

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.12.2013

+ **FAO (OS) 396/2013 & CM No. 13486/2013**

COLGATE PALMOLIVE COMPANY AND ANR.Appellants

versus

HINDUSTAN UNILEVER LTD.Respondent

Advocates who appeared in this case:

For the Appellants : Mr C.M. Lall, Ms Nancy Roy and Ms Pragya Nalwa.

For the Respondent : Mr Neeraj Kishan Kaul, Sr. Advocate with Mr Sameer Parekh, Ms Rukmini, Mr Shashank and Ms Sanjana.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. This is a composite appeal preferred by the appellants/plaintiffs challenging the order dated 27.08.2013 (hereinafter referred as the 'second impugned order') passed by a learned Single Judge of this Court in an application filed by the appellant under Order 39 Rule 1 & 2 of CPC being I.A. No.13434/2013 which in turn was filed in CS(OS) No.1588/2013. The appellant also challenges the order dated 27.08.2013 rejecting the Review Petition, being R.P. No.424/2013 filed under Order 47 Rule 1 read with Sections 114 and 151 of the CPC, seeking review of the order dated 21.08.2013 passed by the learned Single Judge in I.A. No.12818/2013. The learned Single Judge has, by the second impugned order, directed issuance

of notice to the respondent in I.A.13434/2013, thereby not granting the prayer for an ad-interim injunction restraining publication and telecast of the printed and television commercial respectively, which are alleged to disparage the products, goodwill and reputation of the appellants. The present appeal also impugns the order dated 21.08.2013 passed by a learned Single Judge of this Court in I.A. No.12818/2013 filed under Order 39 Rule 1 & 2 of the CPC (hereinafter referred to as the 'impugned order'), whereby the said application for grant of interim injunction was dismissed by holding that the said advertisements in question did not disparage or denigrate the product of the appellants/plaintiffs.

2. The controversy in the present case relates to an advertisement campaign pursued by the respondent/defendant to advertise its product - a Toothpaste which is sold as "Pepsodent Germicheck Super Power" (hereinafter referred to as 'Pepsodent GSP'). The advertisement campaign includes a television commercial as well as advertisements in the print media. An advertisement in the print media appeared in the front page of the newspaper "Hindustan Times", New Delhi edition on 11.08.2013. The said advertisement in print media has also appeared in several national dailies, including in modified forms. The commercial on television has also been repeated on several occasions. Both the Television commercial as well as the advertisements in the print media seeks to convey that Pepsodent GSP is 130% better than the product of the appellant namely "Colgate Dental Cream Strong Teeth" (hereinafter referred to as 'Colgate ST'). The Television commercial is hereinafter referred to as 'impugned TVC' and the advertisement that was published in Hindustan Times on 11.08.2013 is

hereinafter referred to as 'impugned print advertisement'. The said advertisements are collectively referred as the 'impugned advertisements'.

3. The appellants/plaintiffs have filed the suit CS(OS) No.1588/2013, *inter-alia*, seeking a permanent injunction restraining the respondent from publishing and/or telecasting the impugned advertisements or any other similar advertisement or in any other manner disparaging the goodwill and reputation of the plaintiffs and their products sold under the trade mark 'COLGATE'. The appellants/plaintiffs also filed an application (I.A. No.12818/2013 under Order 39 Rule 1 & 2 of the CPC) along with the suit for granting ad-interim injunction against the impugned advertisements and the same was dismissed by the learned Single Judge of this Court on 21.08.2013.

4. The appellants/plaintiffs preferred an appeal (FAO(OS) No.381/2013) before a Division Bench of this Court challenging the impugned order dated 21.08.2013 and the Division Bench of this Court, on 23.08.2013, permitted the appellants/plaintiffs to withdraw the appeal with liberty to file a fresh application for injunction before the learned Single Judge and place on record such new material to establish that the impugned advertisements were disparaging the products of the plaintiffs. The relevant extract of the order dated 23.08.2013 is quoted as under:-

“During the course of submissions, learned counsel for the appellants stated that new material in the form of newspaper articles, letters from dentists and information from consumers has been made available to establish disparagement in the minds of the consumers. He seeks liberty to approach

the learned Single Judge with a fresh application for injunction and place on record such new material.

Liberty granted. All rights and contentions of the parties are reserved. It is open to the appellant to impugn the correctness of the order which may be made in the fresh application and also if necessary, impugn the order which is the subject matter of the present appeal.

In view of the above, the appeal is dismissed as withdrawn.”

5. The appellants/plaintiffs immediately filed a fresh application (I.A. No.13434/2013) under Order 39 Rules 1 & 2 read with Section 151 of CPC bringing on record new facts and documents before the learned Single Judge and also filed a Review Petition (R.P. No.424/2013) seeking review of the order dated 21.08.2013 on account of certain alleged errors which were contended to be apparent in the order dated 21.08.2013. By the second impugned order, the Review Petition was dismissed by the learned Single Judge holding that no ground for review of the order dated 21.08.2013 was made out. In respect of the application under Order 39 Rule 1 & 2 of CPC (I.A. No.13434/2013), the learned Single Judge did not grant the ad-interim injunction as sought for by the plaintiffs and issued notice to the respondent for filing their response. Aggrieved by the dismissal of the Review Petition and non grant of the ad-interim injunction, the appellants have preferred the present appeal.

Submissions on behalf of the Appellants

6. The appellant has contended that the claim made by the respondent, regarding its product Pepsodent GSP, in the impugned advertisements is

based on denigration of the plaintiffs product and malicious falsehood in common law and under Sections 29(8) and 30(1) of the TradeMark Act, 1999. The impugned advertisements are contended to be detrimental to the distinctive character and reputation of the trademark of the petitioner. It is further contended that the impugned advertisements cannot be construed as mere puffery in respect of the respondent's product Pepsodent GSP but constitute untrue statements of facts in relation to Colgate ST as well as Pepsodent GSP.

