

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) No. 1588 of 2013

Reserved on: August 14, 2013

Decision on: August 21, 2013

COLGATE PALMOLIVE (INDIA) LTD Plaintiff

Through: Mr. C.M. Lall with Mr. Neeraj Sharma,
Mr. V. Seshagri, Mr. Alok Tiwari, Ms. Nancy Roy
and Ms. Ankita Ubaja, Advocates.

versus

HINDUSTAN UNILEVER LTD Defendant

Through: Mr. N.K. Kaul, Senior Advocate with
Mr. Sameer Parekh, Mr. E.R. Kumar, Ms.
Rukhmini, Mr. Shashank and Mr. Kshatrshal Raj,
Advocates.

CORAM: JUSTICE S.MURALIDHAR

JUDGMENT
21.08.2013

IA No. 12818 of 2013 (under Order XXXIX 39 Rules 1 & 2 CPC)

1. The question that arises for consideration in this application is whether there should be an interim injunction restraining the Defendant Hindustan Unilever Limited ('HUL') from publishing and/or telecasting the advertisements launched by it for its product Pepsodent Germicheck Superior Power (hereafter 'Pepsodent GSP') toothpaste in the print and electronic media which it commenced on 9th August 2013. The grievance of Plaintiff No.1, Colgate Palmolive Company, and Plaintiff No.2, Colgate-Palmolive (India) Ltd., is that the impugned advertisements misuse the Plaintiffs' registered trademark 'Colgate', are disparaging of the goodwill and reputation of the Plaintiffs' toothpaste Colgate Dental Cream Strong

Teeth (hereafter 'Colgate Strong Teeth') and that the impugned advertisements tarnish, slander and defame the worth and reputation of the Plaintiffs' brand and products.

2. The above suit was filed by HUL on 13th August 2013. It was first listed on the same date when Defendant HUL appeared on caveat. Mr. N.K. Kaul, learned Senior counsel for HUL sought one day's time to respond to the application filed by the Plaintiffs for an ad interim injunction. The application was set down for hearing on the next day i.e. on 14th August 2013 i.e. at 3 p.m.

3. On 14th August 2013, the short reply filed by the Defendant and the enclosed documents were taken on record in the Court. A copy thereof was served on learned counsel for the Plaintiffs.

4. The impugned television commercial, provided by the Plaintiffs in a CD and Defendant in a flash drive, was viewed in the Court several times during the course of arguments. The print advertisement which appeared in the front page of the newspaper 'Hindustan Times' New Delhi Edition dated 11th August 2013 was produced in the Court.

Submissions on behalf of the Plaintiffs

5. Mr. C.M. Lall, learned counsel for the Plaintiffs submitted that the claim made in the impugned advertisements by HUL that Pepsodent could deliver '130% germ attack power' was blatantly false. According to him, the advertisements further falsely depict that the use of Colgate causes germ formation, cavities and is, therefore, harmful for use. According to him, the product and packaging of the Plaintiffs have been shown in the impugned

advertisements completely without even the slightest effort to mask them. The advertisements compare the latest product variation of Pepsodent with a packaging of Colgate that was discontinued in 2010. He submitted that the impugned advertisements took unfair advantage and were detrimental to the character and repute of the trademark 'Colgate' and therefore constituted infringement under Sections 30(1) (a) and (b) of the Trade Marks Act, 1999 ('TM Act').

6. Mr. Lall referred to the Advertising Standards Council of India ('ASCI') Code and, in particular, Clause IV which contains the Declaration of Fundamental Principles which require advertisements to observe fairness in competition "so that the consumer's need to be informed on choices in the market-place and the canons of generally accepted competitive behaviour in business are both served". He also referred to Clauses 4 and 6 of Chapter I of 'Standards of Conduct' as prescribed under the ASCI Code which mandated that advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions, contain statements or visual presentation which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised. Further, Clause 6 mandated that "obvious untruths or exaggerations intended to amuse or to catch the eye of the consumer are permissible provided that they are clearly to be seen as humorous or hyperbolic and not likely to be understood as making literal or misleading claims for the advertised product".

