests is that the Defendant, in its advertisements, calls upon consumers to pay more attention to quality rather than go merely by price. The disparagement, in other words, if at all there is any, is of products, which are 'cheap', not just in terms of price, but also of quality. It may well be that both senses of the word 'cheap' or *'sasta'* are invoked in the present case to convey the above. Ambivalence such as this, refected in the copy, actually lends literary merit or artistic value or adds punch to the advertisement. There is no suggestion here, as Mr. Tulzapurkar suggests, that all products of lesser price are generally inferior, much less that the Plaintiff's product in particular is inferior."

11. In the case of ***Heinz India Private Limited –v- Glaxo Smithkline Consumer Healthcare Limited & Ors.*** reported in ***(2009) 2 CHN 479*** it was held by the Division Bench, comprising of Surinder Singh Nijjar, J. and Biswanath Somadder, J., of this Hon'ble Court that a tradesman can say that his goods are better than those of the rival. But when the impugned statement in the advertisement falls between the two extremes i.e. puffery and disparagement, the test is to ask the alleged infringer whether they have pointed to a specific allegation of some defect or demerit in the competitor's product and if such be the case an

action would lie if the said assertion is false. Relevant paragraph of the judgment is presented below:

> "It is also held by the House of Lords that in cases where the statement falls between the extremes, in order to draw the line, one must apply the test, whether a reasonable man would take the claim being made as being a serious claim or not. A possible alternative test is to ask whether the defendants have pointed to a specific allegation of some defect or demerit in the plaintiff's goods. These observations clearly tend to show that in case the claim would be seen by the reasonable man as a serious assertion and the assertion is false, the action would lie. The same proposition has been reiterated in the case of *Reckitt & Colman of India Ltd.* (supra). It has been observed as under:-
>
> (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 repetition of such defamation."

12. In the case of ***Dabur India Ltd. –v- Wipro Limited, Bangalore*** reported in ***(2006) PTC 677 (Del)*** it was held by a Single Bench, presided by Madan B. Lokur, J., of the Hon'ble Delhi High Court that an advertisement that involves comparison between two products, the hidden message in such advertisement may be that the product of the plaintiff is inferior to that of the defendant but that will always happen in case of a comparison. As per law, it is permissible for an advertiser to proclaim that its product is the best. This does not necessarily imply that all other similar products are inferior. Relevant paragraphs of the judgement are mentioned below:

"22. The intent of the commercial is to suggest that the product of the defendant, that is, Wipro Sanjivani Honey is far superior to that of the plaintiff, that is, Dabur Honey. While doing so, the commercial does not denigrate or disparage the product of the plaintiff—it merely compares the two brands of honey and proclaims that the product of the defendant is superior. It seems to me that it is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to that of the defendant. The commercial clearly intends to say (and so it does) that as compared to the product of the plaintiff, the product of the defendant is far better. The hidden message in this may be that the product of the plaintiff is inferior to that of the defendant but that will always happen in a case of comparison—while comparing two products, the advertised product will but naturally have to be shown as better. The law, as accepted by this Court, is that it is permissible for an advertiser to proclaim that its product is the best. This necessarily implies that all other similar products are inferior.

23. In comparative advertising, a consumer may look at a commercial from a particular point of view and come to a conclusion that one product is superior to the other, while another consumer may look at the same commercial from another point of view and come to a conclusion that one product is inferior to the other. Disparagement of a product should be defamatory or should border on defamation, a view that has consistently been endorsed by this Court. In other words, the degree of disparagement must be such that it would tantamount to, or almost tantamount to defamation. In the present case, the overall audio-visual impact does not leave an impression that the story line of the commercial and the message that is sought to be conveyed by it is that Dabur Honey is being denigrated, but rather that Wipro Sanjivani Honey is better.

....

....

25. A manufacturer of a product ought not to be hypersensitive in such matters. It is necessary to remember that market forces are far stronger than the best advertisements. If a product is good and can stand up to be counted, adverse advertising may temporarily damage its market acceptability, but certainly not in the long run."