7. It is contended that the learned Single Judge has erred in concluding that the impugned advertisements neither disparage nor denigrate the product Colgate ST. The counsel for the appellant has placed the impugned advertisements and has made submissions thereon pointing out certain aspects, which we shall advert to later, which according to him clearly indicate that the impugned advertisements are disparaging of the product of the appellant. It is also urged that the impugned advertisements constitute malicious falsehood, inasmuch as, the essential message conveyed by the impugned advertisements is false and the impugned advertisements are designed to falsely show that the product of the respondent is superior to that of the petitioner in respect of its anti-bacterial/germ qualities and in respect of preventing tooth decay.

8. It is contended on behalf of the appellant that the learned Single Judge has erred in examining the impugned advertisements as may be viewed by a discerning viewer. According to the appellant, the correct test that needs to be applied is to determine as to how the impugned advertisements would be viewed by average consumers with imperfect

recollection. The learned counsel for the appellant contended that even though the impugned advertisements may be construed as not disparaging of the products of the appellant by some viewers, nonetheless, the court would interdict such advertisements, if the advertisements were capable of being construed differently by other consumers. In other words, it is contended that if an advertisement or an expression is capable of two meanings, one of which is disparaging while the other is not, the court will, nonetheless, issue an injunction restraining the dissemination of the same as disparaging the product or reputation of the concerned party. This proposition has been referred as the “multiple meaning rule”. According to the appellant, the impugned advertisements must be tested on the anvil of the multiple meaning rule. It is submitted that this rule is well accepted and applied by courts in various cases and the learned counsel has referred to *Ajinomoto Sweeteners Europe SAS v. Asda Stores Ltd.*: [2011] Q.B. 497, *Glaxo Smithkline Consumer Healthcare Limited and Others v. Heinz India Private Limited and Another*: I.A. No.15233/2008 in CS (OS) No.2577/2008, Decided on 12.11.2010, *Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.*: 2008 (5) R.A.J. 664 (Del.) and *Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.*: 200 (2013) DLT 563 in this regard.

9. The learned counsel for the appellant has also submitted that the entire claim as made in the impugned advertisements is based on an alleged study done where it has been found that, after four hours of brushing, the retention of Triclosan in the dental plaque on usage of Colgate ST is 37.1 ppm and on usage of Pepsodent GSP is 48.8 ppm. On the basis of this

study, the impugned advertisements profess a higher efficiency in dealing with dental cavities as compared with Colgate ST. The correlation which is sought to be portrayed between higher levels of Triclosan and cavities is contended to be malicious and misleading insofar as it indicates that Colgate ST is in any manner inferior in respect of preventing cavities compared to Pepsodent GSP. This according to the appellant is for two reasons:-

- (a) It is contended that a minimum level of Triclosan that is required for killing oral bacteria or in combating its growth (referred to as Minimum Inhibitory Concentration – MIC) for plaque bacteria is in the range of 0.2-0.3 ppm. It is contended that as long as this minimum level is maintained there would be no additional benefit even if a higher level of Triclosan are delivered. The learned counsel sought to draw our attention to various documents in support of this contention. Viewed in this perspective, the impugned advertisements would be misleading, inasmuch as, the advertisement conveys a higher efficiency in dealing with oral bacteria/germs in comparison with Colgate ST.
- (b) It was further urged on behalf of the appellant that there are several reasons of tooth decay and plaque bacteria by itself does not cause cavities. The appellant's product also has additional ingredients, to combat cavities which prevent tooth decay, including fluoride which is one of the most vital ingredient for prevention of tooth decay. If the impugned advertisements are viewed in this factual backdrop, it would be apparent that the same

are false and misleading inasmuch as they seek to correlate Triclosan with cavities and profess that Pepsodent is superior in combating cavities in comparison with Colgate ST.

10. The learned counsel for the appellant has also contended that the learned Single Judge has erred in proceeding on the basis that Colgate ST contained only 0.2% Triclosan as compared to Pepsodent GSP. It is contended that this is erroneous as, admittedly, Colgate ST also contains 0.3% Triclosan and this fact is not disputed. The learned counsel has drawn our attention to Para 6 of the reply filed by the respondent wherein it has been stated that Colgate ST has the same level of permissible Triclosan (0.3%). This was also one of the grounds for review in R.P. No.424/2013. It is further contended that the claim of 130% germ attack power has been erroneously held by the learned Single Judge to be puffing up of Pepsodent GSP in comparison with Colgate ST. According to the appellant, it is only the humorous and hyperbolic claims that can be considered as exaggeration or puffing. It is contended that all claims which would be taken seriously by a reasonable man cannot be overlooked as puffery. It is contended that a claim of 130% better germ killing quality is a serious claim and is liable to be viewed as such by any reasonable viewer and thus, the same cannot be considered as mere puffery or exaggeration and, as such, the claim would fall foul of the ASCI Code.

11. The appellant has also seriously disputed the claim of the respondent that Pepsodent GSP has the quality of sustained release of retained Triclosan. It is contended that only Colgate Total (which is another product manufactured by the plaintiffs) contains 'Gantrez' which permits sustained

release of Triclosan. In addition, the learned counsel for the appellant also submitted that the ‘Super’, (i.e. the string of textual messages which are placed at the bottom of the screen during certain portions of the impugned TVC) which is considered by the learned Single Judge, is not visible when impugned TVC is viewed on a normal TV. The said Super which reads as under is thus not visible to a average viewer:-

“Creative visualisation of the action of triclosan on cavity and causing germs. New Pepodent Germicheck enhances delivery of triclosan in the mouth. Claim based on the In-Vivo study where Germ Attack Power refers to amount of Triclosan remaining in the mouth 4 hours after brushing where Colgate Strong Teeth is indexed at 100% and Pepsodent GSP 130%. Brush twice daily.”

It is contended that the learned Single Judge, thus, erred in relying on the same and failed to consider that as per the ASCI Code, the ‘Supers’ are required to be legible on a standard television set.

12. It is contended by the appellants that the appellants had established a good *prima facie* case and the learned Single Judge erred in not considering the balance of convenience and the irreparable loss to the reputation and goodwill of the appellants that would be caused if the ad-interim injunction as prayed for was not granted.