7. Mr. Lall referred to Section 17(c) of the Drugs and Cosmetics Act, 1940 (DACA) and urged that inasmuch as the label accompanying the toothpaste Pepsodent GSP contains a statement which is both false and misleading, the

Defendant is guilty of misbranding. Laying emphasis on the 'Supers' (textual message strings) which run at the foot of several frames of the TV commercial and the printed advertisements, he submitted that they violate the ASCI's minimum lettering size and duration specifications. These require that the Supers should be clearly legible. On TV ads they should be long enough for the full message to be read by an average viewer on a standard domestic TV set. For print ads, the font size of the Supers should be a minimum 6 and 7 points for a 100 column centimeter or less and more than 100 column centimetre or equivalent size ads respectively.

8. Mr. Lall submitted that HUL had a history of making false claims in respect of its products. He referred to an order dated 5th and 6th November 1997 of the Monopolistic and Restrictive Trade Practices Commission ('MRTPC') which restrained HUL from claiming that Pepsodent was 102% better than Colgate. In that advertisement HUL had not expressly named the competing product as Colgate but had used the expressions 'the famous and renowned toothpaste' and 'leading toothpaste'. The appeal against the said order filed by the HUL had been dismissed by the Supreme Court by an order dated 17th December 1997 reported as *Hindustan Unilever Limited v. Colgate Palmolive AIR 1998 SC 526*.

9. Mr. Lall submitted that the claim of 130% is not just a gimmick but trickery. The figure of 130% was against a base toothpaste that has no anti-bacterial actives, as was explained with an asterix mark on the packaging of Pepsodent GSP. Therefore, the 130% claim could not be against Colgate Strong Teeth since it was a fluoridated anti-cavity toothpaste with anti-bacterial actives. He accordingly submitted that both the impugned

television commercial and print advertisement made claims contrary to the Defendant's own packaging. He referred to para 9 of the plaint which states that the market share of Pepsodent dropped from 13.7% to 6% and that Pepsodent GSP, depicted in the impugned advertisement, had a market share of 0.2%. In comparison, Colgate was the market leader having more than 50% market share amongst all toothpastes. Colgate Strong Teeth enjoys approximately 30% market share both by value and by volume in 2013. The Plaintiffs apprehend that they would their lose market share if such deceptive and unfair advertising by HUL is permitted to continue.

10. Mr. Lall referred to a series of decisions involving HUL and certain other companies which would, according to the Plaintiffs, show that the Defendant has made a habit of introducing such false and misleading advertisements to dupe members of the public and increase its market share dishonestly. By the time the aggrieved party could seek legal recourse, the Defendant has already caused sufficient damage to its competitors. Reference is made to the decisions in *Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.* 200 (2013) DLT 563 (hereafter *Dettol v. Lifebuoy* case) and *Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.* 2013 V AD (Del) 94 (hereafter *Dettol Liquid* case) and *Reckitt Benckiser (India) Ltd. v. Hindustan Unilever Ltd.* 151 (2008) DLT 650 where this Court at the end of a full-fledged trial in the *Dettol v. Lifebuoy* case held against HUL and opined that the advertisement in that case were disparaging of Dettol soap of the Plaintiff. There was no stay granted by the Division Bench (DB) in the appeal filed by HUL against the said decision.