13. In the case of ***Dabur India Ltd. –v- Emami Ltd.*** reported in ***2004 (75) DRJ 356*** it was held by a Single Bench, presided by Dr. Mukundakam Sharma, J., of the Hon'ble Delhi High Court that even if there is no direct reference to the product of the plaintiff, a reference is made to the entire class of Chyawanprash in its generic sense and in such circumstances disparagement is possible. Relevant paragraphs of the judgement are presented below:

"7. In the light of the aforesaid legal position, I have to scrutinize and examine the position in the present case to come to a conclusion as to whether or not an injunction should be granted in favour of the plaintiff, as prayed for, for any disparagement or defamation or insinuation to the goods of the plaintiff in the advertisement in question. The aforesaid advertisement appears on the electronic media for a few seconds and it shows Sunny Deol saying that Chayawanprash is not to be taken in the summer months and instead Amritprash is to be taken. The message that is sought to be conveyed by the aforesaid T.V commercial is that consumption of Chayawanprash during the summer months is not advisable and Amritprash is more effective substitute for Chayawanprash in summer season. The plaintiff is manufacturing and marketing and has a market share of 63% of the total market of Chayawanprash throughout India and, therefore, is vitally interested in seeing that Chayawanprash is sold through India during all the seasons. If, on the other hand, the said product is sold and marketed only for a few months of the year and not throughout the year the business of the plaintiff is going to be vitally and prejudicially affected. It is also brought on record that the defendant has a market share of about 12% of the total market in Chayawanprash throughout India whereas in the market of Amritprash, which is a new product being brought out by the defendant, there is no other competitor in the market. Therefore, what is sought to be done by the defendant is to forbid and exclude user of Chayawanprash during the summer months so that it can exclusively capture the Indian market during the summer months, which is sought to be done by sending a message that consumption of Chayawanprash during the summer season serves no purpose and Amritprash is more effective substitute thereof and thereby attempting to induce an unwary consumer into believing that Chayawanprash should not be taken in summer months at all and Amritprash is the substitute for it. The aforesaid effort on the part of the defendant would be definitely a disparagement of the product Chayawanprash and even in generic term the same would adversely affect the product of the plaintiff. The presence of the defendant in the market is only to the extent of 12% of the total market of Chayawanprash in India whereas the plaintiff has about 67% share/presence in the Indian market and if sale of Chayawanprash is weeded out from the market during the summer months, the plaintiffs presence in the market for sale of Chayawanprash is adversely affected. In my considered opinion, even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of Chayawanprash in its generic sense, even in those circumstances disparagement is possible. There is insinuation against user of Chayawanprash during the summer months, in the advertisement in question, for Dabur Chayawanprash is also a Chayawanprash as against which disparagement is made. To the same effect is the judgment of the Calcutta High Court in *Reckitt & Colman of India Limited* v. *M.P. Ram-chandran & Another* (supra).

....

....

9. In my considered opinion, when the defendant is propagating in the advertisement that there should be no consumption of Chayawanprash during the summer months, it is also propagating that the plaintiffs Chayawanprash should not also be taken during the summer months as it is not good for health and instead Amritprash, which is the defendant's product, should be taken. Such an advertisement is clearly disparaging to

the product of the plaintiff as there is an element of insinuation present in the said advertisement."

14. In the case of ***Dabur India Limited –v- Colgate Palmolive India Ltd.*** reported in ***2004 (77) DRJ 415***, a Single Bench of the Hon'ble Delhi High presided by Mukul Mudal, J. reiterated the law on generic disparagement and held that generic disparagement of rival product without specifically identifying or pin pointing the rival product is objectionable and clever advertising can indeed hit a rival product without specifically referring to it. Relevant paragraphs of the judgment are presented below:

> "10. *Prima facie*, I am of the view that the offending advertisement is clearly covered by the fourth principle set out in the two judgments of Single Judges of this Court noted above. Slandering of a rival product as bad is not permissible. I respectfully agree with the views of the two Single Judges and indeed am bound by such decisions.
>
> 11. According to the counsel for the plaintiff, a learned Single Judge in Dabur India (supra) has followed the Calcutta High Court judgment in Reckitt Coleman (supra) and specifically held that a generic disparagement would entitle even a plaintiff with 12% market share to complain and the present plaintiff with 80% share of the market of the decried generic product is thus entitle to impugn advertisements which disparage the generic product.
>
> 12. In my view the law relating to generic disparagement of a specified commodity and the entitlement of one of such unidentified manufacture of such decried product is settled by Dabur's judgment following the Reckitt Coleman judgment. The Dabur's judgment (supra) indeed in paragraph 9 refers specifically to and proscribes generic disparagement.
>
> 13. While Mr. Rohtagi is right in submitting that the generic disparagement was not to be found in the judgment of the learned Single Judge in Reckitt & Coleman's case (supra) which was followed in Dabur's case, yet I am of the view that the position of law about generic disparagement in Dabur's case was not only justified but also warranted. Even if the ratio of the two learned Single Judges' judgments of this Court is considered to be only in respect of an identified product, in principle there is no reason why the manufacturer of a disparaged product, which though not identified by name, cannot complain of and seek to injunct such disparagement.

....

....

19. I am further of the view that generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or genre of a produce within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified. In this context the plaintiff has rightly rejected the offer of the defendant to drop the container from its advertisement so as to avoid the averred identification of the plaintiff's product."

15. Upon a close and conjoint examination of the judgements cited by the parties, in my view, certain undisputable principles emerge. The key principles that are required to be kept in the Court's mind before deciding on whether the offending advertisement is disparaging or is a mere puffery are elucidated below :-

a) While deciding the issue of disparagement the court has to apply the reasonable man test, that is, whether a reasonable man would take the claim being made as being a serious claim or not.

b) The impugned advertisement campaign has to be looked into with a broader perspective to decide whether a serious comparison is made by the alleged infringer.

c) The comparison in the nature of "Better or Best" based on truthful claims is permitted, but comparison in the nature of "Good v. Bad" is not.

d) The impact and impression of the impugned advertisements has to be examined and if it gives out an impression that the rival product has a defect or demerit (which is not true) then such impression would make it disparaging.

e) The comparison between rival products is allowed only to the extent of "Puff" and honest trade practice. Any malicious or deliberate depiction of rival product in a bad taste is not permitted.

f) Generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable, clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or genre of a product within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified.

g) The comparative advertising campaign should be 'comparison positive'. If the advertisements contain valuable information for the consumers and can promote healthy competition in the market, the courts should be resilient and allow the negative derivatives of such comparison. This is because the final outcome is positive. However if it can be gauged that the message broadly demonstrates slanderous or indiscriminate negative comparison or insinuation, Courts should not be slow in ensuring that such messages do not spread.

16. In ***Hindustan Unilever Limited (supra)***, the court dealt with the impugned advertisement of kitchen cleaning liquid. The petitioner was successful in getting relief from the court because the nature of advertisement was serious. The two rival products were compared with each other in a manner which highlighted that the advertised product is far superior in cleaning the dishes as compared to its rival. The

superiority of the advertised product was established by pointing and insinuating that the rival product is deficient and lacks cleaning property. Overall impression of the advertisement portrayed the rival product in a bad light and the claim with regard to deficiencies of the rival product was not established as a true statement by the advertiser. In light of such facts, the court held that the comparison of qualities was not in the nature of a "puff", moreover, the court held that advertising data, figures etc. of the rival products should not be permitted. **The above case squarely applies to the present dispute because the comparison made by the defendant/respondent is specifically pointing towards deficiency of the other rival products including the petitioner's product. Moreover, the claim made by the defendant/respondent with regard to number of ingredients of the rival product is false and misleading**.