Submissions on behalf of the Respondent

13. The respondent has raised a preliminary objection with respect to maintainability of the present appeal. It is contended on behalf of the respondent that the present appeal is a composite appeal against three orders including the order dated 27.08.2013 dismissing the review petition,

R.P. No. 424/2013. It is submitted that an appeal against an order rejecting the application for review was barred under provisions of Order 47 Rule 7 of CPC. In support of this contention, the respondent has relied upon the decision of the Supreme Court in the case of *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput*: (1994) 2 SCC 753.

14. It is further submitted on behalf of the respondent that by virtue of the second impugned order, the Court has issued notice in IA No.13434/2013 and has not rejected the said application. Thus, the second impugned order would not be an appealable order as no appeal has been provided under CPC. The same could also not be construed as a “Judgment” and, consequently, an appeal under Section 10 of the Delhi High Court Act, 1966 would also not lie against the second impugned order. In support of his contention, the respondent has relied on the decision of this Court in *Nisha Raj and Anr. v. Pratap K. Kaula and Ors.*: 57 (1995) DLT 490. The respondent has also placed reliance on the decision of the Supreme Court in the case of *Shah Babulal Khimji v. Jayaben D. Kania & Anr.*: (1981) 4 SCC 8. It is submitted that for an interlocutory order to qualify as a judgment, the same must have a element of finality. It is submitted that the second impugned order does not have any trappings of finality attached and thus, no appeal would lie against the said order.

15. The learned counsel for the respondent has also submitted that an appeal against the impugned order was also not maintainable at this stage in view of the earlier order passed by a Division Bench in FAO(OS) No.381/2013. It is contended that the order dated 23.08.2013 passed in FAO(OS) No.381/2013 granted liberty to the appellant to impugn the

correctness of the order which may be passed in the fresh application as also the order impugned therein (i.e. the impugned order in the present appeal). According to the learned counsel for the respondent, the appellants are at liberty to challenge the impugned order, however, the same could only be done after the fresh application filed by the appellant before the learned Single Judge had been considered and decided. Since, in the present case, IA No.13434/2013, which was filed pursuant to the liberty granted by the Division Bench by the order dated 23.08.2013, is still pending, the appellant is not at liberty to file the present appeal.

16. It has been contended on behalf of the respondent that the impugned advertisements are comparative advertisements which are permissible. The learned counsel for the respondent has supported the finding of the learned Single Judge that the impugned advertisements do not disparage the products of the appellant nor denigrate the goodwill and reputation of the appellants in any manner. It is, thus, contended that the said advertisements are not proscribed. The learned counsel relied on the decision of a Division Bench of this Court in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*: 167 (2010) DLT 278 (DB), in support of his contention.

17. It has been contended on behalf of the respondent that advertisements are to be viewed as a whole and the respondent place reliance on the decisions in *Marico Limited v. Adani Wilmar Limited*: 199 (2013) DLT 663, *Glaxo Smithkline Consumer Healthcare Limited and others v. Heinz India Private Limited and another*: I.A. No.15233/2008 in CS (OS) No.2577/2008, Decided on 12.11.2010 and *McDonald's Hamburgers Ltd. v. Burgerking (UK) Ltd.*: [1986] F.S.R. 45. The learned

counsel has relied on the decision in the case of **Reckitt Benckiser (India) Limited v. Hindustan Unilever Limited**: 2008 (5) R.A.J. 664 (Del.), and contended that the test of an average person with imperfect recollection is applied for determining disparagement.

18. It is contended on behalf of the respondent that the advertisement is a form of commercial speech and as such is protected under Article 19(1)(a) of the Constitution of India. Thus, the impugned advertisements cannot be interdicted by any law unless the same falls within the exception of Article 19(2) of the Constitution of India. In support of this contention, the respondent has relied upon the decision of the Supreme Court in **Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.**: (1995) 5 SCC 139.

19. The learned counsel for the respondent has controverted the contention that the 'multiple meaning rule' should be applied to the facts of the present case. It is contended that the learned Single Judge has rightly applied the test as to how the impugned advertisements would be viewed by a discerning viewer. It is contended that the multiple meaning rule as canvassed by the appellant has no basis in law and the said rule has not been accepted in India. It is further contended that this rule is also not accepted in the United Kingdom. The learned counsel has sought to distinguish the case of **Ajinomoto Sweeteners Europe SAS** (*supra*) by contending that the said case did not relate to grant of interim relief but related to the instructions given to a Jury and, as such, the said rule could not be applied in the present case. The learned counsel also relied on the decision in the case of **Tesla Motors Ltd, Tesla Motors Inc. v. British**

Broadcasting Corporation: [2013] EWCA Civ 152 to contend that even in United Kingdom, the test of multiple meaning rule has not been followed.

20. The respondent further contended that the impugned advertisements were truthful and the claims made in the impugned advertisements were substantiated by the *In vivo* and *In vitro* tests carried out by two independent laboratories. The respondent further supported the findings of the learned Single Judge and contended that the same were neither perverse nor against any settled principle of law and thus, could not be interfered with by an appellate court. With regard to the appellants contention that additional Triclosan concentration did not in any manner provide additional protection against dental cavities as conveyed by the impugned advertisements as also the contention that better efficiency of protection against tooth decay and cavities could not be projected on the basis of a higher concentration of triclosan, the respondent pointed out, at the close of the arguments, that the said contentions were not urged before the learned Single Judge and also before this Court in the opening arguments. It was submitted that as there was no occasion for the respondent to deal with the said contentions, the same could not be entertained by this Court.