11. The Court was taken from one frame to the other as far as the TV

commercial was concerned. Various components of the print advertisement were explained to show that they were disparaging and denigrating of the reputation and goodwill attached to Colgate and also that the claims made in the impugned advertisements were untruthful and misleading. In particular, the focus was on the ingredient Triclosan in the Pepsodent GSP toothpaste, the use of which was claimed to have enhanced the delivery of Triclosan in the mouth. The claim was that Triclosan remains in the mouth four hours after brushing. It was submitted that the TV commercial purports to depict a 'preventive cavity test' when there is no such known test in the world of dentistry, and that the 'Colgate boy' appearing on the left side of the TV screen is shown to have failed the cavity test whereas the 'Pepsodent boy' appearing on the right side of the TV screen not only passes the test but the 'Colgate boy' also concedes this. Mr. Lall referred to the expressions of the faces on the mothers of the respective boys and submitted that the mother of the Colgate boy was unhappy and worried which, according to him, showed Colgate in a poor light. He focussed on the voice over towards the end of the TV commercial which claimed that Pepsodent was 130% better than Colgate which, according to him, was a wholly false claim when in fact Colgate Strong Teeth was indexed at 100%. He submitted that comparison if at all had to be of like products, in which event Colgate Total toothpaste, which contained 0.3% Triclosan, should have been taken up for comparison and not Colgate Strong Teeth. The 'Super' appearing at the foot of the TV commercial was, according to Mr. Lall, unreadable. The so-called indexing of Colgate at 100% was not visible at all. Focussing on the next frames of the TV commercial, Mr. Lall submitted that while the Colgate boy was shown brushing his teeth in an improper manner and his teeth showed gaps thereby indicating cavities, the Pepsodent boy not only brushed his teeth

properly but was also shown not having any gaps in his teeth. The claim in the TV commercial that Pepsodent GSP would result in an increase in Triclosan, depicted by the increasing number of Triclosan soldiers, was palpably false. According to Mr. Lall, when the TV commercial was viewed as a whole, it was meant to show that a child would develop cavities if he used Colgate Strong Teeth toothpaste and, therefore, the advertisement was clearly denigrating and disparaging of Colgate. Referring to the decision of the DB in *Dabur India Limited v. Colortek Meghalaya Pvt. Ltd.* 167 (2010) DLT 278 (hereafter *Dabur Colortek*) he submitted that the impugned advertisements defame the product and brand Colgate of the Plaintiffs.

12. As regards the print advertisement, Mr. Lall contended that the Colgate boy on the right side was sitting with a sad face clenching his left cheek as if to indicate that he was in pain and unable to eat the pastry kept in front of him whereas the Pepsodent boy on the left sported a beaming smile and was shown being prepared to eat the pastry kept in front of him with a spoon. This, according to Mr. Lall, was disparaging of Colgate. He submitted that the words 'Pepsodent now better than Colgate Strong Teeth' were meant to convey that Colgate Strong Teeth was no longer a good product. According to him the word 'Attaaaack' was an attack on Colgate and not on the cavity causing germs.

13. Lastly, Mr. Lall submitted that the balance of convenience was entirely in favour of the Plaintiffs. The advertisement campaign has just begun. HUL had, in fact, already been using alternative 'point of sale' materials omitting the Colgate part appearing on the right side of the print

advertisement. This meant that HUL had already anticipated the present litigation and a possible injunction against it. Therefore, no prejudice would be caused to HUL if the interim injunction as prayed for was granted.

Submissions on behalf of the Defendant

14. Mr. Neeraj Kishan Kaul, learned Senior counsel appearing for the Defendant HUL, reiterated the two principles settled in the decision in ***Dabur Colortek***. One was that the comparative advertisements were permissible. The second was that the manufacturer of a product could claim that his product was better than that of the competitor. He submitted that some element of denigration in that process was inevitable. What the Court has emphasised is that it should not be malicious so as to cause injury to the product of the competitor. He referred to the decision in ***Marico Limited v. Adani Wilmar Ltd. 199 (2013) DLT 663*** where the Single Judge applied the principles settled in ***Dabur Colortek*** and declined an injunction in similar circumstances.

15. Mr. Kaul submitted that Courts ought not to adopt a hyper technical view and analyse an advertisement like a statute or a clause in some Will or agreement. He submitted that, taken as a whole, neither the TV commercial nor the print advertisement in the present case rubbishes the product or the brand of the Plaintiffs. He submitted that while HUL in this advertisement did claim that Pepsodent GSP was a better product, there was no denigration as such of Colgate Strong Teeth. He referred to the results of the *in vivo* and *in vitro* tests which supported the statements of HUL that Pepsodent GSP could deliver a 130% germ attack power.

