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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 9th May 2023
Pronounced on: 18th May 2023

\+ CS(COMM) 258/2023

RECKITT BENCKISER (INDIA) PVT. LIMITED & ANR.
..... Plaintiffs

Through: Mr. C.M. Lall, Sr. Adv. with Ms. Nancy Roy, Ms. Aastha Kakkar, Mr. Prashant, Ms. Nida Khanam and Ms. Ananya Chug, Advs.

versus

WIPRO ENTERPRISES (P) LIMITED ..... Defendant

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Ankur Sangal, Ms. Pragya Mishra, Ms. Trisha Nag, Ms. Sanya Kumar and Ms. Asavari Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T

% 18.05.2023

I.A. 8257/2023 (*Order XXXIX Rules 1 and 2 of the CPC*)

1. An adorable young girl (no child should be left nameless, and so we shall call her Priya) wants to play with her mother. Priya's mother has, however, been gardening, and her hands are rough and dirty. She washes her hands with Santoor Hand Wash, a product of the defendant. Having washed her hands, she goes to play with her daughter. Priya is amazed at the softness of her mother's hands. While Priya coaxes her mother into continuing to play with her, a voice over announces: "*haath itne soft ki chhodne ka mann na kare*" (*the hands are so soft that you do not feel like leaving them*). Priya's

mother lovingly caresses her daughter's cheeks. Thus far, one has viewed a warm and endearing picture of parental love and domestic bliss. It is what happens thereafter that has raised the shackles of the plaintiff and provoked him to approach this Court, bristling with ire.

2. After caressing Priya's cheeks, her mother removes, from the shelf, a plastic bottle, labelled "ordinary hand wash". The bottle bears the shape of the plaintiff's Dettol Hand Wash, and Mr. Sibal, learned Senior Counsel for the defendants, frankly acknowledges that the product intended to be shown was indeed the plaintiff's Dettol Hand Wash. Having removed the "ordinary hand wash" from the shelf, Priya's mother replaces it with the defendant's Santoor Hand Wash, with which she had washed her hands. A voice-over announces, simultaneously, "*saadhaaran handwash ke muqable naye Santoor Handwash mein hain chandan ke gun jo rakhe haathon ko soft*" ("*as compared to ordinary hand washes, Santoor Hand Wash has, in it, the benefits of sandal, which keeps the hands soft*"). A second voice-over announces "*ab har sparsh mein komalta*" ("*now, softness in every touch*").

3. It is this advertisement which is the bone of contention in the present case.

4. The rival products shall be referred to as "Dettol" and "Santoor", for the sake of convenience.

5. The story board of the impugned advertisement is provided thus, for ready reference:

Screenshot	Voice over /Action
	DAUGHTER: *Mere sath khelo Mummy.* Translation: Mummy please play with me.
 	[Mother shown washing hands with SANTOOR handwash]

 	[Mother shown playing with her daughter]
	DAUGHTER [amazed by the softness of mother's hands]: So soft.
	DAUGHTER: *Phir se banao.* Translation: make it again.

 	VOICE OVER: *Haath itne soft ki chhodne ka mann na kare.* Translation: The hands are so soft that you do not feel like leaving them.
  	VOICE OVER: *Saadhaaran handwash ke muqable naye Santoor Handwash mein hai chandan ke gun jo rakhe haathon ko soft.* Translation: as compared to ordinary hand washes, Santoor Handwash has, in it, the benefits of sandal, which keeps the hands soft.

	VOICE OVER: *Ab har sparsh mein komalta.* SANTOOR HANDWASH. Translation: now, softness in every touch. Santoor Handwash.

6. The plaintiff Reckitt Benckiser (India) Pvt. Limited ("Reckitt", hereinafter), who manufactures Dettol, claims that the advertisement disparages its product. The defendant Wipro Enterprises (P) Ltd. ("Wipro", hereinafter) contends, *per contra*, that the advertisement does not disparage or denigrate Dettol in any manner, but merely extols Santoor. While acknowledging that, to some extent, the impugned advertisement does compare Santoor with Dettol, Mr. Sibal's contention is that the comparison is within well the permissible limits of comparative advertisement, and that the plaintiff is being hypersensitive.

7. The issue before the court is, therefore, elementary. Over a course of time, the principles relating to comparative advertisement, and its legitimate boundaries, stand delineated by several authoritative judicial pronouncements. All that the court is required to do is to cull out the principles which emerge from the said pronouncements and apply them to the facts of the present case. The inevitable outcome, in law, must follow.

8. Along with CS (Comm) 258/2023, instituted by Reckitt, seeking permanent injunction against telecasting, broadcasting or

publishing of the impugned advertisement, Reckitt has also filed IA 8257/2023, under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC), seeking interlocutory injunctive relief. Consequent to issuance of notice on the application, reply, thereto, stands filed by the Wipro and rejoinder, thereto, by the Reckitt.

9. With consent of learned Senior Counsel, both sides have been finally heard on IA 8257/2023 which is, accordingly, being disposed of by this judgment.

Rival contentions

10. Mr. Lall, learned Senior Counsel for Reckitt, contends that the capability of imparting softness to the skin is one of the main features which persuade customers to purchase hand washes. This, he submits, is especially so in the wake of the COVID-19 pandemic, during which many persons washed their hands repeatedly. Repeated washing of hands is known to result in roughness of the skin. As such, Mr. Lall's contention is that a customer would inevitably be attracted towards a hand wash which has greater skin softening/moisturising properties. The features of the impugned advertisement which, according to Mr. Lall, disparage Dettol are

(i) the amazement of the Priya at seeing how soft her mother's hands have become after washing with Santoor,

(ii) the removal of Dettol from the shelf, thereby indicating that, till then, her mother was using Dettol,

(iii) the replacement of the Dettol bottle with the Santoor bottle,

(iv) the conjoint effect of these two representations, which indicates that Priya's mother's hands were, prior to their being

washed with Santoor, not as soft, and, in effect, rubbishes Dettol as lacking moisturizing or hand softening properties,

(v) the word "ordinary" used with reference to Dettol, which indicates that Dettol was inferior to Santoor,

(vi) the act of Priya's mother in removing Dettol from the shelf and replacing it Santoor which, according to Mr. Lall, amounts to no less than rubbishing Dettol as lacking hand softening or moisturising properties, as compared to Santoor,

(vii) the voice-over, which is heard simultaneously with the act of removal, from the shelf, of Dettol and its replacement with Santoor, which, properly understood, indicates that Dettol is devoid of hand softening properties unlike Santoor, which is enriched with *chandan* (sandal) which softens the skin and

(viii) the subsequent voice-over which, by using the word *ab* (*now*), conveys the impression that it is only *now*, after Priya's mother has started using Santoor, that every touch is soft.

11. Mr. Lall submits that the impugned advertisement conveys an entirely incorrect message, that Dettol does not soften or moisturise the skin. He submits that, while it is true that Dettol does not possess sandal, it, nonetheless, is enriched with glycerine and lactic acid, both of which have softening/moisturising properties. He submits that the impression conveyed by the impugned advertisement is that sandal alone moisturises the skin and that, as the plaintiff's product does not have sandal, it has no skin softening/moisturising effect. This, he submits, would seriously impact the reputation of the plaintiff's product in the market, as a customer would, naturally, be inclined to purchase a hand wash which has skin softening/moisturising properties, as compared to one which does not.

12. Mr. Lall submits that the impugned advertisement far crosses the *lakshman rekha* of comparative advertisement. He submits that, while it is permissible for a manufacturer to compare his product with another's, he crosses the permissible line when he denigrates the latter product or claims the latter product not to have a beneficial effect which is possessed by his product, especially where such claim is incorrect on facts.

13. Puffery of one's product is permissible, submits Mr. Lall; denigration of the other is not. The statement, in the impugned advertisement, that the plaintiff's product does not have moisturising/skin softening ability, he submits, is *ex facie* denigrating and disparaging in nature.

14. In the backdrop of the message conveyed by the impugned advertisement, Mr. Lall submits that the word "ordinary" assumes an especial, and pejorative, significance.

15. Mr. Lall submits that the word "ordinary" has varying etymological connotations, depending on the context in which it is used. It is not always, he submits, that the word "ordinary" can be likened to "usual". If, for example, one advocate is, in comparison to another, stated to be "ordinary", Mr. Lall submits that the message that is conveyed is, clearly, that the latter advocate is superior to the former. Implicit in such an assertion is a denigration of the professional skills of the former advocate.

16. Mr. Lall has cited, in support of the stand that he adopts, on

(i) paras 11, 12, 14, 16, 17, 21 to 23 of ***Dabur India Ltd. v.***

Colortek Meghalaya[1],

(ii) paras 24 and 26 to 35 of ***Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Ltd.***[2],

(iii) paras 20 to 22, 29 to 37, 39, 41, 42, 45 to 48, 52 and 53 of ***Hindustan Unilever Ltd. v. Reckitt Benckiser (India) Pvt. Ltd***[3]**.**

(iv) paras 57 to 59 of ***Hindustan Unilever Ltd. v. Reckitt Benckiser (India) Pvt. Ltd.***[4]

(v) paras 26, 27, 29, 30, 34, 35, 39, 45 and 51 of ***Colgate Palmolive Company v. Hindustan Unilever Ltd.***[5]

(vi) paras 49, 56, 57, 63 to 65 of ***Reckitt Benckiser (India) Pvt. Ltd. v. Gillette India Ltd.***[6]

(vii) paras 94, 96 to 98, 100, 104, 107 to 109 and 116 of the judgment of the High Court of Madras in ***Gillette India Ltd. v. Reckitt Benckiser (India) Pvt. Ltd***[7]**.**

(viii) paras 13, 27, 35 and 36 of ***Gujarat Cooperative Milk Marketing Federation v. Hindustan Unilever Ltd***[8]**.**

(ix) paras 20, 25, 28, 30 to 32, 34 to 36 and 40 of ***USV Pvt. Ltd. v. Hindustan Unilever Ltd***[9]**.**

(x) para 12 of ***Reckitt Benckiser (India) Pvt. Ltd. v. P & G Hygiene and Healthcare Ltd.***[10] and

(xi) ***Reckitt Benckiser (India) Pvt. Ltd. Jyothy Laboratories Ltd***[11]**.**

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[1] **ILR (2010) (iv) Del 489**
[2] **2022 SCC OnLine Del 3094**
[3] **2023 SCC OnLine Del 2133**
[4] **207 (2014) DLT 713**
[5] **206 (2014) DLT 329 (DB)**
[6] **(2016) 160 DRJ SN 660**
[7] **2018 SCC OnLine Mad 1126**
[8] **2018 SCC OnLine Bom 7265**
[9] **2022 (91) PTC 533**
[10] Order dated 14th December 2015 in FAO(OS)(Comm) 622/2015

17. Responding to Mr. Lall's contentions, Mr. Akhil Sibal submits that the decisions cited by Mr. Lall are by themselves sufficient to defeat the plaintiff's case. He submits that each of the said decisions involved a situation in which the plaintiff's product was directly disparaged. Direct disparagement of a competitor's product is, he submits, completely impermissible. The distinction between the present case and the situations which obtained in the cases cited by Mr. Lall, he submits, is that, while the defendant has, in the course of comparing its product to that of the plaintiff, indulged in puffery and extolled the virtues of its product, it has not denigrated the product of the defendant in any way. The cases cited by Mr. Lall, on the other hand, he submits, involved situations in which, while puffing up their products, the defendant disparaged the products of the plaintiff.

18. The impugned advertisement, submits Mr. Sibal, does not at any point, allude to the properties of the plaintiff's Dettol Hand Wash. All that the impugned advertisement states, according to Mr. Sibal, is that

(i) the defendant's Santoor Hand Wash contains sandal,

(ii) the plaintiff's product does not contain sandal and

(iii) sandal has skin softening/moisturising properties.

19. Each of these statements, he states, is true. At no point, he submits, does the impugned advertisement state that the defendant's product does not contain softening or moisturising qualities. Reading, into the impugned advertisement, any such assertion, would, he submits, be reading into the advertisement much more than what it states, either expressly or by necessary implication.

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[11] **2017 SCC OnLine Del 13008**

20. Mr. Sibal submits that the USP of his client's Santoor Hand Wash product is that it is made out of natural ingredients, and based on Ayurveda. He submits that promotion of products involving natural ingredients, and prepared using Ayurvedic principles, is permissible. The defendant, he submits, is entitled to invite customers to prefer products containing natural ingredients over those which do not.

21. Every comparative advertisement, submits. Mr. Sibal, involves an exhortation, to a prospective customer, to choose the product of one person over another. That does not, however, amount to any kind of an indicator that the product of the latter is harmful in any way. Mr. Sibal draws attention, in this context, to an advertisement, contained on the defendant's website, promoting the defendant's Santoor soap, which reads thus:

> "For centuries, Sandal and Turmeric have been a part of skin care for Indian women. Taking this tradition forward, Santoor combines them in this soap to give you smooth and soft skin, with youthful radiance."

22. Apropos the act of Priya's mother in replacing Dettol with Santoor, Mr. Sibal submits that the time taken in such replacement, *vis-a-vis* the overall time consumed in advertisement, is minuscule. He submits that the plaintiff is making too much of the simple act of replacing Dettol with Santoor. The replacement, he submits, is only a physical manifestation of the message that Santoor, containing sandal and other natural ingredients is preferable to other products, which the advertisement seeks to convey and which is well within the permissible limits of comparative advertising.

23. In fact, submits Mr. Sibal, though the product which is removed from the shelf, and replaced with the defendant's Santoor Hand Wash, is deliberately made to resemble the plaintiff's Dettol Hand Wash, the advertisement is actually directed against all products which do not contain sandal and other such natural ingredients. It is in this context, he submits, that the advertisement uses the word "ordinary". The words "ordinary" and "common", when used in comparative advertising, he submits, are not disparaging in nature. They are merely intended to compare the product which is being advertised with other products. The use of the word "*chandan ke gun*" (benefits of sandal), he submits, clearly convey the message of the advertisement, which is that moisturising through natural ingredients is preferable to other moisturising elements. Apropos the word "ordinary", in this context, Mr. Sibal has also drawn attention to the dictionary meaning of the word "ordinary", which is as under:

> "Ordinary means usual, normal, or of no special quality.
>
> Sometimes, the word is used in a negative way to mean somewhat inferior, below average, or just plain—in much the same way as the word mediocre."

24. There is, therefore, submits Mr. Sibal, no direct disparaging representation of fact, in the impugned advertisement. The only two representations of fact, in the impugned advertisement, neither of which can be disputed, are that the defendant's product has sandal and that sandal moisturises.