Re: Preliminary objection regarding maintainability of the appeal

21. The present appeal is a composite one whereby the appellants have challenged three orders. Insofar as the challenge to the impugned order is concerned, there can be no dispute that in the normal course an appeal would be maintainable against the impugned order whereby the application of the appellants under Order 39 Rule 1 & 2 being IA No.12818/2013 has

been finally rejected. The controversy regarding maintainability of the appeal against the impugned order is premised only on the interpretation of the order dated 23.08.2013 passed by a Division Bench of this Court in FAO(OS) 381/2013. According to the respondent, the appellants having withdrawn their earlier appeal (FAO(OS) 381/2013) are precluded from filing a fresh appeal against the impugned order save as except in accordance with the liberty granted by the Division Bench in their order dated 23.08.2013 passed in the said FAO(OS) 381/2013. Considerable amount of time has been consumed by the respondent in attempting to interpret the said order dated 23.08.2013 as having not granted the appellants the liberty to file a fresh appeal to challenge the impugned order before the fresh application under Order 39 Rule 1 & 2 contemplated therein (which subsequently came to be filed and numbered as IA No. 13434/2013) had been finally heard and decided. A plain reading of the order dated 23.08.2013 indicates that all rights and contentions of the parties were reserved and the Court expressly recorded that it was open for the appellants to impugn the correctness of the order which may be made in the fresh application and also if necessary impugn the order which was subject matter of that appeal (i.e the impugned order herein). We are unable to read any restriction in this order which would prevent the appellant from preferring an appeal against the impugned order prior to the decision in the fresh application that was filed pursuant to the liberty granted by the Court by virtue of the order dated 23.08.2013. It is apparent that the appellants desired to place certain material before the Single Judge in order to persuade the learned Single Judge to grant an ad-interim injunction against the impugned advertisements and had, accordingly, withdrawn the earlier

appeal with liberty to file a fresh appeal, if necessary. The appellants were not successful in persuading the learned Single Judge for an ad-interim order and have thus, found it necessary to file a fresh appeal challenging not only the impugned order but also the non grant of relief as prayed for in the fresh application (I.A. 13434/2013 filed by them). As we are unable to read in the order dated 23.08.2013 any restriction as to the liberty granted to the appellants, we reject the preliminary objection raised by the respondent in respect of the challenge to the impugned order. We are also persuaded by the fact that although, admittedly, the appellants have the right to appeal against the impugned order, their earlier appeal had, indisputably, not been heard and decided. We find no reason to deprive the appellants of their right to challenge the impugned order.

22. Insofar as, the present appeal challenges the second impugned order, it is to be noted that IA No.13434/2013 has not been disposed of. However, according to the appellants non grant of an ad-interim order itself has wide ramifications as far as the business of the appellants is concerned. It has been contended on behalf of the appellants that while the appellants have more than 50% market share of the total market relating to dental creams, the respondents market share is less than 6%. It is the case of the appellants that the impugned advertisements are disparaging and impermissible in law. Thus, insofar as the appellants are concerned, if they are correct in their claim, a denial of an ad-interim injunction would, undoubtedly, affect their valuable rights. An advertisement by a party which disparages the goods of its competitors, indisputably, must be interdicted at the earliest. The non grant of ad-interim relief in such cases

would tantamount to permitting a party to continue to slander, disparage and denigrate the goods of its competitor and it could not be disputed that from the standpoint of a party complaining against such disparagement, a denial of non grant of an ad-interim order would cause serious injustice to the party concerned. The decision of the Supreme Court in *Shah Babulal Khimji* (*supra*) also explains that although every interlocutory order cannot be recorded as a judgment but those orders which decide the “matter of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned” would be considered orders in respect of which an LPA would lie.

23. The question whether an order issuing notice would be appealable was considered by a division bench of this Court in *Nisha Raj v. Pratap K Kaula* (*supra*). In that case, a Division Bench of this court held that Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 provides for an appeal against an order passed under Order 39 Rule 1, Rule 2 or Rule 2A, Rule 4 or Rule 10, however, an order issuing notice is an order under Order 39 Rule 3 and no appeal has been provided against an order passed under order 39 Rule 3 of Code of Civil Procedure, 1908. Thus, an appeal against an order issuing notice would not lie under the provisions of the Code of Civil Procedure. In regard to the question whether an order issuing notice would amount to a judgment under section 10 of the Delhi High Court Act, 1966, the Court held that certain interlocutory orders which are not covered by Order 43 Rule 1 of Code of Civil Procedure, 1908 will, nonetheless, be appealable under section 10 of the Delhi High Court Act, 1966 provided the orders possess the characteristics and trappings of finality. It was further

explained by the Division Bench of this Court that directing issuance of a notice may indeed be a final order in the rarest of rare cases where there is no possibility of restitution. The illustrations of the rarest of rare cases that were cited by the Court included cases where goods were in the process of being exported beyond the territorial waters or where the case pertained to execution by a death sentence. In such cases, restitution was clearly not possible and there was no chance of any kind of retrieval. The Court held that in such category of cases the impact of issuing a notice would be direct and immediate.

24. Taking a cue from the aforesaid judgments in *Nisha Raj v. Pratap K. Kaula* (*supra*) and *Shah Babulal Khimji* (*supra*), we must apply the tests whether the second impugned order irretrievably prejudices the rights of the appellant or whether it decides a matter of moment or affects vital and valuable rights of the parties which work serious injustice to the party concerned. In our view, the answer to this must be in the negative, particularly, in the light of the fact that the earlier interim application seeking similar reliefs had been heard and decided by the learned Single Judge by the impugned order. Accordingly, the present appeal is restricted to challenging the impugned order and on the material placed and the contentions advanced before the learned Single Judge in respect of I.A. 13434/2013.

25. Insofar as, the challenge to the order dated 27.08.2013 is concerned inasmuch as it rejects the Review Petition (R.P. No.424/2013), the same is clearly not maintainable in view of the express language of Order 47 Rule 7(1) of the Code of Civil Procedure, 1908 which provides that an order of

the Court rejecting an application for review shall not be appealable. Accordingly, the challenge to the order rejecting the review petition cannot be considered.

Discussion as to law on disparagement

26. Before proceeding further to address the controversy involved in the present proceedings, it would be apposite to bear in mind the meaning and import of the expressions “disparagement” and “puffing” and similar cognate expressions. The Black’s Law Dictionary, Eighth Edition, defines “Disparagement” to *inter-alia* mean:-

“A derogatory comparison of one thing with another; the act or an instance of castigating or detracting from the reputation of, esp. unfairly or untruthfully; a false and injurious statement that discredits or detracts from the reputation of another’s property, product or business.”