16. Mr. Kaul submitted that the whole purpose of these advertisements was to pose a competition to Colgate at the price segment at which it was selling Colgate Strong Teeth. While 100 gm of Colgate Strong Teeth was sold at Rs.37, 100 gm of Pepsodent GSP with Triclosan was priced at Rs.39. He submitted that the averments in the plaint showed that Colgate's superior product 'Total' which had 0.3% Triclosan was positioned as a premium segment product with a 70gm tube of Total toothpaste selling at Rs.52. In other words, the aim of the Defendant was to show that the superior product that Colgate could offer was always marketed as a premium product. He submitted that the TV advertisement showed that Triclosan in Pepsodent GSP would be retained and released even four hours after the consumption of food. The Triclosan soldiers had to be viewed in that context. He referred to paragraphs 21 and 23 of the plaint where it was averred that the Plaintiffs had stopped marketing the product shown in the advertisement whereas the Defendant had been able to procure, even in August 2013, the same product from the market. As regards the claim of superior power, Mr. Kaul submitted that HUL was not estopped from comparing its product with a product of the Plaintiffs which has anti-bacterial actives. He referred to the decision in *Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd. 2006 (32) PTC 307 (Del.)* and submitted that the question whether HUL's product was superior to that of Plaintiffs would be a matter of evidence. At the present stage the Court ought not to injunct the impugned advertisements.

Discussion of case law

17. First, the Court proceeds to examine the law concerning disparaging advertisements as explained in some of its earlier decisions. In *Dabur Colortek* the DB affirmed the decision of the learned Single Judge in *Dabur*

India Ltd. v. Colortek Meghalaya Pvt. Ltd. 2010 (42) PTC 88 (Del). The question before the learned Single Judge was whether the Defendant in that case had, in its advertisement for 'Good Knight Naturals' mosquito repellent cream, disparaged the Plaintiff's mosquito repellent cream 'Odomos'. The learned Single Judge reiterated the principles settled in ***Godrej Sara Lee Ltd.*** that comparative advertisement is permissible as long as it does not have negative overtones. It was further pointed out that for a Plaintiff to succeed in an action based on malicious falsehood, the necessary ingredients are that (i) a false statement was made which is calculated to cause financial damage (ii) that it was made maliciously with an intention to cause injury and (iii) the impugned statement has resulted in a special damage. The law in England was referred to as laying down that: (i) a trader is entitled to say that his goods were the best; in doing so he could compare his goods with another (ii) say that his goods are better than that of the rival trader in this or that respect (iii) whether the statement made was disparaging of his rival's product depended on whether it would be taken 'seriously' by a 'reasonable man'; an alternative test would be whether the trader had in fact highlighted any specific defect in his rival's goods and (iv) a statement made by a trader puffing his own goods was not actionable. Tested on the anvil of the above principles, the impugned advertisement in that case was held not to constitute disparagement and *prima facie* did not fall within the tort of malicious falsehood.

18. In ***Dabur Colortek*** the DB, while affirming the judgment of the learned Single Judge, emphasised that it is necessary to keep in mind the medium of the advertisement in as much as an advertisement in electronic media would

have a far greater effect than an advertisement in the print media. It was then held in para 18 as under:

“18. On balance, and by way of a conclusion, we feel that notwithstanding the impact that a telecast may have, since commercial speech is protected and an advertisement is commercial speech, an advertiser must be given enough room to play around in (the grey areas) in the advertisement brought out by it. A plaintiff (such as the Appellant before us) ought not to be hyper-sensitive as brought out in *Dabur India v. Wipro Limited 2006 (32) PTC 677 (Del)*. This is because market forces, the economic climate, the nature and quality of a product would ultimately be the deciding factors for a consumer to make a choice. It is possible that aggressive or catchy advertising may cause a partial or temporary damage to the plaintiff, but ultimately the consumer would be the final adjudicator to decide what is best for him or her.”