25. Unlike the situation which arose in the cases cited by Mr. Lall, Mr. Sibal submits that there is no statistical comparison between the defendant's and the plaintiff's product, in the impugned advertisement. He distinguishes the present case, for example, with a case in which, in respect of a toilet cleaner, it is asserted, in the

advertisement, that the advertised product would keep the toilet clean for 100 flushes, as against another, clearly shown product, which keeps the toilet clean only for one flush. Similarly, submits Mr. Sibal, an advertisement which claims a product to be 130% more effective than the product of a competitor, is impermissible, as it contains a statement of fact, on the basis of which the rival product is alleged to be inferior.

26. The position in law, as Mr. Sibal contends, is that

(i) puffery is permissible,

(ii) puffery necessarily involves an element of comparison of one product with the other,

(iii) while comparing one product with the other, it is permissible to extol the product which is advertised, but not to denigrate the other product,

(iv) where, however, verifiable statements of fact, such as statistical comparisons are made, it is necessary that the comparison is factually true, failing which it would not be permissible.

27. The reason for this, submits Mr. Sibal, is that the consumer understands the difference between puffery and factual comparison. For example, he submits, when the impugned advertisement states "*ab har sparsh mein komalta*" ("*now softness in every touch*"), the discerning consumer understands that the message is not to be taken seriously or to mean that, if one uses Santoor Hand Wash, the skin would be rendered permanently soft to touch. Inasmuch as this amounts to mere extolling of Santoor and not to denigrating of Dettol, he submits that it is within the legitimate limits of puffery, and of

comparative advertisement. In the same advertisement, Mr. Sibal contrasts the statement that Santoor contains sandal, which moisturises the skin, and which is not contained in Dettol.

28. Both statements of fact, i.e., that Santoor contains sandal and that sandal moisturises the skin, he submits, would have been impermissible, had they not been true. However, as both these assertions are true, inasmuch as it is an undisputed fact that Dettol does not contain sandal and that sandal does indeed moisturise the skin, he submits that these statements of facts are also permissible.

29. Mr. Sibal emphasises that the impugned advertisement merely professes to state the result of using Santoor. It does not, in any manner, indicate the result of using Dettol; much less does it denigrate or disparage the said product.

30. Thus, submits Mr. Sibal, the ordinary meaning of "ordinary" is not pejorative in any manner, as it merely means "usual", "normal" or "of no special quality". Though the word "ordinary" may, in some special cases, have a negative connotation, there is no reason why a court should hold that, in the impugned advertisement, such a negative connotation is to be accorded to the word "ordinary" as used therein.

31. In support of his submissions, while distinguishing the cases cited by Mr. Lall, Mr. Sibal has placed reliance on

(i) Paras 14, 15, 18, 20, 21 and 22 of ***Dabur India Limited Vs. M/s Colortek Meghalaya Pvt. Ltd***[1]

(ii) ***Horlics Limited v. Heinz India Pvt. Ltd.*** [12]

[12] **256 (2019) DLT 468**

(iii) paras 9, 32, 35 and 36 of ***Dabur India Ltd. v. Emami Ltd.***[13]

(iv) paras 7,8, 12,13 and 22 of ***Dabur India Ltd. v. Wipro Ltd***[14]***.***

(v) paras 3, 8, 12 to 15, 18 and 21 to 24 of ***Marico Ltd. v. Adani Wilmar Ltd.***[15] and

(vi) paras 3, 10.1, 12.1 and 12.2 of ***Hindustan Unilever Ltd. v. Cavincare Pvt. Ltd***[16]***.***

32. Apropos Mr. Lall's contention that, as the plaintiff has a subsisting design registration for the design of its Dettol Hand Wash, the depiction, in the impugned advertisement of a bottle with an identical design – which Mr. Sibal acknowledged to be an overt depiction of the plaintiff's product – amounts to piracy of the plaintiff's registered design within the meaning of Section 22(1) of the Designs Act, Mr. Sibal submits that piracy occurs only where the infringing design is used in the context of sale of the product, and not otherwise.

33. The battlelines standing thus drawn, let us examine the legal position, as it emerges through various decisions handed down on the issue over time. The rival products are also parenthetically shown alongside the titles of the decisions.

Pepsi Co. Inc. v. Hindustan Coca Cola Ltd[17] (Pepsi v. Coke)

34. Pepsico (India) Holdings Ltd (PIHL), in this case, sued Hindustan Coca Cola Ltd (HCCL), *inter alia* for having disparaged

[13] **261 (2019) DLT 474**
[14] **(129) 2006 DLT 265**
[15] **2013 SCC OnLine Del 1513**
[16] **ILR (2010) V Del 748**

PIHL's cola drink Pepsi Cola ("Pepsi", hereinafter) in its Television Commercials (TVCs) for Thums Up, also a cola drink manufactured by HCCL.

35. The Division Bench of this Court recorded the essential features of the disputed TVCs thus, in paras 12 and 13 of the report:

> "12. … Take for example the commercial which is at page 30 (Annexure A) filed with the plaint which describes "PEPSI" as a "Bachhon Wali Drink" and the same is mocked at in the commercial and the message is "that the kids who want to grow up should drink "Thums Up." The entire commercial advertisement is shown to convey that the kids should prefer "Thums Up" as against "PEPSI", which is sweet and meant for small children and not grown up boys. The commercial shows that the lead actor asks a kid which is his favourite drink. He mutters the word "PEPSI", which can be seen from his lip movement though the same is muted. The lead actor thereafter asks the boy to taste two drinks in two different bottles covered with lid and the question asked by the lead actor is that "*Bacchon Ko Konsi pasand aayegi*".? After taste the boy points out to one drink and says that that drink would be liked by the children because it is sweet. In his words he says. "*Who meethi hain, Bacchon ko meethi cheese pasand hai*". He discredited the drink one which according to him has a sweet taste. He preferred the other drink which according to him tastes strong and that grown up people would prefer the same. At that point, the lead actor lifts the lid from both the bottles and the one which is said to be strong taste reveals to be "Thums Up", and one which is sweet, word "PAPPI" is written on the bottle with a globe device and the colour that of the "PEPSI". Realising that he had at the initial stage given his preference for "PEPSI" and subsequently finding it to be a drink for kids, the boy felt embarrassed. This embarrassment gesture he depicts by putting his hands on his head.
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> 13. Second advertisement which appears at pages 35-45 (Annexure B) filed with the plaint is another commercial advertisement in which the star actor asks the audience. "*Ek Sawaal do glass. Bacchon ko konsi drink pasand aayegi?*" As in the first commercial, in this commercial also the drinks are covered and one described as a sweet drink called "*Bacchonwala*" and the bottle comparing the Globe Device and the mark "PAPPI". Like in the first advertisement, in this also the boy covers his head with his arms and hands in the gesture of embarrassment. Then there is another commercial advertisement at pages 46-50 and at page 51 as Annexures C and D of the plaint. These two commercial

[17] **2003 (27) PTC 305**

> advertisements are on the same line as the earlier one. The word "PEPSI" is uttered in muted way. Similarly the globe device and the mark "PAPPI" is used on the bottle. On the choice of the boy for Peppi i.e. Pepsi the lead actor mockingly says, "Wrong Choice Baby". In these commercials the bottle which resembles "PEPSI" and is referred to as "PAPPI" is termed as "*Bacchon Wali*". "Thums Up" is referred to as "*Bado Ke Liye and Damdar Hai*". Pepsi is projected to be a drink for kids, as it is "Sweet"."

36. At the outset, this Court noted that, though the label on the bottle which the child rejected read 'PAPPI', the logo on the bottle, its shape and other features clearly indicated that the bottle was intended to represent PIHL's Pepsi.

37. Thereafter, the Court noted the etymological meaning of "disparagement", thus (in para 11 of the report):

> "11. What is disparagement. The New International Websters' Comprehensive Dictionary defines disparage/disparagement to mean, "to speak of slightingly, undersvalue, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation." The Concise Oxford Dictionary defines disparage as under, to bring dis-credit on, slightingly of and depreciate."
>
> (Emphasis supplied)

The Court held that, to decide the question of disparagement, the Court was required to consider (i) the intent of the commercial, (ii) the manner of the commercial and (iii) the story line of the commercial and the message that it sought to convey. The Court held that "if the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable". Following the precedents in ***Hindustan Lever v.***

Colgate Palmolive (I) Ltd[18]***, Reckitt & Colman of India Ltd v. M.P. Ramachandran***[19] and ***Reckitt & Colman of India v. Kiwi TTK Ltd***[20], this Court set out the legal position thus:

> "15. After analysing the submissions made by the counsel for the parties the picture which emerges can be summed up thus; it is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior."

38. The Court, thereafter, proceeded to hold, on the following reasoning, that the advertisements under challenge indeed disparaged Pepsi:

> "16. *By calling the Cola drink of the appellants "Yeh Bacchon Wali Hai. Bacchon Ko Yeh Pasand Aayegi", "Wrong Choice Baby", the respondents depicted the commercial in a derogatory and mocking manner. It can't be called puffing up. Repeatedly telecasting this commercial will leave an impression on the mind of the viewers that product of the appellant i.e. "PEPSI" is simply a sweet thing not meant for grown up or growing children. If they choose PEPSI, it would be a wrong choice. The message is that kids who want to grow should not drink "PEPSI". They should grow up with "Thums Up". The manner in which this message is conveyed does show disparagement of the appellant's product.*
>
> 17. In one of the commercial the lead actor appears on the screen and asks two boys to come on the stage and point out their favourite drink. One of the boy indicated his preference by mouthing of the word "PEPSI". He was asked by the lead actor to taste the drink from both the bottles which were covered by the glasses. After taking a sip from each of the bottle, that boy gave preference of one over the other. When the reason for the preference was asked, the boy tells that one of them is a sweet drink meant for children and uses the word *"Yeh Meethi hein. Bachhon Ko Meethi Pasand Ahi" "Yeh Bachhon wali hei"* (it is sweet, children like sweets. It is meant for children). The moment it is said, the lid is lifted up by lead Actor from the bottles. The drink which the boy says *"Bachhon wali"* meant for children, on that it is written "PAPPI". The other bottle is of Thums Up. The comparison is in fact between Pepsi and "Thums Up". *It can be seen from the fact that the bottle named as PAPPI is shown to certain Cola of Cola colour. The logo used in the commercial on*

[18] **(1998) 1 SCC 720**
[19] **1999 (19) PTC 741 (Cal)**
[20] **1996 (16) PTC 393**

that bottle consists of circular device and red & blue colour alongwith the word PAPPI written underneath. That the respondent depicted the bottle with the mark "PAPPI" and the global device on it is a clear insinuation that the respondent is showing the product of the appellant i.e. PEPSI meant for children only. Though the actor mouthed the word "PEPSI" in a mute form yet from lip movement one can say he was uttering the word "PEPSI". It is an admitted case of the parties that there are only three Colas having Cola colour namely PEPSI, COCA COLA and THUMS UP. There is no other drink having Cola colour. The bottle of "PAPPI" which the advertiser showed has Cola colour, it is compared with "THUMS UP" which is owned by the respondents, who are also the manufacturer of "COCA COLA". Therefore, it cannot be said that the insinuation was against any other Cola other than "PEPSI COLA". The description of the bottle though with the name of "PAPPI" fits to be that of "PEPSI COLA". It cannot be said that the respondents were not comparing their product "THUMS UP" with "PEPSI COLA". As said by Justice Barin Ghosh in the case of ***Reckitt & Colman of India Ltd.***(*supra*) that *one can boast about technological superiority of his products and while doing so can also compare the advantages of his product with those which sire available in the market. He can also boast about the relative advantages of his own product over the other products available in the market. He can also say that the technology of the products available in the market has become old or obsolete. He can further add that the new technology available to him is far more superior to the known technology, but he cannot say that the known technology is bad and harmful or that the product made with the known technology is inferior*. In the present case while comparing "THUMS UP" with PAPPI i.e. PEPSI, the respondents have tried to project to the customers that the appellants' product is not meant for adults or for grown-up children. *Young and growing children would not like PEPSI as it is sweet meant for children. Hence, of inferior quality. This by no stretch of imagination can be called a mere comparison or boasting of the superior technology of respondents. Rather this shows the product of the appellants in poor state and of inferior quality. No doubt by saying that it is a drink meant for children as such may not denigrate appellants' product but the manner in which the boy felt embarrassed when he is told that the drink for which he gave preference was not meant for grown up and strong children depicts the product of the appellant in low estimation and of less worth. It is nothing but denigrating the product of the appellants.* The expression on the face of the boy indicates that being grown up he must not have given preference for PEPSI. *The manner in which the commercial is shown and the way the actor puts his hands on his head feeling embarrassed is nothing but disparaging the products of the appellant. To say that a particular drink is "Bachhon Wali Drink" is one thing but to redicule the preference for Pepsi by action showing the boy feeling embarrassed after knowing his preference conveys a very serious*

message particularly when the lead actor says "wrong choice baby". This is a clear indication that the product of the appellants is inferior. The observation of the learned Single Judge that this comparison whereby Thums Up has been stated to be a drink for grown up is poking fun, to our mind, is not a proper appreciation of the commercial. *Puffing does not mean one should denigrate the product of the competitor.*

18. Admittedly *puffing one's product by comparing others' goods and saying his goods are better is not an actionable claim but when puffing or poking fun amount to denigrate the goods of the competitor, it is actionable*. Calcutta High Court in the case of ***Reckitt & Colman of India Ltd.* v. *M.P. Ramchandran,*** while dealing with the question of disparagement, laid down the principles which the court should look into while granting the injunction. *One of the principles is that the Court has to look at whether the advertisement or the commercial, as the case may be, merely puff the product of the advertiser or in the garb of doing so directly or indirectly contends that the product of the other trader is inferior. In the present case in the garb of puffing up its product i.e. "Thums Up" prima facie respondents have tried to depict the product of the appellant as inferior.*

19. On the other hand, contentions of the counsel for the respondents that merely calling PEPSI COLA a sweet drink or *"bacchon wala hein"* by itself does not in any way indicate that respondent hinted appellant's product as inferior. The products which are liked by children do not become inferior or harmful nor by saying so respondents denigrated or disparaged the product of the appellant.

20. *There is no doubt that comparison is permissible so long it does not undervalue the product of the rival. In the commercials shown by respondent and as quoted above children are made to understand that young people don't drink sweet Cola. It is not an indication of superiority in technology of respondent's drink but showing inferior quality of the appellant's product as if "PEPSI COLA" is not liked by the young people or that it is meant only for children, therefore, the choice of the Boy for Pepsi is said to be a wrong choice. By projecting so the respondent through the lead actor conveys in a sophisticated way that the product of the appellant is rubbish.*"

(Emphasis supplied)

Thus, held this Court, the impugned TVC of HCCL was disparaging of Pepsi.