Black’s Law Dictionary, Eighth Edition, defines “Trade Disparagement” to *inter-alia* mean:

“The common-law tort of belittling someone’s business, goods, or services with a remark that is false or misleading but not necessarily defamatory. To succeed at the action, a plaintiff must prove that; the defendant made the disparaging remark; the defendant intended to injure the business, knew that the statement was false, or recklessly disregarded whether it was true; and the statement resulted in special damages to the plaintiff, by passing off.”

Black’s Law Dictionary, Eighth Edition, defines Puffing as under: –

“The expression of an exaggerated opinion – as opposed to a factual misrepresentation – with the intent to sell a good or

service; Puffing involves expressing opinions, not asserting something as a fact. Although there is some leeway in puffing goods, a seller may not misrepresent them or say that they have attributes that they do not possess.”

27. The law relating to disparaging advertisements is now well settled. While, it is open for a person to exaggerate the claims relating to his goods and indulge in puffery, it is not open for a person to denigrate or disparage the goods of another person. In case of comparative advertisement, a certain amount of disparagement is implicit. If a person compares its goods and claims that the same are better than that of its competitors, it is implicit that the goods of his competitor's are inferior in comparison. To this limited extent, puffery in the context of comparative advertisement does involve showing the competitor's goods in a bad light. However, as long as the advertisement is limited only to puffing, there can be no actionable claim against the same. In the case of White v. Mellin,: (1895) A.C. 154, the House of Lords while rejecting the contention of disparagement observed as under:

“The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course “better” means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be

bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure - whether a particular article of food was in this respect or that better than another. Indeed, the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better.”

28. The above decision was further explained by the Chancery Division in the case of *De Beers Abrasive Products Ltd. and Others v. International General Electric Co. of New York Ltd. and Another*: 1975 (2) All ER 599, wherein while considering an allegation of false advertising causing injury to a rival traders group, the court observed as under:-

“the law is that any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival's goods..... “The best tailor in the world,” “The best tailor in this town,” and “The best tailor in this street,” none of the three committed an actionable wrong Where, however, the situation is not that the trader is puffing his own goods, but turns to denigrate those of his rival, then, in my opinion, the situation is not so clear cut. 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 [1895] A.C. 154, 171*, which were accepted by Mr. Walton as stating the law, the statement would be actionable.”

29. Thus, as long as claims made in an advertisement are considered only as puffery, no interference with the same by the courts would be

warranted. This is for a simple reason that puffing involves expressing opinions and are not considered as statements of fact which can be taken seriously. As puffery is neither intended to make a representation as to facts nor is considered as such by the target audience. The advertisement involving puffery, thus, cannot be stated to be misrepresenting facts. It is common for advertisements to make extravagant and exaggerated claims in relation to goods and services. It is expected that an advertiser would embellish the goods and services that are advertised and such puffery is neither expected to be nor is taken seriously by any average person. This was also observed by the Chancery Division in *De Beers Abrasive Products Ltd. (supra)* as under:-

“In other words, in the kind of situation where one expects, as a matter of ordinary common experience, a person to use a certain amount of hyperbole in the description of goods, property or services, the courts will do what any ordinary reasonable man would do, namely, take it with a large pinch of salt.”

30. Having stated the above, it is equally well settled that a trader is not entitled to denigrate or defame the goods of his competitor's, while comparing his goods with that of the other traders. In comparative advertising, the comparing of one's goods with that of others and establishing the superiority of one's goods over that of others is permissible, however, while doing so, one is not allowed to make a statement that the goods of others are bad, inferior or undesirable as that would amount to defaming or denigrating the goods of other's, which is actionable. In the case of *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*: 167 (2010) DLT 278 (DB), a Division Bench of this Court reviewed the

propositions on comparative advertisement as held by the Calcutta High Court in the case of *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.*; 1999 (19) PTC 741 and held as under:-

“23. Finally, we may mention that *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.*, 1999 (19) PTC 741, 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*, 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 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.”

31. There is no dispute as to the principles as enunciated in *Dabur India Limited* (*supra*) and it is common ground between the appellants as well as the respondent that the present case must be adjudged on the principles as referred in that case.

Discussion regarding multiple meaning rule

32. Although, there is no controversy regarding the law on disparagement, there has been much debate with respect to the applicability of multiple meaning rule to the facts of the present case. The learned counsel for the appellants has relied upon the decision in *Ajinomoto Sweeteners Europe SAS* (*supra*). In that case, the claimant company manufactured and sold aspartame, an artificial sweetener. A super market chain selling its own brand of health foods packaged some of its products in packaging which carried the following message “no hidden nasties” together with a legend reading “no artificial colours or flavours and no aspartame”. The claimant therein contended that the message on the packaging indicated that aspartame was potentially harmful or unhealthy and was something which health conscious consumers would avoid. Tugendhat J (Trial Court) considered the meaning of the words used on the

packaging and concluded that the following meanings were possible A: That aspartame is harmful or unhealthy. B: That there is a risk that aspartame is harmful or unhealthy. C: That aspartame is to be avoided. D: That these foods were for customers who found aspartame objectionable. The meaning A was rejected outrightly. Meaning C was found to add nothing to meaning B and was also, therefore, not relevant. After having concluded that meanings B and D were both plausible, the Judge applied the single meaning rule and meaning D was adopted as the same was inoffensive while meaning B would convey a message disparaging aspartame. The said decision was carried in an appeal which was considered by the Court of Appeal in *Ajinomoto Sweeteners Europe SAS (supra)*. The Court traced the development of law in this regard. Earlier, the view held was that words were always to be construed in the most inoffensive sense reasonably possible. However, this practice subsequently gave way to the rule that the words and expressions were to be understood “according to the general and natural meaning, and agreeable to the common understanding of all men”. The Court of Appeal also noted that Levinz J in *Naben v. Micoock: (1683) Skin. 183*, explained this rule by holding that the words must be understood “in their natural, genuine and usual sense and common understanding, and not according to the witty constructions of lawyers, but according to the apprehension of bystanders”. The Court of Appeal held that the single meaning rule is not to be imported into the tort of malicious falsehood and further held as under:-

“33. But where it is capable of being applied, as it is in the present claim, the rule is productive of injustice. On the judge's unchallenged findings, the meanings which reasonable

consumers might put on the claimant's health-food packaging include both the damaging and the innocuous. Why should the law not move on to proof of malice in relation to the damaging meaning and (if malice is proved) the consequential damage without artificially pruning the facts so as to presume the very thing — a single meaning — that the judge has found not to be the case?