19. On analysing the advertisement in the said case, the DB was of the view that it “merely gives the virtues of the product of the Respondent...” The DB further observed: “While comparing its product with any other product, any advertiser would naturally highlight its positive points but this cannot be negatively construed to mean that there is a disparagement of a rival product. That being so, whether the Appellant’s product is targeted or not becomes irrelevant.” The DB, in *Dabur Colortek*, concluded as under:

“23. Finally, we may mention that *Reckitt and 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 Ltd. v. MTNL (1995) 5 SCC 139* 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.”

20. In *Marico Limited v. Adani Wilmar Ltd.* the issue before the learned Single Judge was whether the Defendant which was offering Fortune rice bran oil ('RBO') had, through its TV and print advertisements, denigrated the Plaintiff's product Saffola by making false, unsubstantiated and

misleading claims that Fortune RBO was the healthiest oil, healthier than Saffola and good not only for the heart but also for cholesterol immunity, skin and hormones. The learned Single Judge applying the law declined an injunction after holding that “the intent, manner and storyline and message of the advertisement of the defendant is of its product containing a higher quantity of Oryzanol (and which follows from being 100% RBO) sufficient to meet the daily requirement of human body of Oryzanol, and which the other products do not, is better. The storyline and the message conveyed by the advertisements of the defendant is not about the comparative cholesterol lowering ability of Oryzanol and which is shown to be higher in the case of a blend of RBO with Safflower Oil in the ratio of 70:30 than 100% RBO; rather the advertisement/website downloads of the plaintiff handed over during the course of arguments themselves inform the said fact to the customers.”

21. The law as explained by the DB in *Dabur Colortek* is that while it may no longer be open to a trader to make an untrue declaration that his product is better than that of the competitor, he can certainly compare the advantages of his goods over the goods of the competitor. What is prohibited is for the trader to say that his competitor's goods are bad. Defamation of the competitor's goods is not permissible. Defamation can give rise to an action for the recovery of damages and in such circumstances an order restraining such defamation can be passed. It was, therefore, held that that no off-the-cuff claim could be made by a trader that his goods are the best in the world.

The impugned TV advertisement

22. Before proceeding to discuss the impugned advertisements in the instant case, the Court would like to underscore that the observations hereafter are of a *prima facie* nature and at a preliminary stage of the case. They are not to be understood as an expression of a conclusive opinion on the merits of the contentions of either party.

23. The Court is aware that the advertisements have to be viewed as a whole and not analysed like the provisions of a statute. Turning first to the TV advertisement, the Court is of the view that too much cannot be read into the expressions on the faces of the mothers of the Colgate and Pepsodent boys respectively to connect those expressions to the quality of the products. The running theme of the TV advertisement is a comparison between the two products to emphasise that Pepsodent GSP is a better toothpaste than Colgate Strong Teeth when it comes to a toothpaste having Triclosan as an ingredient. The indexing of the Colgate Strong Teeth at 100% and in relation thereto showing Pepsodent GSP as having 130% germ attack power is significant from the point of view of the truthfulness of the claim.

24. The story line of the TV advertisement begins with the 'Preventive Cavity Test' with the Colgate boy on the left side of the screen with his mother standing behind him and the Pepsodent boy on the right side again with his mother behind him and both of them beginning to brush their teeth. There is no zooming in on the teeth of either boy to enable the viewer to notice any gaps in the teeth of Colgate boy much less any cavity. Also, the manner of brushing the teeth is really not the focus at this point at all. Contrary to what was suggested by Mr. Lall, at no point in time is the

expression on the Colgate boy's face is one of disappointment. For some reason, and perhaps not intended that way, the Colgate boy actually is extra cheerful. The frames which show the brushing of the teeth by the Colgate boy with his mother behind him does not reflect anything on the quality of Colgate Strong Teeth, much less adversely. Mr. Lall urged the Court to read into the mother's expression a 'worried and confused look'. That, somehow, was not discernible. In any event all of these aspects would be consistent with the case of the Defendant that it is trying to show that Pepsodent GSP is better toothpaste than Colgate Strong Teeth. Upto this stage, it is not possible to discern any disparagement of Colgate Strong Teeth as such.