39. The takeaway

(i) While examining whether a commercial is disparaging, the Court is required to see

(a) the intent of the commercial,

(b) the manner of the commercial and

(c) the story line of the commercial, and the message that it seeks to convey.

(ii) Ridiculing, undervaluing or commending a competitor's product, directly or indirectly, is disparagement.

(iii) Mere puffery is not actionable. One can claim one's goods to be better than others'.

(iv) What matters is the impression that the advertisement or commercial registers in the viewer's mind.

(v) Disguising the product is of no use, if it can be identified on the basis of its general appearance and surrounding circumstances.

40. Thus, applying these principles, this Court found that, even if the declaration that Pepsi was for children was not *per se* disparaging, nonetheless, the overall effect of the advertisement, which included the expression on the child's face, the mocking manner in which it was intoned "*Yeh bachchon wali hai*", the embarrassment displayed by the child and the placing, by the child, of his hands on his head when he was told that the drink of his choice (PAPPI @ Pepsi) was

not for strong children, or children who were growing, with the deprecatory "wrong choice baby" voice over as the icing on the cake, clearly indicated disparagement of PCIL's Pepsi.

Dabur India Ltd. v. Colortek Meghalaya[1] (Odomos v. Good Knight)

41. The story board of the television commercial (TVC) advertising the Good Knight Mosquito Repellent Cream of the defendant, in the present case, was as under:

STORY BOARD

Video	Audio(Hindi)	Audio (English Translation)
	दो-दो पार्टियां हो रही है	Two parties are going on.
	एक बच्चों की, एक मच्छरों की	One for the kids and the one for mosquitoes.

	अब कहने को मॉस्किटो रीपेलेन्ट क्रीम है, पर लगाओ तो मुसीबत... न लगाओ तो मुसीबत। लगाओ तो रैशेस, एलर्जी का डर... ऊपर से चिप-चिपी	Just to say there are Mosquito Repellant Creams. But if you apply them it's a problem and if you don't, even then it is a problem. If you apply you get rashes, there is a risk of allergy and on top of that its sticky
	और न लगाओ तो मच्छरों की ऐश... तो करें क्या... वही तो बताने आई हूँ... गुड नाइट नैचुरल्स	and if you don't then its a fun time for mosquitoes. So what do we do? That is what I have come here to tell you. Good night naturals.
	तुलसी...	Made of Tulsi...

Video	Audio (Hindi)	Audio (English Translation)
	लैवेन्डर....	Lavender...
	और मिल्क प्रोटीन से बनी...	And Milk Protein...

42. Dabur India Ltd. (Dabur), in this case, alleged that the advertisement, of Colortek Meghalaya Pvt. Ltd. (Colortek), of its product Good Knight Naturals Mosquito Repellent Cream ("Good Knight" hereinafter) disparaged Dabur's Odomos Mosquito Repellent Cream ("Odomos" hereinafter). It was admitted, by Dabur, that the impugned advertisement did not directly or overtly refer to Odomos. Nonetheless, it was sought to be contended that, as Odomos enjoyed a huge market share of 80% in the mosquito repellent segment, the advertisement obviously targeted it. Dabur alleged that the impugned advertisement suggested that Odomos caused rashes, allergy and stickiness.

43. This Court held that an advertiser enjoyed some latitude to gain a purchaser or two, extendable, however, only to permissible assertions and not to misrepresentation. The border line of permissible assertions, was not, however, easily discernible. From the judgment of the Supreme Court in ***Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.***[21]**,** this Court derived the following guiding principles:

(i) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.

(ii) An advertisement must not be false, misleading, unfair or deceptive.

(iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.

An advertisement which travelled beyond the grey areas and was false, misleading, unfair or deceptive was held not to be entitled to the benefit of any protection. This Court also approved, in this context, the enunciation, in ***Dabur India Ltd. v. Wipro Ltd.***[22]**,** that it was "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."

44. This Court noticed that, in his earlier decision in ***Pepsico v. Hindustan Coca Cola Ltd.***[23]**,** this Court had identified the factors, to be borne in mind while examining the question of disparagement as being (i) the intent of the commercial, (ii) the manner of the commercial, and (iii) the storyline of the commercial and the message sought to be conveyed. However, the Division Bench deemed it

[21] **(1999) 7 SCC 1**
[22] **2006 32 PTC 677 (Del)**

appropriate to restate and amplify these considerations in the following manner:

> "(1) The intent of the advertisement - this can be understood from its story line and the message sought to be conveyed.
>
> (2) The overall effect of the advertisement – does it promote the advertiser's product or does it disparage or denigrate a rival product?
>
> (3) The manner of advertising – is the comparison by and large truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible."

45. This Court also held that the medium of the advertisement was relevant, and that an advertisement in the electronic media would have far greater impact than an advertisement in the print media.

46. It was observed that, while advertising, an advertiser was required to walk a tight rope, and to ask himself the questions "Can the commercial be understood to mean a degeneration of the rival product or not? What impact would the commercial have on the mind of a viewer?" This Court held that no clear cut answer could be given to these questions and that each case would have to be decided on its own facts.

47. Emphasising that an advertiser was required to be given enough room to play around in the grey areas in the advertisement, this Court held that the plaintiff ought not to be hyper sensitive, as the deciding factors, on the basis of which a consumer made a choice, were market forces, the economic climate and the nature and quality of a product.

[23] **2003 (27) PTC 305**

48. In para 20 of the report, this Court unequivocally rejected the plea by Dabur that, though the impugned advertisement did not either directly or indirectly refer to Dabur or Odomos, the advertisement, nonetheless, targeted Odomos as Dabur commanded 80% market share. In this context, in para 20 of the report, this Court held thus:

> "20. Learned counsel for the Appellant submitted before us that since his client has over 80% of the market share in the country and a 100% market share in some States, the obvious target of the commercial is the product of the Appellant. In our opinion, this argument cannot be accepted. The sub-text of this argument is an intention to create a monopoly in the market or to entrench a monopoly that the Appellant claims it already has. If this argument were to be accepted, then no other mosquito repellant cream manufacturer would be able to advertise its product, because in doing so, it would necessarily mean that the Appellant's product is being targeted. All that we are required to ascertain is whether the commercial denigrates the Appellant's product or not."

49. On merits, this Court did not agree with Dabur in its submission that the apprehension, voiced in the advertisement, that use of the rival cream could cause rashes or allergy or stickiness amounted to disparagement. Para 21 of the report deserves to be reproduced in this context:

> "21. Learned counsel for the Appellant further submitted that the use of expressions such as an apprehension of getting rashes and allergy or an allegation that other creams cause stickiness amounts to disparagement of the Appellant's product. We cannot agree with the submission of learned counsel. There is no suggestion that any other mosquito repellant cream causes rashes or allergy or is sticky. All that it is suggested is that if a mosquito repellant cream is applied on the skin (which could be any mosquito repellant cream) there may be an apprehension of rashes and allergy. Generally speaking, this may be possible depending on upon the quality of the cream, the sensitivity of the skin of the consumer and the frequency of use etc. – we cannot say one way or the other. The commercial does not suggest that any particular mosquito repellant cream or all mosquito repellant creams cause rashes and allergy. In fact, the Respondents are also trying to promote a mosquito repellant cream and it can hardly be conceived that all mosquito repellant creams (which would naturally include the Respondents' product) cause rashes or allergy. All that the Respondent's are suggesting is that since their product contains tulsi, lavender and

> milk protein such apprehensions are greatly reduced or that they should not reasonably exist."

In the circumstances, this Court held that Dabur was being hyper sensitive.

50. Finally, this Court modified the tests relating to comparative advertising as postulated by the High Court of Calcutta in ***Reckitt and Colmen of India Ltd. v. M.P. Ramachandran***[19]**.** Para 23 of the report is relevant in this regard:

> "23. Finally, we may mention that ***Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.***[19] was referred to for the following propositions relating to comparative advertising:
>
> (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 manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.
>
> These propositions have been accepted by learned Single Judges of this Court in several cases, but in view of the law laid down by the Supreme Court in ***Tata Press v. MTNL***[24] that false, misleading, unfair or deceptive advertising is not protected commercial speech, we are of the opinion that propositions (a) and (b) above and the first part of proposition (c) are not good law. While hyped-up

[24] **(1995) 5 SCC 139**

advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if does so, the advertiser must have some reasonable factual basis for the assertion made. It is not possible, therefore, for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival."

51. The takeaway

(i) The border line of permissible assertions is not always easily discernible.

(ii) Within the limits of permissible assertions, comparative advertising is protected under Article 19(1)(a) as commercial speech.

(iii) The advertisement must not, however, be false, misleading, unfair or deceptive, irrespective of whether it is extolling the advertised product or criticising its rival.

(iv) There is a difference between saying that the advertised product is better than the competitor's and that the competitor's product is inferior to the advertised product.

(v) What has to be seen is the overall effect of the advertisement, i.e. as to whether the advertisement is promoting the advertised product or disparaging the rival product.

(vi) While promoting his product, an advertiser might make an unfavourable comparison, but that may not necessarily affect the story line or message or have an unfavourable comparison as its overall effect.

(vii) Truthful disparagement is permissible; untruthful disparagement is not.

(viii) The medium of advertising is relevant. The effect of an advertisement in electronic media is much greater than in print media.

(ix) The advertiser walks a tight rope, as he has to keep in mind the impression that the advertisement would carry on the average consumer.

(x) What is pivotal is the impact of the advertisement on the mind of the viewer.

(xi) The advertiser has necessarily to be given sufficient room to play around in the grey areas.

(xii) A plaintiff could not afford to be hypersensitive, as the choice of the article which a consumer would select would depend on various factors including market forces, economic climate and nature and quality of the product.

(xiii) Where the advertisement does not directly or indirectly refer to the plaintiff's product, the plaintiff could not claim that its product was being targeted merely because it enjoyed a lion's share of the market.

(xiv) Extolling the virtues of the plaintiff's product as containing natural ingredients, absent in other products, was not disparaging. Extolling of one's positive features is permissible.

(xv) A statement that the application of mosquito repellant cream on the skin results in apprehension of rashes, allergy or stickiness is not *per se* denigrating as it does not amount to a suggestion that these effects are inevitable consequences of such application.

52. On the facts of the case before the Court, therefore, the Court found the advertisement of Good Knight Mosquito Repellant Cream not to be disparaging of Odomos.

Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Ltd.[2] (Harpic v. Domex) (hereinafter "Domex-I")

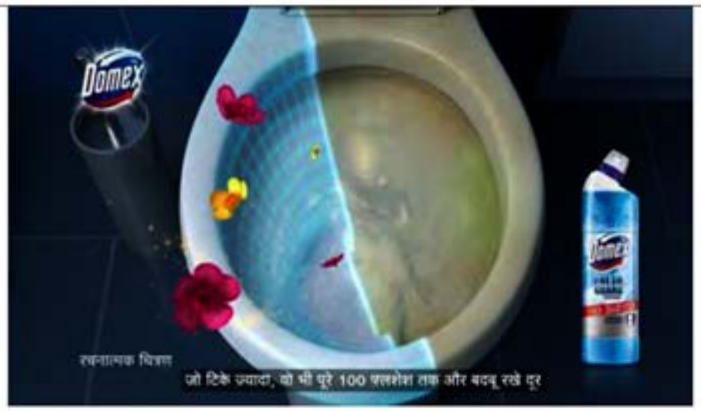
53. The Court was, in this case, concerned with a television commercial (TVC) aired by Hindustan Unilever Ltd. (HUL) for its Domex Toilet Cleaner, with the following story board:

	*VO: ab kya le rahe hai?*
	*VO: Toilet Cleaner*
	*VO: kyon sa?*
 	*VO: Harpic*

	*VO: Kyon?*
	
	*VO: Kyon ki ye toilet saaf kare*
	*VO: To Toilet se badbu nahi aayengi?*

  	*VO: Sahi sawal!*
	*VO: aur badbu ke liye*

	*VO: behtar jawab hai DOMEX*
	*VO: kyon ki toilet ki badbu se ladane ke liye* *Disclaimer: Rachanatmak Chitran*
	*VO: DOMEX main hai FRESHGUARD technology* *Disclaimer: Rachanatmak Chitran*
	*VO: jo tike jada,* *Disclaimer: Rachanatmak Chitran*

	*VO: who bhi pure 100 flushes tak* *Disclaimer: Rachanatmak Chitran*
	*VO: aur badbu rakhe door* *Disclaimer: Rachanatmak Chitran*
	*VO: Meri maniye, Chuniye DOMEX* *Disclaimer: simulated toilet use per kiye gaye Swatantra lab test per aadharit, 2021*

54. Reckitt Benckiser (India) Pvt. Ltd (Reckitt) alleged that the aforesaid advertisement disparaged its product Harpic, which was also a toilet cleaner. Reckitt disputed HUL's claim that Domex was superior in fighting foul odour in comparison to Harpic.

55. This Court, initially referring to the judgment of the Supreme Court in ***Tata Press***[24], noted that commercial speech is a part of the freedom of speech guaranteed by Article 19(1)(a) of the Constitution of India and observed that, therefore, a fair amount of latitude was required to be granted to advertisers. However, it was held that such latitude could not extend to misrepresentation. Where competing rights are involved, finding of an apposite balance is necessary.

56. The Court endorsed the view of the US Supreme Court in ***Virginia State Board of Pharmacy*** v. ***Virginia Citizens Consumer Council Inc***[25] that "untruthful speech, commercial or otherwise has never been protected for its sake" and that there was no obstacle for a State to deal effectively when the commercial speech was "deceptive or misleading". Following this, the Court proceeded, in para 21 of the report, to somewhat tweak the modification in the propositions relating to comparative advertisement enunciated in ***Reckitt & Colman***[19], as postulated in ***Dabur***[1]. As already noted, in ***Dabur***[1]**,** this Court held that propositions (a) to (c) of ***Reckitt & Colman***[19], were no longer good law in the light of the judgment of the Supreme Court in ***Tata Press***[24]. The Division Bench in ***Reckitt Benckiser***[2], however, held that this modification of the principles enunciated in ***Reckitt & Colman***[19], by the judgment in ***Dabur***[1], would not apply to puffery, but would apply only to statements of facts.