17. The argument raised by the Counsel for the respondent with regard to generic disparagement that the impugned advertisements do not identify petitioner's product is not relevant because it is obvious that the petitioner being the leading brand in the market with 63 % share will be hit the most by such serious comparison. The above finding is in consonance with the ratio of ***Hindustan Unilever Limited (supra)*** and ***Emami Ltd. (supra)*** reported in ***2004 (75) DRJ 356***. Therefore, the argument made by defendant with regard to no specific identification of petitioner's product does not hold water.

18. In ***Dabur India Ltd. (supra)*** reported in ***(2019) 261 DLT 474***, relied on by the defendant, the court dealt with a comparison between a sugar-free Chyawanprash and a normal Chyawanprash. It decided the issue in favour of the defendant advertiser because the impugned advertisement only sent an impactful message that Chyawanprash, as a matter of fact, contains 50 % sugar. In such a case, the defendant's right of free speech permits it to state the benefits of its product and is also entitled to make the comparison to such extent. However, in the present case, the defendant did not exercise its right to free speech in an honest manner. **When the defendant highlights that other Chyawanprash contain only 42 ingredients, which is an untrue statement, it cannot claim right to free speech as the same is not allowed to communicate untruthful facts about the other rival products**. Hence, the present case does not help the defendant in any manner. The case of ***Tata Press Limited (supra)***, relied on by the defendant/respondent with regard to the right to free speech is also not applicable due to the above reason.

19. The other cases relied on by the defendant do not apply to the present fact scenario. The case of ***M/s Colortek Meghalaya (supra)*** is not applicable to the present case and it is distinguishable on facts. The advertisement in that case did not target the product overtly or covertly. The advertisement was playing around the grey area which is permissible as per the law. **However, in the present case, direct comparison of number of ingredients between the two products is**

not in the realm of grey area as it points towards the very composition and data of the generic product available in the market. Furthermore, the comparison with a number of ingredients, that is, 42 ingredients, is malicious and slanderous as the product cannot be complete with 42 ingredients and the product of Chyawanprash in the market are all having at least 47 ingredients as per the Drugs and Cosmetics Act, 1940. Ergo, a comparison with a fictitious number that is lesser than the minimum requirement, insinuates that those products are not in compliance with the Drugs and Cosmetics Act, 1940. Such a comparison is slanderous and mischievous, and accordingly, amounts to disparagement.

Conclusion:

20. Annexure "I" is in the form of a comparative chart issued by the respondent on its website and also made available for viewership on e-commerce websites including Amazon Flipkart, Snapdeal, etc. The respondent in this advertisement claims that Baidhyanath Chyawanprash Special is "enriched with 52 Ayurvedic herbs" whereas "ordinary Chyawanprash" are made "with 42 ingredients only"; thereby suggesting to an unsuspecting consumer that Ordinary Chyawanprash are incomplete or deficient. In my view, such comparison falls under the ambit of "negative comparison" because it portraits Dabur Chyawanprash as inferior or lacking in ten more ingredients that are allegedly essential for it to be complete. The statement made by the

defendant/respondent is not positive because calling other Chyawanprash in the market as "ordinary" or "incomplete" is serious comparison which is not protected as commercial speech under the law. More importantly, the comparison made in the above advertisement is based on false information as the respondent has admitted in its affidavit that its product has qualities of "52 ingredients" and does not contain "52 herbs". Furthermore, the comparison with "42 ingredients" is not proper and is misleading the consumers. Mr. Biala has fairly submitted before the Court that the advertisement does contain false and misleading statements. Therefore, this advertisement is permanently injuncted.