25. The next segment of the story line is what happens four hours later. This is when the germi check superior power is supposed to be the focus. Both boys are shown eating from their respective tiffin boxes. The Pepsodent boy is having a sandwich and the Colgate boy a burger. Why this would reflect poorly on the quality of Colgate Strong Teeth is not understood. The two halves of the screen are soon populated by the Triclosan soldiers. At the bottom there is disclaimer in the form of a 'Super' which remains in each frame thereafter. In the CD provided by the Plaintiffs the 'super' and the words 'Index 100%' in white font against a red background on the foot of the left side of the screen (the Colgate side) was not clearly visible. However, in the version provided to the Court by the Defendant these were fairly clearly visible. The Court is informed that this might vary according to the aspect ratio of the TV screen. What according to the Plaintiffs is objectionable is that on the right hand top of the Pepsodent GSP side of the screen, the words '100% germ attack power' is shown

rapidly increasing whereas there is nothing corresponding on the Colgate Strong Teeth side and by the time it reaches 130% the entire screen is only of the Pepsodent side. Mr. Lall urged that this meant that Colgate Strong Teeth was 'zero' when compared to '130%' of Pepsodent GSP. The Court is unable to view it that way. It is arguable that the appearance of the two indices at the bottom of the left and right screens as well as the 'Super' which shows that Colgate Strong Teethy is indexed 100% and Pepsodent Germi Check 130% will enable a discerning viewer to appreciate the comparison in its proper perspective. In any event, the claim of 130% germi check power appears more consistent with the Defendant puffing up Pepsodent GSP to show that it is better than Colgate Strong Teeth. It is difficult to view this as denigrating, slandering or rubbishing Colgate Strong Teeth.

26. Next it was contended by Mr. Lall that from this moment onwards, the Triclosan soldiers are shown to be increasing on the Pepsodent side whereas they are shown to be either decreasing or non-existent on the Colgate side. Ultimately, the entire screen is taken up by the Triclosan soldiers on the Pepsodent side. When the sequence is seen in the context of the advertisement, the explanation, as suggested by the Defendant, appears plausible. The Defendant is trying to show that Triclosan is retained better and longer in teeth that have been brushed with Pepsodent GSP. Secondly, it is attempting to show that there is a sustained release of the retained Triclosan even four hours after consumption of food. The hindi voice over says '*lagataar* attack'. It does not necessarily indicate that there is an enhancement of Triclosan. There is no claim either in the voice over or in the visual that the percentage of Triclosan has increased. There is a

suggestion regarding the enhanced efficiency of the Triclosan. It will be a matter of evidence during the trial whether this claim that Pepsodent GSP is 130% effective when compared to the 100% effectiveness of Colgate Strong Teeth is borne out. For the present, the Defendant has placed on record test reports conducted *in vivo* and *in vitro* in support of its aforementioned claim. At this stage, the Court is not expected to examine this aspect in greater detail. Suffice to say that the Court is unable to conclude at this stage that the claim of the Defendant is false or untruthful.

27. The next segment of the story line focuses on the results of the cavity test. The Pepsodent boy is shown victoriously proclaiming 'Pepsodent ka attack' whereas the Colgate boy is shown saying 'attack' with Pepsodent GSP appearing next to him. The expression on the Colgate boy's face at this point is far from 'defeated' as suggested by Mr. Lall. Even if one has to infer that the Colgate boy thereby accepts that Pepsodent GSP is better than Colgate Strong Teeth, it is consistent with the attempt by the Defendant to show that Pepsodent GSP is better than Colgate Strong Teeth. It by no means shows that by using Colgate Strong Teeth a child would develop cavities. An overt or covert rubbishing of Colgate Strong Teeth is difficult to discern.