57. In other words, puffery and hyperbole are still entitled to the benefit of propositions (a) to (c) in ***Reckitt & Colman***[19]**.** Representations of fact, however, would not be entitled to benefit of the said propositions; in other words, if they are untrue, they are

[25] **1976 SCC OnLine US SC 89**

impermissible. Puffery and exaggerated opinions, it was held, are merely intended to attracted the attention of customers, and not as representations or warranties, nor was such puffery to be accepted as serious representations of facts. As such, puffery and hyperbole are not to be tested on the anvil of accuracy or truth. This Court, therefore, endorsed the view in ***Colgate Palmolive***[5] that "whereas it is open for a person to exaggerate the claims relating to its goods or services and embellish their virtues or benefits; it is not open for a person to denigrate or disparage the goods of another person".

58. Apropos puffery, this Court further noted, referring to the decisions of the Chancery Division in ***De Beers Abrasive* v. *International General Electric Co.***[26] that puffery, as a matter of pure logic, involved an element of denigration of the rival's goods. The distinction between permissible puffery and impermissible puffery was held to be accurately captured in the following passage from ***De Beers Abrasive***[26]:

> "Obviously the statement: 'My goods are better than X's' is only a more dramatic presentation of what is implicit in the statement: 'My goods are the best in the world'. Accordingly, I do not think such a statement would be actionable. At the other end of the scale, if what is said is:'My goods are better than X's, because X's are absolute rubbish', then it is established by dicta of Lord Shand in the House of Lords in ***White v. Mellin***[27], which were accepted by counsel for the Defendants as stating the law, the statement would be actionable.

59. It was further held that puffery and hyperbole, to some extent, involved an element of untruthfulness. However, as they are not intended to be viewed as serious statements of fact, they are permissible. For example, if a tailoring shop claimed to be providing

[26] **1975 (2) All ER 599**
[27] **(1895) AC 154**

the best tailored suit in the city, though the statement may have been untruthful, it was, obviously puffery and not intended to be taken as a representation of unimpeachable fact. No action for misrepresentation could be founded on the basis of such a statement.

60. The position, however, differed where the statement was not with respect to the advertised goods, but, rather, the goods of a rival. The statement, made by the advertiser, of a competitor's goods were entitled to much less latitude. Returning to the tailor shop example, this Court held that "whilst it is open that the tailoring shop to state that it provides the best tailored suit in the city; it is not open for it to advertised that the other tailoring shops in the city lacked the necessary skills and their suits are ill-tailored".

61. This, it was held that, "in a comparative advertisement, it is open for an advisor to embellish the qualities of its products and its claim, but it is not open for him to claim that the goods of his competitors are bad, undesirable or inferior". Comparative advertisement would always involve a statement that the advertised goods are better, in some aspects, than the goods of the competitors. However, there is a line which an advertiser cannot cross, on the other side of which lie disparagement and defamation of the goods of the competitor.

62. It was further held that an advertiser could highlight special features of its product which might be demonstrably better than those of a competitor but the attempt, in such a case, had necessarily to be restricted to highlighting those features, and not to disparaging or denigrating the product of the rival.

63. Tested on these propositions, this Court held the impugned advertisement of HUL to be *ex- facie* disparaging of Reckitt's Harpic. The findings of this Court, in the regard, are contained in the following passages from the judgment.

> "30. The advertisement begins with the mother and a child shopping in a departmental store. The mother is looking for household goods. It is also apparent that the mother is shown to be a regular customer who purchases Harpic (Reckitt's product) and is looking for the same. This is clear because the child quizzes her "Ab kya le rahe hain?", which freely translated means "what are we buying?". The mother responds by informing him that they are buying a toilet cleaner. This conversation is in the backdrop where HUL's product Domex is shown lining a number of shelves while Reckitt's product (Harpic) occupies a relatively small portion of a single shelf and shares the same with other products.
>
> 31. The mother then picks up a bottle of Harpic – apparently because that is what she is looking for – and puts it in her shopping cart. At the time, she also informs the child that she is buying Harpic.
>
> 32. The child then quizzes her "Kyon" (freely translated "why"). The child is curious and wants to know why his mother is buying Harpic. While he is asking this question, another shopper who prefers Domex is shown to be drawn into the exchange between the mother and child. She too has a quizzed and a concerned look. Apparently, the message is why the mother is buying Harpic. The mother then responds to the child by saying "Kyoki ye toilet saaf kare?" Freely translated means "because this cleans the toilet". In response to this, the child holds his nose and with a disturbed look (bordering an expression of disgust) and questions his mother: "to toilet se badbu nahi aayegi", which freely translated means "whether the toilet will not emanate bad odour". The look on the child's face while holding his nose is a strong message. The mother's facial expression changes to one of concern. She is disturbed by her child's question. She picks up a Harpic bottle and looks at it, concerned and somewhat confused. At the same time, the other shopper, who is Domex's loyal customer, turns around and says to the child that he has raised the correct question ["sahi sawal" freely translated "the correct question"]. She then picks up a bottle of Domex from one of the shelves where it is displayed, presents it forward and states "Behtar jawab hai DOMEX".
>
> 33. On a plain viewing, it is clear that the message sent by the advertiser is that Harpic does not address the problem of bad

odour. The astonished expression of the child and his gesture of holding his nose while asking the question whether the toilet will not stink and the mother of the child getting concerned and worried, sends out a clear message that if you use Harpic, the toilet will continue to stink because the mother, who is otherwise regularly using Harpic, has not been able to address the problem of foul odour persisting in their toilet. The latter part of the impugned TVC-1 then shows a toilet bowl with discolouration possibly reflecting bad odour and the voice over saying "Kyoki toilet ki badbu se ladne ke lie DOMEX me hai fresh guard technology". The remaining part of the impugned TVC-1 is about the product Domex and its quality to combat bad odour for a longer period of time.

34. The impugned TVC-1 not only projects a message that Domex fights odour for a longer period of time, it also sends a clear message that Harpic does not address the problem of foul smell that emanates from toilets. The manner in which the impugned TVC-1 is structured, first, sends a message that Harpic only cleans without addressing the problem of bad odour and thereafter, sends the message that whoever chooses Harpic would have to live with their toilets smelling foul. This is a message that disparages Reckitt's product and, in our view, cannot be permitted.

35. The finding of the learned Single Judge that the impugned TVC-1 does not denigrate Reckitt's product is erroneous and cannot be sustained. The latitude available in advertising is wide but does not extend to denigrating the product of one's competitor."

64. <u>The Takeaway</u>

(i) It is necessary to provide a fair amount of latitude to advertiser.

(ii) At the same time, misrepresentation and untruth in advertisements is impermissible.

(iii) It is necessary to strike a balance.

(iv) Propositions (a) and (b) in ***Reckitt & Colman***[19]***,*** i.e. that a tradesman could declare his goods to be best in the world or

better than his competitors, even if the statements are untrue, would not apply to puffery or hyperbole, though they would apply to statements of facts. To that extent, the observations in ***Dabur***[1], *vis-à-vis* ***Reckitt & Colman***[19] stand diluted in ***Reckitt Benckiser***[2]**.**

(v) Statements of facts cannot be untrue.

(vi) Puffery is allowed as it is not to be taken seriously.

(vii) Puffery is not, therefore, to be tested on the anvil of truth. Some element of hyperbole and untruth is inherent in puffery.

(viii) Exaggeration of one's virtues is allowed, but denigration of others is not.

(ix) An advertisement cannot claim that a competitor's goods are bad, undesirable or inferior.

(x) However, claiming one's goods to be better than those of the competitor is permissible.

65. In the facts of the case before it, this Court found HUL's advertisement to be *ex facie* disparaging of Harpic. The factors which convinced this Court to so hold were that (i) HUL's Domex was shown lying on a number of shelves whereas Harpic occupied a relatively small portion of a single shelf which was shared with other products, (ii) when the mother picked up the bottle of Harpic from the shelf, another shopper, who preferred Domex, was shown to be having a quizzed and concerned look, conveying concern as to why the mother was buying Harpic, (iii) when the mother stated that she was

buying Harpic to clean the toilet, the child held his nose and, with a disturbed look, bordering on disgust, asked his mother whether, in that case, the toilet would not emit any foul odour, (iv) the image of the child holding his nose was found to be a strong and penetrating image, (v) the mother was shown to be disturbed at the child's query and her facial expression changed, (vi) she, thereupon, picked up the Harpic bottle and looked at it, concerned and somewhat confused (vii) the other shopper, who was a Domex customer, thereupon, commended the child for having asked the correct question and, handing over a bottle of Domex to the child's mother, stated that Domex was the better answer.

66. Holistically seen, this Court found that the advertisement conveyed a clear message that Harpic did not address the problem of foul odour in toilets. The astonished expression of the child, the gesture of his holding his nose while asking whether the toilet would not stink, and the concerned and worried expression on the face of the mother, it was found, sent out a clear message that use of Harpic would result in the toilet continuing to stink. It was also observed that, the latter part of the TVC showed a discoloured toilet bowl possibly reflecting foul odour and a voice over, declaring that the Domex had fresh guard technology to fight foul odour in toilets. Thus, this Court found that the TVC did not merely conveyed the message of Domex being able to find odour for a longer perod of time, but also conveyed the message that Harpic was incapable of addressing the problem of foul smell emanating from toilets. The message that was sent out was, quite clearly, that Harpic merely cleaned without addressing the problem of foul odour and that,

therefore, anyone who chose Harpic would have to live with a foul smelling toilet. This was found to be frankly disparaging of Harpic.

Hindustan Unilever Ltd. v. Reckitt Benckiser India Pvt. Ltd.[3] (Domex v. Harpic) (hereinafter, "Domex-II")

67. This Case again involved an advertisement of Domex, which was alleged to be disparaging of Harpic. In this case, HUL claimed that it was the holder of a patent for a technology called "saline" which was used in Domex and enhanced the capability of fighting foul odour by extending the period of its effectiveness. The court was concerned with a print advertisement, three videos and a TVC, all of which were alleged, by Reckitt, to be disparaging of Harpic.

The impugned advertisements

Impugned Print Advertisement


First Impugned Video tilted "Domex Fresh Guard Demo Video"	
	*How long does your toilet cleaner*
	*Fight bad smell?*
	*Let's pour*
	*Some odour causing fluids in a clean toilet and find out*
	*As you can see*

	*Ordinary toilet cleaners cannot fight odour causing fluids*
	*Whereas Domex FreshGaurd does not let these fluids stick for up to 100 flushes.*
	*Keeping your toilet fresh*
	*Keeping your toilet fresh*
	*Domex Fresh Guard*
	*Fight bad smell for up to 100 flushes*

<table>
<tr><td colspan="2">Second Impugned Video titled

“Domex Fights Bad Smell For Long”</td></tr>
<tr><td> 


</td><td>VO: Aapka toilet cleaner kabtak badboo se ladhata hai?</td></tr>
<tr><td> 
</td><td>VO: Domex Ladhe 100 flushtak!</td></tr>
<tr><td> 
</td><td>Disclaimer: Toilet cleaner, bina water-repellent technology ke sandharbha main Simulated toilet per kiye gaye swatantra lab test par aadharit, 2021</td></tr>
</table>

<table>
<tr><td colspan="2">Third Impugned Video titled

“Domex Freshgaurd Helps Skip Bad Smell”</td></tr>
<tr><td> 
</td><td rowspan="2">VO: kya sadharan toilet cleaner badbu nahi skip kar paraha hai?</td></tr>
<tr><td> 
</td></tr>
<tr><td> 
</td><td rowspan="2"></td></tr>
<tr><td> 
</td></tr>
<tr><td> 
</td><td>Disclaimer: toilet cleaner, bina water repellent technology ke sandharbh main</td></tr>
</table>

	*VO : Chune Domex FreshGuard*
	*Disclaimer : simulated toilet use per kiye gaye swartantra lab test per aadharit, 2021*

68. This judgment is actually a sister decision to ***Domex-I***, as this was the challenge by HUL to the decision of the learned Single Judge to injunct the print advertisement and the three YouTube videos of HUL.

69. This Court initially reiterated the observations contained in ***Domex-I*** and held, in para 22, that honesty, in comparative advertising, meant not only accuracy and truth of the statements of fact made in the advertisement but also that the overall message delivered by the said statements of fact was not misleading, from the stand point of the customer. Para 22 may be reproduced thus:

> "22. It is also settled law that honest comparative advertisements are permissible. This implies that not only the statements of fact made in the advertisements are accurate and true but that the overall message delivered by the said statements of facts is also not misleading. Obviously, this would have to be determined from the standpoint of the customer viewing the said advertisement."

70. Thereafter, apropos the advertisements in question before it, this Court found all four advertisements to be disparaging of HARPIC. Paras 25 to 32, which dealt with the print advertisement, read thus:

> "25. A plain reading of the aforesaid impugned advertisement clearly indicates that HUL's intention is to compare its product 'DOMEX FreshGuard' with that of 'Harpic Power Plus 10x Mac Clean'. The message advertised is that Domex fights bad smell for a longer period of time. HUL claims that this is on account of the revolutionary FreshGuard technology. The text in the advertisement is reproduced below for ready reference:
>
> > "Leaves and petals are known to keep fluids from settling on their surface. And now, your toilet bowl will have have that ability too. All you need is Domex FreshGuard to coat it with a transparent hydrophobic layer. So any fluids that could potentially cause bad smell are instantly repelled. *Leaving your toilet fresh for upto 100 flushes."*
>
> 26. The footnote at the bottom right of the advertisement reads as under:
>
> > *"based on independent lab test on simulated toilet use, 2021, Harpic Power Plus 10x Max Clean does not have FreshGuard technology."*
>
> 27. HUL claims that its product Domex FreshGuard includes a compound called "Saline', which makes the hard surface, such as that of the toilet bowl, hydrophobic. Resultantly, fluids that cause bad smell do not stick to the surface of the toilet bowl. It is also claimed that its product continues to be effective in this regard for upto 100 flushes.
>
> 28. The image of the toilet bowl in the impugned advertisement indicates that the side of the toilet bowl, which is treated with HUL's product Domex is clean (represented by the blue color) and flowers emanating out from that side of the toilet bowl depict a pleasant smell. *However, the side of the toilet bowl which is not treated with Domex is shown as unclean. Green fumes representing a foul smell are shown as emanating from the side of the toilet bowl where the toilet cleaner without FreshGuard technology is used.*
>
> *29. The overall message of the impugned advertisement is loud and clear: if one uses Harpic to clean the toilet, the toilet bowl will emanate a foul smell but if one uses Domex, then the toilet would smell pleasant*. HUL attributes this to the use of FreshGuard technology (which uses 'Saline' as one of the active ingredients in the product).