21. Annexure "J" refers to other Chyawanprash including Dabur Chyawanprash as "Ordinary" or "Aam" (in Hindi) and raises a question "whether your Chyawanprash is complete" (i.e., "kya aapka Chyawanprash Sampoorn hai?, in Hindi). The question gives a direct/indirect impression that other Chyawanprash (which are "ordinary") are deficient Ayurvedic medicine formulations, not made as per the traditional recipe and they do not provide immunity, extra energy or help sharp brain growth, while only Baidhyanath Chyawanprash is "Special", complete, and provides immunity, extra energy and helps sharp brain growth. The argument made by the defendant that it has not depicted petitioner's product anywhere in the advertisement is not tenable as the entire advertisement has to be looked at through a broader perspective and through the eyes of an

ordinary consumer. Usage of the word "ordinary" ('Aam' in Hindi) and "others" ('Oron' in Hindi) does include petitioner's product as well. Advertisement campaigns of such nature do not only affect the petitioner that has substantial part of market share, but also identifies all other products as inferior. Furthermore, the comparison with 42 ingredients is a false one and disparaging in nature (as explained in paragraph 19). In my view, the first part of the advertisement in relation to the question "kya aapka Chyawanprash Sampoorn hai (translates in English as "whether your Chyawanprash is complete?" is only puffery and highlights the product of the defendant only. In the event the comparison to "42 ingredients" is removed, the advertisement would not be disparaging. Accordingly, the advertisement in its present form is injuncted. However, if the defendant removes the reference to "42 ingredients", the advertisement may be displayed in future.

22. In Annexure "K", the respondent refers to its product as "complete" (Sampoorn in Hindi) to convey that Chyawanprash comprising of 52 ingredients is "complete". The advertisement further communicates that respondent's product is made with 100% pure ghee while others are made with a mixture of vegetable oil and ghee. In my view this comparison would not be disparaging as the same is based on a true statement. Dabur Chyawanprash contains 'til oil' which is derived from 'til seeds', that is, sesame seeds. Sesame oil or 'til oil' is indeed an edible vegetable oil derived from sesame seeds. Ergo, the statement of the defendant is not false. Accordingly, this comparison of '100 % pure ghee'

with 'a mixture of vegetable oil and ghee' is not disparaging. However, the comparison of 42 ingredients is based on a false statement and is disparaging in nature. (as explained in paragraph 19) In the event the comparison to "42 ingredients" is removed, the advertisement would not be disparaging. Accordingly, the advertisement in its present form is injuncted. However, if the defendant removes the reference to "42 ingredients", the advertisement may be displayed in future.

23. In Annexure "L", the respondent claims through an L- band television advertisement that "Complete Chyawanprash is the one that is formulated as per correct formulation" ("Sampoorn Chyawanprash wahi, jiski vidhi ho sahi!" in Hindi). The primary distinction between Annexure "L" and Annexure "J" and "K" is that there is no mention of the comparison of ingredients between two different products of the parties i.e. Dabur & Baidyanath. In Annexure "L", there is no "negative comparison" between the products with respect to oil content of the Chyawanprash i.e. vegetable oil or ghee etc., it only highlights a generic statement about completeness of the Chyawanprash. The broad message that could be inferred from the advertisement is not of the nature that puts the petitioner's product on a lower pedestal. Thus, in my view, it would not qualify as disparagement.

24. Lastly, in Annexure "M", the respondent publishes a full-fledged video on social media on its official YouTube channel. In this video, there is a comparison between Respondent's Chyawanprash and other

Chyawanprash. In the advertisement, husband walks into the living room with a bag containing grocery items in his hand. When the wife takes out the bottle of Chyawanprash from the grocery bag, the label read “Chyawanprash ‘42 ingredients’ ”. After looking at the product the wife is shocked and disappointed to see that her husband has bought ordinary “Chyawanprash” with only “42 ingredients”. After that, she questions the choice of her husband by asking him the name of Chyawanprash to which the husband responds that it does not matter and thereafter he continues to watch cricket and says that his team has to make only 52 run to win. After this, the wife is flabbergasted with her husband’s ignorance & choice of Chyawanprash and correlates the ingredients of ordinary Chyawanprash with the ongoing cricket match and poses a question: What if the team scores only 42 runs? To this question, the husband mockingly responds that 52 runs are required and not just 42. Thereafter, the wife states that just like your cricket match, to prevent illness, we need the power of total of 52 Ayurvedic ingredients and not just 42, only then we will win. The entire chain of events in the video advertisement points out to the comparison which has been drawn by the respondent in the previous print versions of the campaign. Unlike the previous print advertisements, this video advertisement has a higher degree of serious comparison which portrays the other rival Chyawanprash brands in a bad light. The message which is being conveyed to the ordinary consumer is that in order to qualify to be a complete Chyawanprash one must consume the complete

Chyawanprash with all the necessary 52 ingredients otherwise it will not be beneficial for their health.