28. As pointed out in earlier decisions which have been discussed, when one trader claims that his product is better than that of the competitor, an element of denigration of the competitor's product with which the comparison is drawn is inevitable. The question is really whether this is malicious and amounts to rubbishing the Plaintiffs' product and brand. The last frame focuses entirely on Pepsodent GSP toothpaste with the words

130% Germ Attack Power and a voice over in Hindi: '*Naya Pepsodent Germi Check Colgate Ke Mukable 130 pratishat Germ Attack Power*'. When loosely translated it means "When compared to Colgate, New Pepsodent Germi Check (has) 130% Germ Attack Power". This again is a matter of comparison of two products and showing one product to be better than the other. If one were to apply the *Dabur Colortek* principles, the impugned TV advertisement neither defames nor slanders Colgate Strong Teeth. It does not suggest that Colgate Strong Teeth is 'bad'. Much less, as was suggested by Mr. Lall, does it convey that the use of Colgate Strong Teeth would result in cavities developing.

The impugned print advertisement

29. Turning to the print version of the advertisement, the Court is not persuaded to agree with the Plaintiffs that the word 'Attaaack' appearing in the phrase "It's time to Attaaack!" actually means that it is time to attack Colgate and not the germs. This submission overlooks the statement immediately below: 'Pepsodent now better than Colgate Strong Teeth delivers 130% Germ Attack Power'. This is further clarified at the bottom of the advertisement where the words 'Non-stop Attaaaaack!' is above the words (although in smaller font) "On cavity causing germs". The attention span of a viewer of a TV commercial is presumably less than that the reader of a printed advertisement. The word 'attaaaaack' appearing in the print advertisement is not likely to be understood as constituting an attack on Colgate as suggested by the Plaintiffs. The suggestion of Mr. Lall that the depiction of the tooth, '4 hours after brushing' with a larger number of white spots on the tooth on the side of the Colgate boy should be taken as depicting cavities appears farfetched. It is more consistent with the

Defendant trying to show the greater retention of Triclosan four hours after brushing. The ‘Super’ below explains that the advertisement is a “Creative visualisation of the action of Triclosan.” Even if one were to ignore the ‘super’, the picture of the juxtaposed teeth does not *per se* lead to an inference that the tooth brushed by Colgate Strong Teeth develops cavities, as suggested by the Plaintiffs.

30. The last element of the printed ad picked up for comment by Mr. Lall was the expression on the faces of the two boys. No doubt the Colgate boy is not cheerful whereas the Pepsodent boy is. If there is a comparison of products and an attempt to show that one is better than the other, then obviously both boys cannot have happy faces. In a somewhat similar context in *Glaxosmithkline Consumer Healthcare Limited and Horlicks Limited v. Heinz India (P) Ltd. 156 (2009) DLT 330* the Court noted that the Horlicks boy was stronger, taller and sharper in comparison to the Complian boy. This was held not to be disparaging of Complian. It was viewed at best as an instance of puffing.

Discussion on the other submissions

31. Turning to some of the decisions relied upon by the Plaintiffs, it is seen that both in the *Dettol Liquid* and the *Dettol v. Lifebuoy* cases, the Court came to a *prima facie* conclusion on facts that the depiction of the use of the Plaintiff’s product, liquid or soap, did not lead to removal of germs to the extent the competitor’s product did, and that this was disparaging of the Plaintiff’s products. As discussed earlier, the facts in the present case do not persuade the Court to come to a similar conclusion at this stage.