30. *There can be little doubt that the impugned advertisement is disparaging to Reckitt's product. It mentions Harpic in particular and claims that Domex fights bad smell for a longer period of time. Apart from that, it shows that the toilet bowl cleaned with Domex emanates fragrance while that cleaned with the use of Harpic emanates a foul smell*. As stated above, an advertiser can indulge in puffery and hyperbole to reflect its product in a good light. However, *it is not open for an advertiser to claim that the product of its competitor is bad, substandard or its use would be detrimental to the interest or well-being of the customers.* In the present case, *the advertisement denigrates Reckitt's product by reflecting that the toilet bowl cleaned by the use of the said product would result in the same remaining unclean and emanating a foul smell.*

31. *The impugned advertisement is also untruthful, at least to the extent that it reflects that the toilet cleaned by its product would emanate fragrance, while the one cleaned by Harpic would emanate a foul smell*. As stated above, HUL's claim rests on the use of 'Saline', which according to HUL has hydrophobic qualities. It is not HUL's case that the use of 'Saline' would keep the toilet fragrant; it merely states that the liquid causing bad odour would be repelled as the use of 'Saline' on the sides of the toilet bowl would not allow liquids with foul odour (referring to urine) to stick on the side of the bowl.

32. In the aforesaid view, we find no infirmity with the decision of the learned Single Judge in interdicting HUL from publishing the impugned advertisement on the ground that it, *prima facie,* denigrates and disparages Reckitt's product Harpic."

(Emphasis supplied)

71. With respect to the three videos, this Court summarized the contents of the said videos thus, in paras 35 and 36 of the report.

"35. Reckitt's objection to the second impugned video is also to a similar effect. The same also shows the bottle of an ordinary cleaner (which Reckitt claims as its trademark) and mentions that an ordinary cleaner is effective only till one flush whereas HUL's product continues to be effective in combating bad odour till 100 flushes. The message of the third impugned video is that ordinary toilet cleaners are unable to combat bad odour and therefore, the customers should choose Domex FreshGuard. The Ordinary toilet cleaner is represented by a bottle which Reckitt claims as its trademark.

36. *If it is accepted that Reckitt's product Harpic is depicted as an ordinary toilet cleaner, it would follow that the first and the*

> *third impugned videos are disparaging its product Harpic.* Insofar as the second impugned video is concerned, the message is that Domex combats bad odour for use up to 100 flushes. But Reckitt's product does so only till the first flush."
>
> (Emphasis supplied)

72. Applying the tests earlier enunciated by it, this Court found the first and the third videos to be frankly disparaging of HARPIC.

73. Insofar as the second video was concerned, this Court found that the declaration that HARPIC worked only for one flush whereas DOMEX worked for 100 flushes was a statement of fact, which could not be regarded either as puffery or hyperbole. Such a statement could be permitted, therefore, only if it were true. Paras 48 and 49 of the judgment deserves, in this context, to be reproduced:

> 48. There is no dispute that comparative advertisement is permissible. However, the same cannot disparage the products of the competitors. It is permissible to advertise that a particular feature or quality of the product is better than that of the competitor. However, this is clearly subject to the condition that the overall advertisement must not be misleading. A statement of fact or a representation made in an advertisement must not only be accurate but should not be misleading, as well. This has to be viewed from the standpoint of the customers that the advertisements seek to target. For instance, it is possible that a particular feature of the product, which has no material relevance, is compared with the feature of the competing product to craft an advertisement reflecting the product of the advertiser to be superior to the product of its competitor. Whilst the statement regarding comparative features may be true, the overall commercial advertisement may be grossly misleading.
>
> 49. In ***Colortek Meghalaya***[1] this Court had emphasized that there must be a "*reasonable factual basis*" for an assertion."

74. This Court noticed that HUL's claims that DOMEX fought odour for 100 flushes rested solely on the premise that DOMEX was a compound with hydrophobic qualities which stuck to the sides of the toilet bowls and did not let odour causing liquids (urine) stick on the

side of the toilet bowl for up to 100 flushes. In this regard, this Court held thus:

> "53. The question whether the test report furnished by HUL substantiates its claim is a contentious one. The learned Single Judge has proceeded on the basis that determination of the said question requires the parties to lead evidence. Given the nature of the controversy, we find no infirmity with the decision of the learned Single Judge to defer the decision in this regard till the parties have led evidence.
>
> 54. Undisputedly, the balance of convenience lies in favour of Reckitt. A false advertisement campaign would cause irreparable loss to Reckitt while postponing broadcast of an advertisement referring to Reckitt while postponing broadcast of an advertisement referring to Reckitt's product may not have any material effect on HUL, considering that it is free to advertise its product without reference to Reckitt's products.
>
> 55. Given the nature of the controversy and the facts, the learned Single Judge has not interdicted HUL from broadcasting the impugned videos but merely directed that it remove all reference to Reckitt's product and the bottle representing ordinary toilet cleaners as the same is identifiable with Reckitt's product Harpic."

75. It is important to note that, in this case, one of the bones of contention before this Court was whether the impugned advertisements actually referred to HARPIC. HUL sought to contend that there were several toilet cleaners which were sold in bottles with shapes similar to that in which HARPIC was sold and that, therefore, the toilet cleaner shown in the impugned advertisement was not necessarily HARPIC. This Court rejected the contention, in the following words:

> "43. We are also unable to accept that the shape of the bottle shown as an ordinary toilet cleaner is not similar to the shape of the bottle used by Reckitt for the competing product, Harpic. It is well settled that the similarity between competing trademarks is not required to be resolved by juxtaposing them and closely examining various features of the trademarks. Similarity between the trademarks is required to be viewed from the standpoint of a person of average intelligence and an imperfect recollection. The question is whether such a person viewing the shape of the bottle in the

impugned videos, would consider the same to be depicting the bottle of Harpic. Prima facie, the answer is required to be in the affirmative.

44. *We concur with the prima facie view of the learned Single Judge that the shape of the bottle, as depicted in the impugned videos, is deceptively similar to Reckitt's trademark. Trademarks are source identifiers and therefore, we find no infirmity with the reasoning of the learned Single Judge that the depiction of the bottle of an ordinary toilet cleaner in the impugned video is likely to be identified as Reckitt's product Harpic.*

45. *It is not necessary that an advertisement must expressly and clearly mention the competitor's product. It would be impermissible if the disparaged product is likely to be identified as that of a rival.* In ***Hindustan Lever Ltd. v. Colgate Palmolive (India) Ltd. & Anr.***[18], the appellant had telecast an advertisement regarding a toothpaste claiming that its toothpaste would be more effective in combatting germs. The characters in the said TV Commercial did not specifically mention the respondent's product (Colgate Toothpaste). It merely showed a lip movement by a child in the TV Commercial, which could be identified as pronouncing "Colgate". Further, in the background, a jingle was played, which could be identified as that from the respondent's advertisement. This was sufficient to establish that the appellant was alluding to its rival's product, 'Colgate Toothpaste'. Similarly, in the case of ***M/s Colortek Meghalaya***[1] a depiction of a red toothpowder was found to be referring to the appellant's toothpowder.

46. In view of the above, we find no infirmity with the decision of the learned Single Judge interdicting the telecast of the first and the third impugned videos.

47. *The second impugned video mentions that the ordinary toilet cleaner (referring to Reckitt's product Harpic) is only effective for one flush but HUL's product is effective for a longer period of 100 flushes. It is common a ground between the parties that HUL's message is not in the nature of puffery or hyperbole but is held out as a statement of fact. Thus, the question whether HUL is entitled to run an advertisement representing that its product is effective for 100 flushes and Harpic is effective for only one flush, is required to be answered by determining whether the said statement is true and not misleading.*"

(Emphasis supplied)

76. <u>The takeaway</u>

(i) In comparative advertising, a certain amount of disparagement is implicit.

(ii) An advertisement has necessarily to be honest. It was not only, thereby, required to be accurate and true, but could also not convey an overall misleading message, seen from the stand point of the customer.

(iii) On facts, this Court found as under:

(a) The print advertisement was *ex facie* disparaging as well as untruthful. The sides of the toilet bowl which were treated with DOMEX were shown to be clean, represented by a blue colour, emanating a pleasant smell, as was reflected by flowers emanating out of that side of the toilet bowl. As against this, the side of the toilet bowl which was not treated with DOMEX was shown as unclean, with green fumes emanating, representing a foul smell. This sent out a loud and clear message that, if one used HARPIC to clean the toilet, the toilet would emanate a foul smell whereas use of DOMEX would result in a fragrant toilet. Inasmuch as the advertisement mentioned HARPIC in particular and claimed that DOMEX fought the bad smell for a longer period of time, the advertisement was *ex facie* disparaging of HARPIC. The disparagement was exacerbated by the image of a fragrance emanating from the toilet bowl cleaned with DOMEX, and a foul smell emanating from that cleaned with HARPIC. While it was open to an advertiser to indulge in puffery and hyperbole to extol the advertised product, the advertiser could not claim that the competitor's product was bad or was substandard or that

its use would be detrimental to the interest or wellbeing of customers.

(b) The court found the advertisement also to be untruthful, to the extent it suggested that, if DOMEX were used to clean the toilet bowl, it would emit fragrance. The Court found that there was no material to substantiate this claim. HUL's only contention was that DOMEX used a newly patented saline technology. It never sought to contend that use of saline technology would result in the toilet being rendered fragrant. All that it suggested was that saline technology prevented fluids emanating bad odours from remaining stuck to the sides of the toilet bowl. As such, the suggestion in the advertisement, that use of DOMEX would result in a fragrant toilet was found to be untrue and impermissible.

(c) The print advertisement was, therefore, found to be both disparaging of HARPIC as well as untrue in its representation of the positive virtues of DOMEX.

(d) With respect to the videos, the Court, having found the rival product, reflected in the advertisement, to be accurately referring to HARPIC, found the first and third videos to be frankly disparaging of HARPIC, and a bare glance at the video can leave no doubt of the correctness of the view of the Court.

(e) Apropos the second video, the Court found that it held out a specific statement of fact, which was that

DOMEX was effective in preventing foul odour from the toilet for up to 100 flushes. This, it was found, was not merely puffery or hyperbole, but a specific statement of fact, which would be regarded as one by the consumer. Such a statement of fact had necessarily to be truthful for it to be permissible. There had to be reasonable factual basis for the assertion. In this context, HUL was relying on a laboratory test conducted by the International Association of Plumbing and Mechanical Officials (IAPMO). This Court noted the features of the test and observed that the question of whether the test report of HUL substantiated its claim was contentious. In the circumstances, this Court held that the learned Single Judge was correct in his view that the determination of the said question required leading of evidence. In these circumstances, it was held that the balance of convenience lay in favour of a Reckitt, as a false advertisement campaign would result in irreparable loss to Reckitt, whereas postponing the broadcast of the advertisement referring to Harpic would not have any material effect on HUL, as it was free to advertise Domex without reference to Harpic. The learned Single Judge was, it was held, therefore, justified in directing removal, from the free impugned videos, of all references to Harpic.

Hindustan Unilever Limited v. Reckitt Benckiser (India) Pvt. Ltd.[4]

(Dettol v. Lifebuoy)

77. The competing products in this case were the Dettol soap of Reckitt and the Lifebuoy soap of HUL. Reckitt alleged the advertisement of HUL's Lifebuoy soap to be disparaging of its Dettol soap. The learned Single Judge, agreeing with Reckitt, injuncted telecasting the advertisement of Lifebuoy. HUL, therefore, appealed to the Division Bench. Though the impugned advertisement did not specifically refer to, or name, tDettol, Reckitt argued that Dettol soap had a distinctive orange colour and shape, and was packed in a distinctive green and white packaging. The shape of the rival soap, shown in the impugned advertisement, and the packaging in which it was shown, it was submitted, clearly indicated that the soap was Dettol. I may note that this Court found this contention to be correct, and no further reference is needed to be made thereto.

78. Para 56 of the report summarized, in précis, the advertisement, thus:

> "56. It would be necessary to briefly summarize the whole advertisement. A doctor and his wife return home on a rainy day. The wife plans to bathe and the takes out an orange bar of soap from a green wrapper. This part of the film is less than two seconds. The husband, at this stage exclaims that his wife can only be saved by God; later he and the children sing out that naadan (the ignorant) should be given wisdom and all of them should be saved from naivett; the wife, surprised at this, questions them. Next, the husband holds up the orange soap (this for about 2 seconds) and says that with such cure, a blessing too would be necessary. In the next scene, a bathing lady is shown raising the said orange bar of soap; it is accompanied by a male voice over which states that ordinary antiseptic soaps dry up the skin; the camera then zooms to the upper arm, shown under a magnifying glass revealing cracked skin with green germs lodged in them. The male voice then comments that germs get into the cracks (of the skin). As if to emphasize the idea, the term "ordinary antiseptic soap" appears on the screen. Next in a water shot, a bar of red LIFEBUOY soap emerges out of the water. This scene highlights the words "Glycerine" and "Vitamin E" and the male voiceover states this is why, new Lifebuoy Skin Guard). To underline the idea, the arm under the magnifying glass is shown again, this time with a voice

> over stating that it (LIFEBUOY) attacks germs; the scene then shows glycerine flowing - and the voice over adding that (LIFEBUOY) also builds a protective wall. The next scenes show that the wife allays the fears of her family, and all of them saying that they have no fear (thus suggesting that the wife accepted the suggestion to stop using the antiseptic soap and had started to use LIFEBUOY). The final part of the advertisement shows a LIFEBUOY Skin guard bar of soap and its package with the LIFEBUOY logo zooming onto the package and the male voice-over announcing "Lifebuoy Skin Guard"; the Hindustan Lever Limited logo is then focused and the advertisement ends then."

79. HUL argued that its advertisement did not disparage Dettol and merely educated consumers and the public of the difference between toilet soaps which contained glycerin, which has a long term moisturizing effect and ordinary antiseptic soaps which may not contain glycerin or provide moisturization and removal of the possibility of formation of cracks in the skin. It was further contended that HUL's claim was based on laboratory tests conduct by it.

80. Analyzing the facts, this Court initially emphasized the legal position that tradesmen and manufacturers are free to commend their goods and state that they are better than those of their rivals. However, while doing so, the advertiser could not make any false advertisements as to the quality or character of the rival's goods or products. If no such false representation is made, the advertisement, howsoever commendatory or exaggerated, cannot result in an actionable claim. Such exaggerated claims, absent false representation are amount to puffery. The test was to be applied by considering whether a reasonable man would take the claim being made as a serious claim.

81. This Court also deemed it appropriate to expostulate, to some extent, on the nature and character of the customer from whose perspective the matter was required to be viewed. This Court held that

"whilst there can be no quarrel with the fact that a reasonable man and an average man refer to the same metaphor and imperfect recollection refers to a natural attribute of a reasonable or average man" what needed closure scrutiny was whether disparagement was to be viewed from the point of view of a particular class of user who felt that the representation was disparaging. In the case before it, for example, the learned Single Judge had examined the aspect of whether the advertisement of HUL was disparaging of Dettol or not, from the point of view of a Dettol user, and held that such a class of user could easily identify the soap in the impugned advertisement as the Dettol original. This Court disapproved this standard and held that the issue of whether a statement was disparaging or defamatory in nature was to be considered from the point of view of the general public, and not by adopting a sectarian approach.