34. I do not accept that doing this will make trials of malicious falsehood claims unwieldy or over-complex. This is not because these claims are always tried by a judge alone: the experience of common law judges is that juries are on the whole very good at assimilating and applying sometimes complicated directions. It is because it makes the trial of the issues fairer and more realistic. Instead of (as here) denying any remedy to a claimant whose business has been injured in the eyes of some consumers on the illogical ground that it has not been injured in the eyes of others, or alternatively (and Mr Caldecott's case necessarily involves this) giving such a claimant a clear run to judgment when in the eyes of many customers the words have done it no harm, trial of plural meanings permits the damaging effect of the words to be put in perspective and both malice and (if it comes to it) damage to be more realistically gauged.

35. For these reasons I would hold that the single meaning rule is not to be imported into the tort of malicious falsehood.”

33. The multiple meaning rule by itself is not determinative in a case of malicious falsehood. The multiple meaning rule has to be applied in conjunction with determining the intent of the person against whom a claim of malicious falsehood is launched. If the statements made are honest and without any malintent then it is obvious that a single meaning rule would be applicable and the meaning which is inoffensive would be considered over offensive ones. This was also held in the case of the *Lait v. Evening Standard Ltd.*: [2011] 1 W.L.R. 2973, wherein it was held as under:-

“52. The first question is whether the single meaning rule, as explained by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 , 171–174, and as discussed more recently by Sedley LJ in *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497, applies where the defence is one of honest comment. In my view, it does. First, given the rationale for the rule in the field of defamation (which has been affirmed in *Charleston v News Group Newspapers Ltd.* [1995] 2 AC 65 , 71–72), it is a little hard to see why, as a matter of principle, it should not apply when the court is assessing a defence of honest comment. Secondly, it appears to me that it would be inconvenient, particularly if the case was being tried by a jury, if the single meaning rule applied in a defamation trial for some purposes, but not for others. Thirdly, a number of authorities support this conclusion: see *Merivale v Carson* 20 QBD 275 , 279, 281 and 282, and *Burstein v Associated Newspapers Ltd* [2007] 4 All ER 319, paras 7–8. I also agree with Laws LJ that the approval in the *Charleston* case [1995] 2 AC 65 of Diplock LJ's judgment in the *Slim* case appears to support this conclusion.”

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.

36. The decision in *Tesla Motors* (*supra*) also does not support the view that multiple meaning rule has not been followed in United Kingdom as was contended by the learned counsel for the respondent. The facts in that

case related to an action that was instituted for claiming damages for libel, for malicious falsehood and for an injunction to prevent further publication of statements which was a subject matter in those proceedings. Tesla Motors Limited and Tesla Motors Inc. (referred to as 'Tesla') were manufacturers of motor vehicles and had made available two vehicles for a review by a well-known television programme "Top Gear" which was broadcast by the respondent. In one episode of the programme that was telecast, the cars (Roadsters) that were made available by Tesla were shown to be tested. The tests were designed to push the car to the limits of their performance in terms of acceleration, straight-line speed, cornering and handling. The presenter of the programme, a well-known personality Jeremy Clarkson, who was filmed as driving one of the cars around the track, made various comments regarding the motor vehicle. Some of which were complementary, however, some of the comments were not. Tesla took an exception to two portions of the film including one portion which is described as under:-

"..begins with Mr.Clarkson praising the car and saying:

"This car, then, really was shaping up to be something wonderful. But then....'At this point there is the artificial sound of a motor slowing down and stopping, followed by a shot of Mr. Clarkson sitting in what has become a stationary vehicle saying: 'Oh! ... Although Tesla say it will do 200 miles, we worked out that on our track it would run out after just 55 miles and if it does run out, it is not a quick job to charge it up again.' There follows a shot of people pushing one of the Roadsters into the hangar and Mr. Clarkson plugging in the cable in order to re-charge it."

It was contended on behalf of the Tesla that the statement, “although Tesla say it will do 200 miles, we worked out that on our track it would run out after just 55 miles”, was defamatory as it meant that Tesla had, recklessly, grossly mislead potential purchasers by claiming that its vehicles had a range of 200 miles, while in fact, the range of the vehicle was only about 55 miles. This contention was not accepted as the Court of Appeal held that the statement made by the presenter in the programme related to the range of the vehicle in test conditions. The Court further viewed the film to ascertain the impression that it conveyed and held as under:-

“21. For the purposes of the appeal I have watched the whole of the film a number of times. In my view it was important to do so because, although the transcript with which the court was provided is a helpful reminder of what was said and shown, it does not convey the same impression as the film itself. One important matter which is vividly conveyed by the film is the nature of the testing that was carried out by the ‘Top Gear’ team, which involved violent acceleration (described as a “drag race”), continuous high-speed driving at or near the limits of the car's capability and heavy cornering. Testing of this kind is typical of ‘Top Gear’, as most viewers of the programme would know, but even a person viewing the programme for the first time would immediately realise that the style of driving bears no relationship to that which could be engaged in on a public road, even if the car were to be driven quickly by normal standards. It was for this reason that Mr. Caldecott Q.C. submitted that no reasonable person could draw the inference that the car's range undernormal, albeit quick, driving conditions was only 55 miles or that in claiming that it had a range of 200 miles Tesla had dishonestly set out to mislead the public.

22. At the heart of this part of the case is the allegation that the statement contained in the film meant that the true range of

the Roadster was in the order of 55 miles. That is important, because it is the extent of the discrepancy between the claimed range of 200 miles and the alleged true range of about 55 miles that supports what is said to be the implied assertion of dishonesty. Indeed, so great is the discrepancy that, if it were true, it is difficult to see what other inference could reasonably be drawn. However, it is clear from what the viewer sees of the tests carried out on the car that they bear no relationship to driving on public roads, or at any rate to the kind of driving on public roads of a kind on which a manufacturer could possibly base an estimate of range. It would be obvious to a reasonable viewer, therefore, that the range derived from track testing was not in any meaningful sense the car's "true range" and he would therefore have no reason to infer that by claiming a range of 200 miles Tesla had set out to mislead."