25. A misleading advertising, as the term implies, is one that deceives, manipulates, or is likely to deceive or manipulate the consumer. These commercials have the potential to influence consumer's purchase preference in the market and it also harms its rivals, hence, they must be used with caution. There should be a balance between the right of commercial speech and the interest of public and competitors. In the present case, the video advertisement is, to a large extent, misleading. As agreed by both the parties that comparative advertisement within the gambit of puffery under the law is allowed. **The problem however, in my view, arises when a bottle highlighting 42 ingredients and labeled as 'Chyawanprash' is shown in the respondent's advertisement. Under Section 3 (a) of the Drugs & Cosmetic Act, 1940 and as agreed by both parties, there can be no Chyawanprash available in the market with 42 ingredients. The ayurvedic texts prescribed and approved under the First Schedule of the Act lays down a minimum of 47 ayurvedic ingredients that are required for the product to qualify as "Chyawanprash"**. By showing 42 ingredients on the bottle of Chyawanprash, and thereafter, referring to the same in comparison to 52 ingredients at two crucial junctures in the advertisement, the defendant falls with the realm of slander as the advertisement clearly compares its own product with other 'Chyawanprash' that contain only 42 ingredients. As pointed out in

paragraph 19 above, reference to the number '42' is not permissible as 'Chyawanprash' cannot be made with only 42 ingredients and would not qualify as a 'Chyawanprash' as per Drugs and Cosmetics Act, 1940. The very statement that Chyawanprash is available in the market with '42 ingredients' is a mischievous and false statement that would create confusion in the minds of the general public. The reference to '42 ingredients' is an innuendo that the Chyawanprash of all other brands is an incomplete formulation and is not 'Chyawanprash' at all. Such a comparison is not only deleterious but a factually false statement that denigrates all other brands of Chyawanprash. Precedents cited by both parties make it clear that true statements can be made even if it denigrates the rival's product, but false and misleading statements cannot be allowed under the guise of free speech. In light of the same, this video advertisement is disparaging and an action from this Court would lie. In light of the reasons provided above, this video advertisement is permanently injuncted. However, keeping in mind the various precedents cited by both the parties, and on suggestions that had fallen from the Bar, a modified version of the video advertisement may be allowed on the following conditions:

a) The bottle that is shown in the 6th second of the advertisement shall only have the printed words "CHYAWANPRASH" and no other word;

b) The reference to the words "42 nahi" in the 29th to 31st second of advertisement shall also be removed.

In the event the above changes are made, the advertisement shall be permitted to be shown on television, social media and other platforms.

26. Hence, based on the above discussion, to summarize, I am passing the following orders on the impugned advertisements in the following manner:

a) Annexure "I" is permanently injuncted.

b) Annexure "J" is permanently injuncted in the present form. However, this advertisement can be printed after removal of the reference to "42 ingredients".

c) Annexure "K" is permanently injuncted in the present form. However, this advertisement can be printed after removal of the reference to "42 ingredients".

d) Annexure "L" is **NOT** injuncted.

e) Annexure "M" is permanently injuncted. However, if the changes suggested in paragraph 25 are made, the advertisement can be permitted to be shown on television, social media and other platforms.

27. With the above directions I.A. G.A. No. 1 of 2021 in C.S. No 232 of 2021 is disposed of.

28. I would go amiss if I do not state my sincere appreciation for the dexterous and assiduous efforts of Counsel appearing on behalf of both sides. A special mention for Mr. Biala, Counsel appearing for the

defendant/respondent for his painstaking efforts in skillfully putting forth the defendant's case.

29. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)