82. The court, thereafter, examined the question of the manner in which the advertisements were to be viewed and the legal standard against which the advertisement was to be judged. The exposition in this regard, as contained in para 49 of the report, merits reproduction *in extenso*:

> "49. The first question here is as to the manner in which such advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged. On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view to catch an 'infringement'. This distinction is thin, but important: in trying to determine whether commercial disparagement has occurred, the relevant consideration is how the viewer (i.e. the individual to whom the alleged disparagement is addressed) would see the advertisement. This consideration is important also because of the manner in which the advertisement is appreciated - whether as a running reel or frame by frame. The answer to this necessarily is the former, for two clear reasons. First, when deciding such matters, the judge is RFA (OS) 50/2008 Page 41 to consider (as will be discussed below) how an average,

> reasonable man would view the advertisement as it appears on the television or electronic medium, as in the present case. In order to do this, the endeavour of the court is to substitute its judgment for that of the average/reasonable man. Undoubtedly, when the advertisement is displayed on the television, it is not scrutinized in every detail by the viewers, but rather, taken as a whole as it is displayed. This simple proposition is of great relevance, since a judge, sits in an adversarial setting with the clear purpose of determining whether commercial disparagement has occurred, and thus, on the look-out for any indication of the same, must equally remain cautious that the advertisement is viewed as viewers normally view it."

83. Following on the above, the Court held that the learned Single Judge had erred in examining the impugned advertisement frame by frame. This, held the Division Bench, was not the correct approach, and the appropriate method to view the advertisement would be to consider its overall effect, from the point of view of right thinking members of the public or of reasonable man and women.

84. HUL contended, before the Division Bench, the exposure to the orange coloured soap – stated to be representing Dettol – was only for about 5% of the entire advertisement, which rendered the possibility of any lasting impact improbable. This Court held that the submission, though attractive, did not represent the correct test to be applied, as the impact that was to be examined was of the overall advertisement, and not a frame by frame analysis. It was not the time involved in showing the orange soap bar which was relevant, therefore, but its contextual setting.

85. The Court noted the fact that clever advertising could suggest something which was plainly not said and, thereby, even while facially staying on the right side of the bright line, actually create the desired misleading impact in the mind of the viewer. Such innuendo,

held the Court, had to be discouraged. On facts, this Court held that the combined effect of elaboration, by the impugned advertisement, of the ill effects of antiseptic on the skin and the specific targeting of antiseptic soaps, in the backdrop of the three visuals which distinctly showed Dettol soap, powerfully conveyed, to an ordinary viewer, the message that usage of Dettol soap was harmful to the skin. This, therefore, was a case in which the hidden meaning was intended to impact the viewer more than the obvious superficial one. The message that was actually conveyed was found to be plainly disparaging in nature. Dealing with an argument advanced by HUL to the effect that it had material with it to show that antiseptic soaps caused skin damage, this Court held that the submission was irrelevant, as Reckitt never claimed Dettol to be an antiseptic soap. In any event, the message that percolated through the advertisement was, precisely, that Dettol was bad for the skin.

86. The takeaway

(i) Puffery and claiming of superiority *vis-à-vis* the goods of a rival manufacturer is permissible. However, what was not permissible was false or incorrect representation regarding the quality and character of rival goods.

(ii) The test to be applied is what a reasonable man would take as a serious claim.

(iii) A reasonable man, or woman, was a right thinking member of the general public, and not a member of any particular class or section.

(iv) The advertisement was to be viewed as a normal viewer would view it, and not with the specific aim of catching disparagement.

(v) The advertisement was to be seen as a whole, not frame by frame.

(vi) The time spent in showing the product was irrelevant; what was relevant was the context in which the product was shown.

(vii) Even if the rival product was not specifically targeted, an indirect representation, which was sufficient to identify the product, was as good as direct targeting.

(viii) What mattered was the impact on the viewer's mind which, at times, could be by clever advertising or innuendo instead of conveying of a direct message.

(ix) A manufacturer who had greater market share was more vulnerable to the effects of such an advertisement

Applying the above principles, this Court found the impugned advertisement to be disparaging.

Colgate Palmolive Company v. Hindustan Unilever Ltd.[5] (Colgate v. Pepsodent)

87. This case involved a TVC and print advertisement for HUL's Pepsodent Germicheck Superpower toothpaste, both of which were

alleged, by Colgate Palmolive Co. to be disparaging of its Colgate toothpaste.

88. Hindustan Unilever Ltd. (HUL), in its TVC for its Pepsodent Germicheck Superpower (Pepsodent GSP) toothpaste, as well as in its print advertisement for the same product, canvassed that Pepsodent GSP was 130% better than Colgate Dental Cream Strong Teeth (Colgate ST). The claim of Pepsodent GSP being 130% better than Colgate ST in fighting cavities was predicated, by Pepsodent, on a study which revealed that, four hours after brushing, only 37.1 PPM of Triclosan was retained in the dental plaque on usage, whereas Pepsodent GSP retained 48.8 PPM. On the premise that higher PPM toothpastes had better cleaning quality, it was sought to be asserted that Pepsodent fought cavities 130% better than Colgate ST. Colgate, *per contra*, contended that the link that was being sought to be drawn, between higher quantities of triclosan and cleaner teeth was without justification. It was also pointed that the minimum level of triclosan which was required for killing oral bacteria or in combating its growth ("the Minimum Inhibitory Concentration") was in the range of 0.2 to 0.3 PPM. So long as this minimum inhibitory quantity of triclosan was present, Colgate contended that higher quantities or concentrations of triclosan would make no difference. It was further contended that Colgate ST had additional ingredients which combated tooth decay such as fluoride. It was contended that the learned Single Judge (against whose order Colgate was in appeal) had erred, firstly, in observing that Colgate ST had 0.2% Triclosan, whereas it had 0.3%, and, secondly, in treating the claim, of HUL, that Pepsodent GSP had 130% of the germ attack power of Colgate as puffery.

89. The Court noted, at the outset, the basic principles of legitimate comparative advertising – that puffery was permissible, so long as another's goods were not denigrated or disparaged, or stated to be bad, inferior or undesirable; that puffery involved exaggeration, not to be taken as serious statements of fact; that in comparative advertisement, a certain amount of disparagement was implicit, even in the portrayal of the advertised goods as superior to the competitor's and that, so long as the advertisement was limited to puffery, it was not actionable.

90. Considerable discussion is devoted, in this decision, to the "multiple meaning rule". It is not necessary to paraphrase all that has been said on the issue; suffice it to state that paras 34 and 35 of the report express the application of the rule to cases of alleged disparagement, to the extent it is at all relevant for our purpose:

> "34. However, *in the event, it is found that the intent itself is to convey the meaning which is disparaging then merely because an innocuous meaning is available, the action by an aggrieved party would not be frustrated*. Thus, *if a person wilfully and intentionally uses a disparaging expression and puts out an advertisement which can, plausibly, be construed as disparaging the goods and services of the other and the intention of putting out that advertisement is to seek benefit from making disparaging statements against competitor's goods, it would hardly be just or fair to afford such party the defence that the advertisement could also, possibly, be construed in an innocuous manner which is not harmful.*
>
> 35. The learned counsel for the respondent has advanced his contentions in respect of the multiple meaning rule on the fundamental premise that it is mutually exclusive to the test, as to the inference drawn by an average reasonable man reading or viewing the advertisement. However, this in our view is erroneous as *applying the multiple meaning rule does not, by implication, exclude the need to examine as to how the advertisement is viewed by an average reasonable person*. It is now well settled that in order to examine the question, whether an advertisement is misleading or whether the same disparages the goods/services of another or leads a viewer to believe something which is not true, it must be examined as to how the same is perceived by an average reasonable man. But *we do not think that in order to examine how*

> *a reasonable man views an advertisement, all perceptions except one must be discarded*. While determining how an advertisement is viewed by a reasonable person, in some cases, *it may be necessary to examine whether an average reasonable person could view the advertisement in a particular manner, even though another reasonable view is possible. We do not think, it is necessary that all reasonable views except one must be discarded while determining the question as to how an advertisement is perceived.* The presumption that there must be a single reasonable man militates against the principle that two or multiple acceptable views may be adopted by different persons who are fully qualified to be described as reasonable persons."
>
> (Emphasis supplied)

Para 37 clarified, unequivocally, that "the multiple meaning rule is applied only in cases where two meanings are plausible".

91. This Court proceeded, thereafter, to approve the following principles from ***Tesla Motors Inc. v. British Broadcasting Corporation***[28]:

> "(1) *The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article or viewing the programme once.*
>
> (2) *The hypothetical reasonable reader (viewer) is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*
>
> (3) While limiting its attention to what the defendant has actually said or written *the court should be cautious of an over-elaborate analysis of the material in issue.*
>
> (4) *The reasonable reader does not give a newspaper item the analytical attention of a lawyer* to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.
>
> (5) In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable

[28] **[2013] EWCA Civ 152**

> reader the court is entitled (if not bound) to have regard to the impression it made on them.
>
> (6) *The court should not be too literal in its approach.*"

These principles were paraphrased thus, in para 39 of the report:

> "…While determining as to how average men view an advertisement, *it cannot be assumed that the average men tend to choose a derogatory meaning where other simple non-disparaging meanings are available. However, in cases where the advertisement presents an impression which any reasonable person could perceive as being derogatory or defamatory or disparaging, the goods/services of another person then certainly it would not be reasonable to discard that view only because certain other meanings are also possible. The aid to the multiple meaning rule must be taken only in such circumstances where two plausible meanings are possible and it is probable that certain viewers (readers) would adopt a view which is disparaging*. In the present case, it is not necessary for us to delve into these contentions much further as, in our view, the facts of the present case do not suggest the dilemma of two divergent plausible views."

92. The Court proceeded, thereafter, to summarize the TVC thus, in paras 41 and 42:

> "41. The impugned TVC starts with a close up of a signage which reads as "PREVENTIVE CAVITY TEST". The font size of the word "PREVENTIVE" is significantly smaller than the font size of the words "CAVITY TEST". The advertisement thereafter shows two children with their respective mothers standing behind them. The children are shown brushing their teeth. While one child is shown to be brushing with Colgate ST (hereinafter referred to as 'Colgate child'). The other child is shown to be brushing with Pepsodent GSP (hereinafter referred to as 'Pepsodent child'). The children seem to be participating in some sort of an experiment which relates to the effectiveness of the two Toothpastes. The packaging of both Colgate ST and Pepsodent GSP are clearly visible in the TV Commercial. After the children finish their brushing, the Colgate child shows his teeth to the dentist and invites him to test his teeth. In conformity with the storyline, this can only mean the Preventive Cavity Test which was indicated at the commencement of the commercial. The dentist does not conduct the test and asks the Colgate child to go, on which the Colgate child shows his surprise and states "Aapne hi to bola tha, Cavity Test Hoga" (freely translated means "you only said that there would be a Cavity Test"). The dentist then explains to the Colgate child "Asli Test Ab Nahi, Tab Karenge Jab Cavity Ka Khatra Zyada Ho" (freely translated means "the real test would not

be now, but would be done subsequently when the danger of cavity is higher').

42. The next shot of the commercial depicts the children four hours later and this is indicated by a Super appearing on the left hand side of the frame simultaneously on the right hand side of the frame a clock is seen rapidly moving from 8 to 12. This clearly depicts the passage of time of four hours. The next set of frames depict both the 'Colgate' and 'Pepsodent' children with their respective lunch boxes and at that moment, the dentist appears alongwith the respective mothers of the two children. The dentist takes out some sort of hand held scanning device which is depicted as a tool to examine the teeth of the two children. The next frame is a split frame where the light emanating from the scanning device is shown to pan on the teeth of the two children. On the left hand side (Colgate Child's side of the screen) the product Colgate ST is clearly visible and which identifies that the Colgate child has used Colgate ST. Similarly, on the right hand side (Pepsodent Child's side of the screen) Pepsodent GSP is visible. A screen shot of this frame is reproduced herein below : -

43. The next frame is again a split screen where alien looking creatures depicting Triclosan as soldiers are shown. The Triclosan soldiers pertaining to Colgate are shown in red and Triclosan soldiers pertaining to Pepsodent are shown in blue. The right hand side frame also bears the caption 100% germ attack power, below the Pepsodent GSP tube. The expression "INDEX 100%" is indicated at the bottom of both the split frames. A screen shot of the frames is reproduced herein below : -

The right hand side split screen expands rapidly and the term 100% in the caption "100% germ attack power" is also shown increasing to 130%. Simultaneously, the Colgate side of the screen diminishes in proportion. A screen shot of the frames is reproduced herein below : -

At this stage, the following super appears at the bottom of the screen : -

> "Creative Visualization of the Action of Triclosan on Cavity causing Germs. New Pepsodent Germicheck enhances delivery of Triclosan in the mouth. Claim based on In-Vivo study where Germ Attack Power refers to amount of Triclosan remaining in mouth, 4 hours after brushing, where COLGATE STRONG TEETH is indexed at 100% and PEPSODENT GERMI CHECK is 130%. Brush twice daily."
>
> The impugned TVC then ends with a statement "Naya Pepsodent Germicheck Colgate Ke Mukable 130% Germ Check Power" (freely translated means "new Pepsodent Germ check gives 130% germ check power in comparison with Colgate")."

93. This Court proceeded, thereafter, to reiterate the principle that the advertisement is not to be assessed frame by frame to decide whether it is disparaging, and has to be viewed in its entirety without dissecting each word and expression. The following exordium, from the ruling of the Chancery Division in ***McDonald's Hamburgers Ltd v. Burgerking (UK) Ltd***[29] was cited with approval:

[29] **[1986] FSR 45**

> "Advertisements are not to be read as if they were some testamentary provision in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared."

"The relevant question to be asked", held the Court, "is what is the story line of the impugned TVC, the intent of the advertiser and the message that it leaves with the consumers/prospective consumers."

94. Dealing with the advertisement under challenge, this Court went on to hold that, as the child using Colgate ST ("the Colgate child") is not shown to be suffering any adverse or ill effect as a result of use of Colgate, it could not be said that the advertisement denigrated Colgate ST.