32. As far as the MRTPC decision is concerned, it is pointed out by Mr. Kaul that the injunction against the advertisement was only till such time an expert panel verified the veracity of the claims of Colgate. It is stated that at that stage Colgate Strong Teeth used to be an ordinary chalk based toothpaste without any anti-germ actives. When Pepsodent was launched as a superior product, Colgate introduced Triclosan with a 0.1% concentration thus giving the consumer a superior choice. Thereafter, Pepsodent increased the Triclosan concentration to 0.2% and added fluoride to the formulation. Ultimately, the complaint before the MRTPC was withdrawn since the Plaintiffs themselves had added fluoride and 0.2% Triclosan to Colgate Strong Teeth. It is thus argued by Mr.Kaul that the said event actually resulted in superior products being made available to the consumer and the market leader was forced to change its formulation which it continues to do till date. The above submissions warrant a detailed examination by the Court whether there is justification for the Plaintiffs' charge that launching disparaging advertisements against a market leader's product is a 'habit' of the Defendant. That exercise is not required to be undertaken at this stage.

33. Advertisements that compare the product of a trader with the product of a market leader can offer the consumer better information about the product. They can also help to improve the overall quality of like products in the market and, in that process, the product of the market leader. Advertisements when viewed in a positive light can be seen as challenging the market leader to offer a better product at a competitive price. In the world of marketing, these are acknowledged business strategies adopted by traders having to compete in a market dominated by one or a few players. The market leader should view this as an opportunity to offer a superior

product at a competitive price. Without evidence being led, it is not possible at this stage to conclude that the impugned advertisements would seriously dent the Plaintiffs' market share and would be detrimental to the distinctive character and repute of Colgate.

34. The Plaintiffs surely do not suggest that preferences of male children of a certain school-going age group would significantly impact the Plaintiffs' entire market share in toothpastes, a product which by its very nature commands loyalties and habit of use by the average consumer, spread across genders over a range of age groups. The choice of toothpaste, the use of which is perhaps the first activity of the day for many an average consumer, would depend on a variety of factors. Only evidence at a trial can possibly demonstrate whether the impugned advertisements showing the Colgate child switching his preference to Pepsodent GSP has the potential of swinging loyalties of all or a part of a different consumer cohort to the competitor's product. As observed by the DB in *Dabur Colortek* it is possible that "aggressive or catchy advertising may cause a partial or temporary damage to the plaintiff, but ultimately the consumer would be the final adjudicator to decide what is best for him or her."

35. It was repeatedly urged by Mr. Lall that comparison if at all should have been made by the Defendant with the Plaintiffs' most recent Colgate 'Total' which has 0.3% Triclosan. In response, Mr. Kaul pointed out that Pepsodent was focussing on the price segment where 100 gm of a tube of Colgate Strong Teeth is sold for Rs.37 whereas a similar quantity of Pepsodent GSP is sold at Rs.39. Mr. Lall did not deny that 70 gm of Colgate Total costs Rs.52 and, therefore, Colgate Total with 0.3% Triclosan was positioned as

a premium segment product. The attempt by the Defendant appears to be to offer a product with 0.2% Triclosan in the price segment of Rs.37 to 39. This perhaps explains why it has taken up Colgate Strong Teeth for comparison. The 'Super' on the packaging of Pepsodent GSP that it is superior vis-a-vis toothpastes not having anti germ actives does not preclude the Defendant from comparing, in the impugned advertisements, its product with one having anti germ actives and showing that its product is better than such a toothpaste as well. This Court is unable to discern at this stage any unfairness in this practice that may attract the clauses of the ASCI Code or even Section 30(1) (a) and (b) of the TM Act. It is also not possible, without further evidence being led in the matter, for the Court to come to a definite conclusion regarding violation of Section 17 (c) of the DACA by the Defendant.

Conclusion

36. For the aforementioned reasons, the Court is not persuaded to hold at this stage that the impugned TV advertisement or the impugned printed advertisement by HUL is disparaging of or denigrating the product Colgate Strong Teeth of the Plaintiffs. The Court is not satisfied that the Plaintiff has made out a *prima facie* case for the grant of an ad interim injunction as prayed for. Reiterating the observations in para 22 above, the application is dismissed.

S. MURALIDHAR, J.

AUGUST 21, 2013

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