37. It is apparent from the above that this was not a case where the Court was presented with a set of facts where two meanings were possible. The multiple meaning rule is applied only in cases where two meanings are plausible and thus there was no scope of applying multiple meaning rule in *Tesla Motors (supra)*.

38. Our attention was drawn to paragraph 19 of the aforesaid judgment in *Tesla Motors (supra)* which reads as under:-

"19. It was common ground that the judge applied the correct principles for the purposes of determining what meanings relating to the Roadster's range the programme was capable of bearing. They were derived from *Skuse v Granada TV* [1996] EMLR 278 and *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 (unreported) and are summarised as follows in paragraph [10] of his judgment:

"(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 averse to scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (Emphasis added.)

(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 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.

The above list was broadly followed by the Court of Appeal in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14], save that it added the important point that the hypothetical reader is taken to be representative of those who would read the publication in question.”

39. We do not think that there is any quarrel with the principles as enunciated in the above referred passage from the decision in *Tesla Motors (supra)*. 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.

Impugned TVC

40. Having briefly outlined the principles of law that are applicable, we may proceed to examine the impugned advertisements.

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 Kareng 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”).

44. It is contended on behalf of the appellants that the impugned TVC is *per se* disparaging the product and goodwill of the appellants. The test which is shown to be conducted is a cavity test and it is contended that no such test, in fact, exists. The impugned TVC is stated to depict the mother of the Colgate child as wearing a worried and a concerned look in contradiction to the mother of the Pepsodent child who appears as being confident and satisfied. The expression of the Pepsodent Child’s mother indicates superiority, which it is contended, is meant to show the superiority of Pepsodent GSP. It is contended that the impression that is conveyed is that Colgate child’s mother is circumspect about Colgate ST. Much emphasis was laid by the learned counsel for the appellants on the depiction of the triclosan soldiers, while triclosan soldiers in blue, which pertain to Pepsodent GSP, are shown to be increasing and subsequently

occupying the entire screen, the triclosan soldiers shown in red, pertaining to Colgate, are shown to be diminishing. It is contended that this depiction is mischievous as Triclosan is not a live organism and does not multiply. The learned counsel for the appellants has also sought to attribute meaning to the word “ATTACK” which is exclaimed by the child after the cavity test.

45. The examination of the impugned TVC frame by frame and its detailed analysis of the words used or the expressions of the mothers and attributing a message to them, is in our opinion, not the correct way to view any advertisement. The advertisement must be viewed in its entirety and it is not necessary to dissect each word or expression. In the case of **McDonald’s Hamburgers Ltd v. Burgerking (UK) Ltd.**: [1986] F.S.R. 45, the Chancery Division stressed that the advertisement should be considered as a whole in the case of disparagement and held as under:

“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.”

46. The relevant question to be asked 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. In the case of **Pepsi Co., Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr.**: 2003 (27) PTC 305 (Del.), a Division Bench of this Court had held that factors which are required to be considered while deciding the question of the disparagement are (1) Intent of the commercial (ii) Manner of the commercial (iii) Story line of the commercial and the message sought to be conveyed by the

commercial. These factors were further clarified by a Division Bench in the case of *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr. (supra)* wherein the court held as under:-

- “(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?

In this context it must be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavourable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.

- (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.”

47. The learned Single Judge has examined the impugned TVC in detail and has come to a conclusion that the impugned TVC does not depict the Colgate child in any bad light or points out any defect in Colgate ST. Although, it had been contended on behalf of the appellants that the mother of the Colgate child looked worried and concerned and the teeth of the Colgate child did not look as well formed as that of the Pepsodent child, the learned Single Judge after examining the frames has not found any such derogatory representation and has come to a conclusion that impugned TVC cannot be held to be disparaging Colgate ST. A comparative

advertisement is permissible and it is open for a trader to compare his goods and services with that of his competitors and, if true, also proclaim his goods/services as better than those of competitors. However, he cannot proclaim that the goods of competitors are bad or make any disparaging statements about the goods/services of his competitors. We have also viewed and examined the impugned TVC and, without going into the truthfulness and accuracy of the message conveyed by the impugned TVC, it is not possible to conclude that the advertisement per se denigrates or slanders Colgate S.T. It is not possible to come to a conclusion that the Colgate child has been shown in a bad light or to be suffering from any dental ailment and in that view of the matter while the impugned TVC does proclaim Pepsodent GSP to be 130% better than Colgate, it cannot be stated that the impugned TVC *per se* denigrates Colgate ST.

48. Having stated the above, it would also be necessary to examine the intent and the overall effect of the advertisement. Following the decision in ***Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*** (*supra*), it is also important to examine the storyline and the message that the impugned TVC conveys to an average person who is a consumer or a prospective consumer of the products that are advertised. An average person cannot be assumed to be gullible and is presumed to have the ability to ignore puffery. However, an average viewer is likely to accept the factual representations that are conveyed by an advertisement if the same are conveyed as serious statements of fact and not as hyperbole. An average viewer does not analyse an advertisement and is likely to be receptive to the message that the advertisement projects. A similar view has been articulated by a Single

judge of this Court in *Glaxo Smithkline Consumer Healthcare Limited and others v. Heinz India Private Limited and another*: I.A. No.15233/2008 in CS (OS) No.2577/2008, Decided on 12.11.2010, wherein this court held as under:-

“An application of the principles discussed previously in this judgment, would mean that the Court has to, as far as possible, consider the overall effect of the advertisements; a minute dissection of each term, or phrase is uncalled for, and the stand point from where the Court should judge the nature of the alleged disparagement should be not of the aggrieved trader, but the reasonable, or average consumer, who is conscious of trading rival's propensities to puff and exaggerate their products. At the same time, this reasonable or average consumer is likely to be influenced by factual assertions made in such advertisements. Specific assertions, or claims, in advertisements are more likely impact directly, as contrasted with vague and general claims.”