95. However, the assertion, in the advertisement, that Pepsodent GSP was 130% more effective than Colgate ST in combating cavities, held the Court, was not mere puffery or hyperbole, but was a serious statement of fact, which would be so understood by the consumer as well. Such a claim, held the Court, had to be tested on the touchstone of truthfulness, and, if there was insufficient material to indicate that it was true, could not be permitted to be broadcasted to the public. Para 49 of the report, in this regard, states thus:

> "49. If one considers the question, what is the message that is conveyed by the impugned TVC, we have little doubt that any reasonable person who views the impugned TVC would receive the message that Pepsodent GSP is 130% more effective than Colgate ST insofar as combating cavities is concerned. Certain consumers who are not aware of the appellants products in premium segment are also likely to conclude that Pepsodent GSP is better than the Colgate toothpastes in view of the voice-over at the end of the impugned TVC. The entire theme of the impugned TVC is conduct of a cavity test (the expression "preventive" only appears, in a smaller font size, on the banner at the commencement of the impugned TVC and is not referred to thereafter). While the Pepsodent child clears the test with flying colours apparently the Colgate child does not fare that well. *Any reasonable person viewing this advertisement would take with him the message that*

> *Pepsodent GSP is significantly better in combating tooth decay and oral germs/bacteria than Colgate/Colgate ST. A scientific basis is sought to be supplied for the expression "130% better", thus this cannot be ignored as hyperbole. The erroneous usage of percentage as a measure may be ignored but the statement that Pepsodent is better that Colgate in respect of combating cavity causing germs is, undoubtedly, a statement of fact. The message that Pepsodent GSP is better than Colgate ST in combating tooth decay (cavities) is the message that the impugned TVC delivers and this is a serious representation of fact. Thus, the question that requires to be addressed is whether this claim by the respondent is truthful or not.*"
>
> (Emphasis supplied)

96. The Court observed that the superior ability of Pepsodent GSP to combat tooth cavities, as compared to Colgate ST, was attributed, by HUL, to the tests conducted, which indicated that the residuary concentration of Triclosan in Pepsodent GSP four hours after brushing was higher in the case of Pepsodent GSP than Colgate ST. Colgate disputed the link that was being sought to be drawn between Triclosan concentration and cavity fighting ability. This aspect, therefore, held the Court, was "vital to determine the truthfulness of the impugned TVC". The standard to be applied was thus set out by the Court in para 50 of the report:

> "…*The essential message conveyed by the advertisement must be truthful* and given the fact that in a case of comparative advertisement where the reputation of the products/services of another dealer/person is at stake, *the truthfulness of the essential message should be strictly tested*."
>
> (Emphasis supplied)

Para 51 went on to sound the following note of caution, when distinguishing between the manner in which the representation was made and the message that it conveyed, from the judgment of the Supreme Court in ***Lakhanpal National Ltd v. M.R.T.P. Commission***[30]:

[30] **(1989) 3 SCC 251**

> "7. However, the question in controversy has to be answered by construing the relevant provisions of the Act. The definition of "unfair trade practice" in Section 36-A mentioned above is not inclusive or flexible, but specific and limited in its contents. The object is to bring honesty and truth in the relationship between the manufacturer and the consumer. When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine *whether it contains a false statement and is misleading and further what is the effect of such a representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly a statement, which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively than a literally correct statement. It is, therefore, necessary to examine whether the representation, complained of, contains the element of misleading the buyer. Does a reasonable man on reading the advertisement form a belief different from what the truth is? The position will have to be viewed with objectivity, in an impersonal manner.* It is stated in Halsbury's Laws of England (4th Edn., paras 1044 and 1045) that *a representation will be deemed to be false if it is false in substance and in fact; and the test by which the representation is to be judged is to see whether the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee.* "Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to establish a misrepresentation" and "that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, even though there may have been any number of inaccuracies in unimportant details. Conversely, *if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true" …"*
>
> (Emphasis supplied)

97. Observing that this aspect of the matter had not been examined by the learned Single Judge, this Court remanded the issue, qua the TVC, to the learned Single Judge for *de novo* consideration. While doing so, the roadmap to be followed by the learned Single Judge was thus chalked out by the Division Bench, in para 54 of the report:

> "54. We have refrained from examining whether the essential message which is conveyed by the impugned TVC is untruthful or

inaccurate as the same had not been placed before the learned Single Judge. However, we must add that *in the event the learned Single Judge, on the basis of the material placed by the parties, comes to a conclusion that the appellant's contention that higher concentration of Triclosan as claimed by the respondent does not, prima facie, establish that Pepsodent GSP is superior in its efficacy to combat tooth decay in comparison with Colgate ST then in such event the telecast of the impugned TVC would be liable to be interdicted as the balance of convenience is squarely in favour of the appellants. In the event that impugned TVC is found to be, prima facie, misleading and inaccurate, it would follow that the appellant's contention that they must be protected against the injury being caused to their reputation and goodwill is liable to be accepted. Restraining the telecast of the impugned TVC would not result in any significant damage or injury to the respondent even if, subsequently, the claim against them is not established. As indicated earlier, in our view, the balance of convenience in this case would lie squarely in favour of the appellants provided they are able to, prima facie, establish that the message of the impugned TVC, as discussed hereinbefore, is not accurate or is misleading or untruthful.*"

(Emphasis supplied)

98. The Court turned, next, to the print advertisement which was impugned before it. The commercial was described thus, by the Court:

"56. A full page advertisement that was published in the Hindustan Times showed a hand gripping a product Pepsodent GSP and below which was a caption "IT'S TIMES TO ATTACK". The lower half of the page of the impugned print advertisement depicted a comparison between Colgate ST and Pepsodent GSP and the caption boldly stated read as "PEPSODENT - NOW BETTER THAN COLGATE STRONG TEETH. DELIVERS 130% GERM ATTACK POWER." Lower half of the impugned print advertisement is split in two parts, one part is the Pepsodent side which is in a blue background. The other part is the Colgate side which is in a red background. Each part has picture of a child. The child on the Pepsodent side (referred to as the "Pepsodent Child") is depicted holding a spoon and is in the process of consuming a visibly appetising dessert (a slice of cake or pastry which has a liberal dose of chocolate syrup) which is placed before him. The product Pepsodent GSP is clearly visible on the Pepsodent side of this advertisement. On the Colgate side, the child (referred to as the "Colgate Child") is shown to be unhappy. Although, a plate of dessert is before him, he is not shown to be consuming the same but is shown as having placed his clenched fist on his jaw clearly depicting certain amount of discomfort,

obviously, on account of a dental problem. The dessert placed before the child is also not as appetising. On the centre of the lower half of the page is a depiction of a tooth, which on the Pepsodent side is shown as covered in green spots barring one spot which is shown in white. The Colgate side of the tooth is depicted having red and white spots. The caption on the tooth states "4 Hours After Brushing". On the lower portion of the impugned print advertisement, a picture of Pepsodent GSP alongwith the caption "Non-Stop Attaaaack! on cavity causing germs" is printed. The advertisement contains a Super which is in fine print and reads as under : -

> "Creative Visualization of the Action of Triclosan on Cavity causing Germs. New Pepsodent Germicheck enhances delivery of Triclosan in the mouth. Claim based on In-Vivo study where Germ Attack Power refers to amount of Triclosan remaining in mouth, 4 hours after brushing, where COLGATE STRONG TEETH is indexed at 100% and PEPSODENT GERMI CHECK is 130%. Brush twice daily."

The lower half of the impugned print advertisement is reproduced herein below : -

99. The print advertisement, the Court held, was *ex facie* disparaging in nature, in the following passages from the judgment:

> "57. The tests to determine whether an advertisement is disparaging or misleading as are discussed in respect of the impugned TVC are equally applicable to the impugned print advertisement. *One has to only look at the advertisement to realise that the visual story that is conveyed is that while the Pepsodent child is happy, healthy and can enjoy his dessert, the child using Colgate is uncomfortable and clearly unable to consume the*

dessert, presumably on account of a dental ailment toothache which is depicted by the child holding his jaw on a clenched fist.

58. The learned counsel for the appellants has made submissions as to how the colour scheme and certain finer aspects of the advertisement are all designed to disparage Colgate ST and has also handed over a glossy print of the advertisement alongwith comments pointing out as to how the Pepsodent GSP is shown not only to be superior than Colgate ST but also depicting that use of Colgate would cause discomfort to its user. We do not find it necessary to examine each of those comments separately, as in our view, *an advertisement must be viewed in the perspective of the impression that is obtained by an average consumer/prospective consumer who views/reads the advertisement. Viewed from the perspective of an average person with imperfect recollection, we are in no manner of doubt that the advertisement not only conveys an impression that use of Colgate would not be as effective as Pepsodent but also conveys an impression that use of Colgate ST instead of Pepsodent GSP would result in causing harm and discomfort to its consumers. This is clearly the essential message of the visual story depicted by juxtaposing the two children, one happy and enjoying his dessert and the other who is in discomfort and unable to consume the dessert placed before him on account of a dental ailment. Given the fact that advertisements are not analysed carefully but are usually glanced over by most readers. It is apparent that a consumer who glances at this advertisement would, surely carry the impression as stated above. Thus, in our view, the impugned print advertisement is prima facie disparaging of the appellant's goodwill and its product Colgate ST.*

59. In our view, *even if, we assume that the representation that Pepsodent is more effective in combating germs, 4 hours after brushing, in comparison with Colgate ST, is correct even then, prima facie, the advertisement would be disparaging as it also conveys the message that Colgate is ineffective and lacks the requisite quality to maintain oral hygiene and combat tooth decay and its usage, as depicted by the Colgate child, would result in the user ending up with a tooth related ailment*. As explained in ***Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.***[1] *a trader 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*. In our view, this is precisely what the impugned print advertisement conveys by its advertisement theme and the visual story."

(Emphasis supplied)

100. The takeaway

(i) Puffery is permissible; not denigration, as puffery is not meant to be regarded as a statement of fact, to be taken seriously. Puffery is expected to be exaggerated and extravagant.

(ii) A certain amount of disparagement is implicit in puffery.

(iii) Denigration of a rival's goods is impermissible.

(iv) The advertised goods can be claimed to be superior to a rivals, but the rival's goods cannot be castigated as bad, inferior or undesirable.

(v) Words used in the advertisement are meant to be understood in their natural, general and usual sense and as per common understanding.

(vi) If the statement made in an advertisement is honest and without malignant intent, the Court would attribute, to it, the single, inoffensive, meaning.

(vii) If an advertisement is clearly intended to be disparaging, then, too, the possibility of an alternative – in this case innocuous – meaning would be irrelevant, and would not mitigate the disparagement.

(viii) The multiple meaning rule is to be applied only where more than one meaning can be attributed to the recital or

depiction in an advertisement, and there is a possibility that certain viewers would accept the derogatory meaning.

(ix) The "reasonable viewer"

(a) is not naïve,

(b) can read between the lines,

(c) can read in implication into the advertisement,

(d) may indulge in some amount of loose thinking,

(e) is not avid for scandal and

(f) does not select a derogatory, or bad, meaning to be attributed to an advertisement where alternative, non-defamatory meanings are also available.

(x) The Court, in such cases, should not undertake an over-elaborate analysis.

(xi) The Court should not be too literal in its approach either.

(xii) The advertisement is not to be seen frame by frame, like covenants in a testament, but as a whole.

(xiii) The Court is required to examine

(a) the story line of the advertisement,

(b) the intent of the advertiser, and

(c) the message that the advertisement leaves with consumers.

(xiv) Factual representations are not permitted to be untrue as the average viewer might ignore puffery but would be impressed by serious representations of fact.

(xv) The truthfulness of such assertions or statements of fact is, therefore, to be strictly tested.

101. Applying the above principles, this Court found the TVC not to be disparaging, as it did not show the Colgate child to be in any pain or suffering any adverse reaction by reason of his having used Colgate ST, but held, nonetheless, that the additional representation that Pepsodent GSP was 130% more effective than Colgate ST in fighting cavities, being a serious statement of fact, could be permitted to be retained only if it were proved to be true. The print advertisement was, however, found to be clearly disparaging, as it showed, in express terms, the Colgate child to be clutching his cheek in apparent pain on account of a tooth ailment as a reason of his having used Colgate ST. Such a negative portrayal of Colgate ST, with clear implication of adverse effects, it was held, was impermissible.

102. These decisions elucidate, with sufficient clarity, the legal position, and I do not deem it necessary to refer to any more decisions in this regard.

103. <u>The principles that emerge</u>

The overall legal position that emerges from these decisions is, therefore, the following:

(i) Where the advertisement does not directly or indirectly refer to the plaintiff's product, the plaintiff could not claim that its product was being targeted merely because it enjoyed a

lion's share of the market. Targeting of the plaintiff's product is the *sine qua non*, whether expressly or by necessary implication. That implication cannot, however, be premised merely on the market share of the plaintiff's product.

(ii) At the same time, even if the rival product was not specifically targeted, an indirect representation, which was sufficient to identify the product, was as good as direct targeting.

(iii) Within the limits of permissible assertions, comparative advertising is protected under Article 19(1)(a) as commercial speech. In comparative advertising, a certain amount of disparagement is implicit.

(iv) Subject to the exception in (v) *infra*, an advertisement must not be false, misleading, unfair or deceptive, irrespective of whether it is extolling the advertised product or criticising its rival. Misrepresentation and untruth in advertisements is impermissible. An advertisement has necessarily to be honest. It was not only, thereby, required to be accurate and true, but could also not convey an overall misleading message, seen from the stand point of the customer.

(v) Puffery is the only exception, as puffery, by its very nature, involves exaggeration and embellishment, and an element of untruth is bound to exist in it. Untruth in puffery is permissible only because puffery is inherently not taken seriously by the average consumer. Puffery is not, therefore, to

be tested on the anvil of truth. Some element of hyperbole and untruth is inherent in puffery.

(vi) Mere puffery is not actionable. One can claim one's goods to be better than others. Extolling the virtues of the plaintiff's product as containing natural ingredients, absent in other products, was not disparaging. Extolling of one's positive features is permissible.

(vii) However, denigration of a rival's or a competitor's product is completely impermissible. While it is permissible, therefore, to state that the advertised product is superior to the competitor's, it is not permissible to attribute this superiority to some failing, or fault, in the product of the competitor. An advertisement cannot claim that a competitor's goods are bad, undesirable or inferior. The subtle distinction between claiming one's goods to be superior to the others', and the other's goods to be inferior to one's, has to be borne in mind.

(viii) Serious statements of facts cannot, however, be untrue. The truthfulness of such assertions or statements of fact is to be strictly tested.

(ix) What matters is the impression that the advertisement or commercial registers in the viewer's mind. The hidden subtext, so long as it is apparent to the average consumer, therefore, matters. The impact could be conveyed by clever advertising or innuendo instead of conveying of a direct message.

(x) The reasonable man, from whose point of view the advertisement is to be assessed, is a right thinking member of the general public, and not a member of any particular class or section. He

(a) is not naïve,

(b) can read between the lines,

(c) can read in implication into the advertisement,

(d) may indulge in some amount of loose thinking,

(e) is not avid for scandal and

(f) does not select a derogatory, or bad, meaning to be attributed to an advertisement where alternative, non-derogatory meanings are also available.

(xi) While examining whether a commercial is disparaging, the Court is required to see

(a) the intent of the commercial,

(b) the manner of the commercial and

(c) the story line of the commercial, and the message that it seeks to convey.

What has to be seen is the overall effect of the advertisement, i.e. as to whether the advertisement is promoting the advertised product or disparaging the rival product. The advertisement has to be seen as a whole, not frame by frame. While promoting his product, an advertiser might make an unfavourable comparison, but that may not necessarily affect the story line or message or have an unfavourable comparison as its overall effect.

(xii) The Court should neither undertake an over-elaborate analysis, nor be too literal in its approach.

(xiii) The advertisement was to be viewed as a normal viewer would view it, and not with the specific aim of catching disparagement. Words used in the advertisement are meant to be understood in their natural, general and usual sense and as per common understanding.

(xiv) The time spent in showing the product was irrelevant; what was relevant was the context in which the product was shown.

(xv) A plaintiff cannot afford to be hypersensitive, as the choice of the article which a consumer would select would depend on various factors including market forces, economic climate and nature and quality of the product.

(xvi) It is necessary to provide a fair amount of latitude to the advertiser as well.

Applying these principles to the present case

104. All that remains to be done, to close the story of Priya and her mother, is to apply the above principles to it. Doing so, it is not possible for me to accept Mr Lall's contention that the impugned advertisement disparages Dettol.

105. I say so for the following reasons:

(i) *There is no direct reference, whatsoever, to any property, or characteristic, positive or negative, of Dettol*. The entire recital, in the impugned advertisement, is with respect to

Santoor. The clear implication, from the advertisement, is that Priya's mother's hands are soft because she has washed them with Santoor. The primary message that the advertisement seeks to convey, to extol Santoor as superior to other similar products, is that it contains sandal, which is known to moisturize the skin.

(ii) It would be reading too much into the impugned advertisement, in my opinion, to extract, from it, anything derogatory or deprecating regarding Dettol. Mr Lall has, essentially, sought to submit that five features of the advertisement, cumulatively seen, clearly deprecate Dettol, viz.

(a) the amazement at Priya's face at seeing that her mother's hands are so soft, which makes her coax her mother to play with her some more,

(b) the depiction of the bottle resembling Dettol (for the nonce, we shall treat it as Dettol) on the shelf, thereby indicating that, till then, her mother was using Dettol, which left her hands dry and hard,

(c) the removal, by Priya's mother, of Dettol from the shelf and its replacement with Santoor, which was, according to Mr Lall, the last nail in the coffin, as it amounted to no less than an overt message that Dettol was useless and that, if one wanted a hand wash which would keep the hands soft, Dettol would not serve the purpose, and Santoor would,

(d) the simultaneous voice-over, declaring that Santoor had moisturizing properties, as it contained sandal, which Dettol did not, and

(e) the second voice over, declaring that, "*ab*" ("*now*"), Priya's mother's hands were always soft.

I cannot agree. Even if all these features of the advertisement are collectively seen, they do not make out, in any manner of speaking, a message which either denigrates or disparages Dettol. Mr Sibal is correct in his submission that, unlike the cases on which Mr Lall relies, the impugned advertisement does not, even obliquely, refer to the moisturizing qualities, present or absent, of Dettol. They merely extol Santoor. Let us deal with each of the five features that Mr Lall had sought to emphasize, individually as well:

(a) Priya's amazement, especially considering that it is the reaction of a little girl, all of around 5 to 6 years of age, cannot be subjected to a searching psychoanalysis. She finds her mother's hands soft, and is delighted at it. It cannot, thereby, be legitimately held that Priya was, impliedly, conveying a message that, earlier, her mother's hands had not been soft. At the highest, all that could be said was that, perhaps, her mother's hands were softer than they used to be. Priya's reaction is the spontaneous reaction of a child, not the searching response of a critic.

(b) Even if, for that matter, it can be said that the impugned advertisement transmits a message relating to the ability of the hand wash which Priya's mother was earlier using, in softening her hands, that message is,

most certainly, *not that the earlier handwash being used by Priya's mother did not moisturize, or even that it did not satisfactorily moisturize.* At the highest, the message conveyed could be that the use of Santoor left Priya's mother's hands softer than they were before she started using Santoor. This, at worst, would amount to a representation that Santoor had better moisturizing qualities than Dettol. Though I am not, frankly, able to read even such a representation into the impugned advertisement, assuming it could, it would, nonetheless, not be either denigrating or disparaging in any manner.

(c) Comparative advertising, short of denigration and disparagement, is permitted in law. Extolling the advertised product as better than its peers is not actionable. Unlike a case in which a positive, or negative, qualititative or quantitative representation of fact is made with respect either to the advertised product or to its rival, the average consumer, who has his head and heart in place, would immediately recognize an advertisement such as that impugned in the present case to be a pure and simple case of comparative advertising, intended at portraying Santoor as a hand wash with superior moisturizing qualities. The advertisement does not push him to give up Dettol, as it has poor moisturizing ability – if he is otherwise a Dettol aficionado – but may possibly goad him to try Santoor.

(d) The second and third features highlighted by Mr. Lall, may be dealt with together, as they are essentially interconnected. The advertisement shows the Dettol bottle on the shelf, which Priya's mother removes and replaces with Santoor. How much do we read into *this*? Mr. Lall would read, into it, a caustic commendation of Dettol, disparaging it as rubbish, and not worthy of use as it does not moisturize the skin. I, however, would not.

(e) In the first place, it must be said – as I have seen the advertisement closely – that the entire act of showing the old container and replacing it with the new container takes, as Mr. Sibal correctly says, two seconds – from time spot 25 secs to 27 secs to be exact, out of a total 35 seconds spent in the advertisement. Though it is correct that the time spent in showing the rival product is not determinative, one cannot, given the fact that the overall impression conveyed by the advertisement on the consumer is what matters, entirely ignore the time for which the allegedly disparaging act figures. No consumer is expected to keep a recording of the impugned advertisement and rewind and play it again and again. What has to be assessed is the effect of the advertisement on the consumer at one viewing. When seen in its entirety, as one advertisement and not frame by frame, it is only with an effort, and a strained intention to freeze the image at the time when the rival product is shown and replaced, that one notices that the bottle resembles Dettol, or that a conscious replacement of

Dettol with Santoor has taken place. Mr. Sibal submitted that the act of replacement was no more than a physical manifestation of the message that one should prefer Santoor over other hand washes, including Dettol, and, having seen the advertisement, I find that to be the only message that percolates. Imploring the consumer public to use the advertised product instead of others is, by no means, objectionable in law, so long as there is no message, overt or covert, disparaging or denigrating the rival product.

(f) It is not uncommon that, when one purchases a new soap, or shampoo, or other skin care product, one replaces the one earlier used with the new product. That, by itself, does not "rubbish" the earlier product, as Mr Lall seeks to contend. "Rubbishing" would require a positive denigration of the rival product. That, in the impugned advertisement, is conspicuously absent.

(g) I may note, here, that, though Mr. Sibal candidly acknowledged that the replaced bottle had consciously been made to resemble Dettol, it is not the intent of the advertiser which matters, but the effect of the advertisement on the viewer. What matters more is what the advertisement *conveys*, not what it *seeks to convey*. An advertisement cannot be injuncted as disparaging merely on the ground that it was *intended* to be disparaging if the advertisement, seen as a whole by a

reasonable and right thinking consumer, does not, in fact, convey an impression that disparages the rival product.

(h) I would, therefore, read, into the showing, in the impugned advertisement, of Dettol on the shelf, and its replacement with Santoor, only the message that, given the softness which Santoor lent to her skin, Priya's mother decided to use Santoor in place of the hand wash she was earlier using. That is no more than a qualitative choice, and could easily represent a knee jerk reaction to Priya's delight at finding her mother's hands so soft. It does not amount to an act of denigration, much less condemnation or rubbishing, of Dettol.

(i) Nor does the voice over, simultaneously heard, convey any such impression. All that it says is that, in comparison with the ordinary handwash, Santoor has sandal, which moisturizes the skin. I agree with Mr. Sibal that there are, in fact, only three representations of fact made here; firstly, that Santoor contains sandal; secondly, that the "ordinary handwash" does not contain sandal, and, thirdly, that sandal moisturizes the skin. These being positive representations of fact, have necessarily to be accurate and true, and Mr. Lall does not dispute either their accuracy or their truth. The three statements of fact, contained in the impugned advertisement, therefore, pass the litmus test of scrupulous truth, that the precedents on the point lay down.

(j) The voice-over says nothing more. It does not say, as Mr. Lall would seek to contend, that sandal alone has moisturizing qualities. It does not comment, either directly or indirectly, on the moisturizing ability of the "ordinary hand wash". It does extol Santoor as containing sandal, unlike the ordinary hand wash, and this is a correct assertion. The reasonable and right thinking viewer, if he desires to try Santoor after seeing the impugned advertisement in place of Dettol, or any other hand wash that he was earlier using, would do so not because the impugned advertisement denigrates other hand washes as being bereft of moisturizing or softening capabilities, but because Santoor contains sandal, and sandal moisturizes. There is an ocean of difference between these two impressions. The first disparages; the second does not. The impugned advertisement, in my opinion, is on this side of the *lakshman rekha*, not that.

(k) Mr Lall was, in my view, unduly critical of the use of the word "ordinary". "Ordinary" is a word of multifarious meanings, and has to be understood in the sense in which it is used in the context. I do not deem it necessary to expostulate further on this issue; suffice it to say that, as used in the impugned advertisement, the only impression that the word "ordinary" conveys to the right thinking consumer is that the hand wash in question is one other than Santoor. The word "ordinary", in the context, represents, clearly, nothing more than a handwash other than Santoor. To analogize it with

comparison between an ordinary advocate and another, as Mr Lall suggests, is to compare chalk with cheese; as the skill of an advocate is not based on objectively determinable criteria but on innate professional ability, which qualitatively differs from person to person.

(l) Equally, the stress on the monosyllabic "*ab*", in *"ab har sparsh mein komalta"*, by Mr. Lall, is, in my view, not justified. At the highest, what is conveyed, thereby, is that, now that Priya's mother uses Santoor, her hand would remain soft every time she washes it. As Mr. Sibal submits, this is nothing more than puffery, and no discerning consumer is expected to carry home an impression that, by using Santoor, the hands remain permanently soft. Even otherwise, it is, clearly, not comparing Santoor with any other product, and cannot, howsoever one may view it, be regarded as disparaging. The statement that, if one was to use Santoor, one's hands would remain soft forever may, or may not, be true. Either which way, it does not amount to a qualitative, much less a critical, comment on the attributes of other hand washes, including Dettol.

The factors emphasized by Mr. Lall, therefore, even if cumulatively seen, do not make out a case of denigration, or disparagement, of Dettol.

(iii) There is a distinction between an advertisement which disparages, and one which seeks to compel the viewer to choose the advertised product. If the capacity to moisturize is one of

the selling points of hand washes and if an advertisement extols the moisturizing capability of a particular hand wash as compared to others, that is permissible. So long as other hand washes are not disparaged or rubbished, or reflected as resulting in undesirable results if used, the standards of permissible comparative advertising are met. Every advertisement seeks to promote a particular product over others, as superior. Else, the very *raison d' etre* of advertising the product is lost. So long as the advertisement does not slight the rival product, no justifiable cause for pique can be said to exist. The impugned advertisement, in my opinion, does not slight either Dettol, or any other hand wash. In fact, it does not – at the cost of repetition – comment, either directly or indirectly, on any other hand wash, or its moisturizing or softening ability.

(iv) Mr. Lall sought to contend that the impugned advertisement was required, in order to present the viewer with a holistic picture and to enable her, or him, to make an informed choice, to portray the benefits of the rival product as well. The contention has merely to be stated to be rejected. The law does not recognize any such requirement. No judgment, which so requires, has been brought to my notice. An advertisement is, at the end of the day, an advertisement; not a statistical representation of data regarding all the products in the market. If Mr. Lall's contention were accepted, it would result in a strange situation in which an advertisement for Santoor hand wash would have to completely avoid comparing it with any other hand wash, or to present, before the viewer, all details of

the moisturizing capacities of all other rival hand washes. This is obviously not required in law.

106. The plea that the impugned advertisement disparages Dettol, therefore, fails.

107. Mr. Lall also urged, as a "low hanging fruit", a plea that the impugned advertisement pirated the design registration held by the plaintiff in the design of the Dettol bottle and was, therefore, additionally liable to be injuncted under Section 22 of the Designs Act. Mr. Sibal answers, correctly, that Section 22(1)[31] applies only where the pirated design is used by the infringer "for the purposes of sale" of the infringing product. Mr. Lall sought to contend that the words "for the purpose of sale" applied only to the first part of Section 22(1), and not to the latter part which reads "or to do anything with a view to enable the design to be so applied". The submissions stands defeated by the use of the otherwise innocuous word "so". By using the phrase "so applied", the qualitative features of the first part of Section 22(1) apply, *mutatis mutandis*, to the latter part of the clause. Section 22(1) applies, therefore, only where an infringer uses the registered design on his article for the purposes of sale.

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[31] **22.** **Piracy of registered design**.—(1) During the existence of copyright in any design it shall not be lawful for any person—

(*a*) for the purpose of sale to apply or cause to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or

(*b*) to import for the purposes of sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered, and having applied to it the design or any fraudulent or obvious imitation thereof; or

(*c*) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article in any class of articles in which the design is registered without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

108. Indeed, Mr. Lall's interpretation, if accepted, would result in an absolute embargo on any representation, in any form, of every registered design, except with the licence of the registrant. If comparative advertising is permissible, it would include, within it, the right to show the competing product. No case of design piracy can, thereby, be said to have been made out.

109. The low hanging fruit of Mr. Lall is also, therefore, found, regrettably, to be lacking in flavour.

Conclusion

110. No *prima facie* case is, therefore, made out, to injunct the broadcasting or display of the impugned advertisement.

111. IA 8257/2023 is, therefore, dismissed.

112. All views expressed herein are only *prima facie*, and are not intended to be treated as binding expressions of opinion at the stage of hearing and decision of the suit.

C. HARI SHANKAR, J.

MAY 18, 2023
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