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 than 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.

50. The entire basis of the claim being made by the respondent is that the *In vivo* and *In vitro* test conducted by independent laboratories have found that concentration of triclosan in dental plaque, after four hours of brushing, is higher where Pepsodent GSP has been used in comparison with cases where Colgate ST is used. These findings are also disputed. However, notwithstanding the dispute, the question which arises is, does this parameter by itself lead to an inference that Pepsodent GSP is more efficient in combating tooth decay and cavities in comparison with Colgate ST. The co-relation between higher concentration of Triclosan after four hours of usage of Pepsodent GSP as claimed by the respondent and cavity prevention qualities of the two compared products is vital to determine the truthfulness of the impugned TVC. In the event, it is found that this co-relation is illusory and a higher concentration of Triclosan in dental plaque does not have a proportionate impact in combating tooth decay or germ

build up or that Colgate ST has certain other ingredients in addition to Triclosan which also prevent tooth decay then clearly the message sent out by the impugned TVC would be untruthful and thus impermissible. To illustrate this point, let us take a hypothetical case of comparison between two motor vehicle manufacturers. While one manufacturer may use an engine of a higher cubic capacity, the other manufacturer, while using an engine of a lower capacity may tune it differently and employ a better fuel injection system which, in fact, leads to delivering more power to the wheels in comparison to the vehicle employing the larger capacity engine. While it would be appropriate for the car manufacturer using a larger engine to put out a comparative advertisement indicating that the engine used in vehicles manufactured by him were of a higher capacity than the engine used by other car manufacturer, it would be completely misleading if the former car manufacturer would on the basis of a higher capacity engine proclaim that the vehicles manufactured by him were more powerful and faster than that of his competitor. 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.

51. In the case of **Lakhanpal National Ltd. v. M.R.T.P. Commission:** (1989) 3 SCC 251, the Supreme Court explained that an advertisement may contain inaccurate facts yet convey an essentially truthful message. On the other hand, an advertisement may be entirely accurate on facts but convey a completely misleading message. In that case, advertisements were issued

by a dry cell battery manufacturer who was manufacturing and dealing in power cells under the brand name “Novino”. The advertisements announced that Novino batteries were manufactured in collaboration with National Panasonic of Japan using National Panasonic techniques. In fact, there is no company known as National or Panasonic. The same were brands names of Mitsushita Electric Industrial Co. Ltd. Technically viewed, the advertisement contained inaccurate facts, however, the Supreme Court held that viewed from the perspective of the message that was being communicated, the same could not be held to be untrue. This was explained by the Supreme Court in the context of unfair trade practice as under:-

“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"; Let us examine the relevant facts of this case in this background."

52. The disclosure of the basis on which the message of the impugned TVC is predicated (i.e. the Super indicating that basis to be *In vivo* study) would not be an adequate defence if the message conveyed by the impugned TVC advertisement is found to be untruthful.

53. We find that this aspect of the matter has not been considered by the learned Single Judge. Even before us, arguments on this aspect were also advanced at the stage of rejoinder and the respondent did not have an occasion to contest the same. In these circumstances, we consider it appropriate if the matter is remanded to the learned Single Judge for considering this aspect of the matter afresh, based on the material that may be produced by the appellant in support of its contentions.

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.

55. We may add that the appellants have a product in their portfolio, Colgate Total, which, admittedly, delivers a sustained release of triclosan. Admittedly, the concentration of triclosan in dental plaque, after four hours of brushing with Pepsodent GSP, does not exceed the concentration of Triclosan where Colgate Total is used. The learned counsel for the

respondent has explained that Colgate Total is a product in the premium segment and the comparative advertisement is not in respect of Colgate Total. In this view of the matter, the voiceover at the end of the impugned TVC which proclaims Pepsodent GSP to be better than Colgate is indisputably inaccurate and *prima facie* mischievous. In this view of the matter, this voiceover is liable to be deleted altogether or modified. The Super in the impugned advertisement which explains the basis of indexing of 130%, is alleged to be not visible when the advertisement is viewed on an ordinary Television Set, this aspect has not been seriously contested by the respondent. In the event, the super is not visible on ordinary television sets, the impugned TVC would also require to be modified to ensure that the super is clearly visible to all viewers including those that view the impugned TVC on ordinary television sets.

Impugned print advertisement

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:-



Credible Visualization of the Action of Triclosan. NEW PEPSODENT GERM CHECK-80X enhances delivery of Triclosan to the result. Claim based on in-vivo study where Germ Attack Power refers to amount of Triclosan remaining in mouth, 4 hrs after brushing, where COLGATE STRONG TEETH is reduced at 100% & NEW PEPSODENT GERM CHECK is 130%. Brush twice daily.

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. & Anr.* (*supra*) 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.

Conclusion

60. To sum up, in our view, the impugned TVC cannot be stated to be *per se* disparaging Colgate ST. However, the voice over at the end of the impugned TVC which states "Naya Pepsodent Germi Check Colgate Ke Mukable 130 pratishat Germ Attack Power" (freely translated means "in comparison to Colgate New Pepsodent Germi Check has 130% Germ Attack Power") is misleading and inaccurate. Thus, this statement in the voiceover is directed to be deleted from the impugned TVC or at the option of the respondent, may be suitably modified to refer only to Colgate ST (Colgate Strong Teeth). The respondent is further directed to ensure that the Super which reads as "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." is clearly

visible when the impugned TVC is viewed on any television set. The matter is remitted to the learned Single Judge to consider afresh the aspect whether the essential message conveyed by the impugned TVC is *prima facie* truthful or misleading in the light of the observations made hereinbefore.

61. We further restrain the respondent and or its agents from publishing the impugned print advertisement or any other similar advertisement which disparages Colgate ST (Colgate Strong Teeth) or any other product of the appellants.

62. The present appeal and the application stand disposed of with the aforesaid directions. The parties are left to bear their own costs.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, J

DECEMBER 10, 2013
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