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

*Reserved on: 27.09.2021*

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*Pronounced on: 09.11.2021*

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CS(COMM) 340/2021

RECKITT BENCKISER INDIA PRIVATE LIMITED.... Plaintiff

Through Mr.C.M.Lall, Sr.Adv. with Ms.Nancy Roy, Mr.Jawahar Lal, Ms.Ananya Chug and Ms. Payal Kalhan, Advs.

versus

HINDUSTAN UNILEVER LIMITED ..... Defendant

Through Mr.Sudhir Chandra, Sr.Adv. with Mr.Ankur Sangal, Mr.Nishad Nadkarni and Ms.Pragya Mishra, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.**

**IA No.8999/2021**

1. This application is filed under Order 39 Rules 1 and 2 CPC seeking the following reliefs:

“A. The Defendant, its directors, principals, proprietor, partners, officers, employees, agents, distributors, franchisees, representatives and assigns be restrained by an ex-parte ad interim and interim injunction from:

i. Telecasting/ broadcasting/ publishing or otherwise howsoever, communicating to the public any of the Impugned advertisements or any part thereof or any other advertisement of a similar nature in any language or in any manner causing the Impugned advertisement or any part thereof or any other advertisement of a similar nature to be

telecast or broadcast or communicated to the public or published in any media including digital/electronic or social media or in any other manner disparaging the goodwill and reputation of the Plaintiffs and their products sold under the trade mark HARPIC;

ii. Using the depiction of the Plaintiffs' product or any other product deceptively similar to that of the Plaintiffs' in its advertisement or in any other manner infringing the Plaintiff's registered trademarks and/or disparaging the goodwill and reputation of the Plaintiff and its product sold under the trade mark HARPIC.

iii. Using any other indicia whatsoever to associate with/depict the Plaintiffs or their products in its advertisements issued in any and all media whatsoever including the electronic media;

B. The Defendant, its directors, principals, proprietor, partners, officers, employees, agents, distributors, franchisees, representatives and assigns be directed to issue a clarificatory advertisement in video and print / digital formats in an effort to repair the loss of reputation caused to the Plaintiff's HARPIC branded product; and

C. Cost of the suit be awarded to the Plaintiff.”

2. It is the case of the plaintiff that it is an internationally renowned company and is involved in the manufacturing of a famous toilet cleaner under the trademark 'HARPIC' in India since 2001. It is stated that HARPIC is a household name in the category of toilet cleaners and the most widely used toilet cleaner brand in the country. It is pointed out that the plaintiff is the registered proprietor of the word mark 'HARPIC' in class 3 bearing registration No.347055 dated 15.03.1979. Details of registrations of the

trademark are given in para 17 of the plaint. It is also stated that apart from the above registrations, the plaintiff has also filed applications for registration of the unique and distinctive bottle shape of the plaintiff's HARPIC branded products in India in class 1 and in class 5. The applications are pending before the Trade Mark Registry.

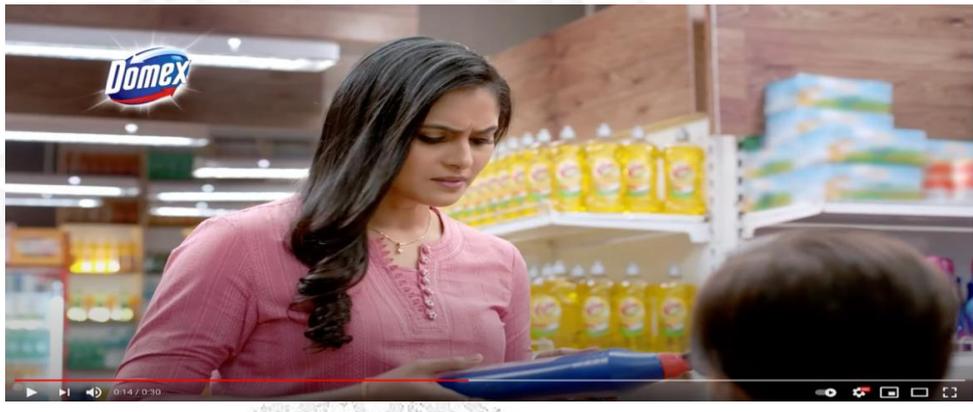
3. The present dispute concerns an alleged advertisement blitzkrieg by the defendant allegedly to vilify, denigrate and defame the plaintiff's HARPIC toilet cleaner. It is stated that five advertisements have been launched by the defendant over the weekend which completely trash the plaintiff's HARPIC brand, declaring it to be ineffective and useless for the purposes that it is used for. It is stated that the advertisement campaign is designed to ride upon the goodwill and reputation of the 'HARPIC' branded toilet cleaner of the plaintiff, a product which represents 77.2% value market share for toilet cleaners, and inviting consumers to substitute the same with the defendant's DOMEX, a product which has a mere 5.3% market share.

4. The first advertisement is a Television Commercial which was launched on 23.07.2021 (*hereinafter referred to as the 'TVC'*). The screenshots of the TVC as reproduced in the plaint are as follows:









and



5. It is claimed that the impugned advertisement is designed to denigrate and defame the plaintiff's HARPIC branded toilet cleaners. The clear portrayal is that use of HARPIC leads to bad odour and smell in the bathroom. The impugned advertisement ridicules HARPIC consumers and prompts them to immediately shift their preferences to DOMEX. It gives a wrong portrayal that HARPIC has already been rejected by a majority of consumers who have shifted their preference to DOMEX.

6. The other advertisements are as follows:

“(i) The second advertisement, relevant portion is as follows:



It is stated that in the above advertisement, the HARPIC bottle is clearly identifiable and termed as an 'ordinary toilet cleaner'.

(ii) The third, a print advertisement is as follows:



It is stated that the above advertisement once again seeks to portray HARPIC as a cleaner of the toilet bowl which causes stench after use.

(iii) The fourth advertisement is as follows:



(iii) The fifth advertisement, relevant portion is as follows:



Hence, the present application.

7. The defendant in its reply has stated that it has introduced the product DOMEX in India in 1997 with its focus on fighting the war against India's sanitation issue as it aids in killing germs including bacteria, virus and fungi. It is urged that the defendant continuously undertakes extensive research and development to improve its products. It is stated that the defendant recognized the consumer need in the market to tackle the issue of malodour in toilet cleaners. In order to tackle the said issue, it is claimed that the

defendant in 2015 - 2016 came up with the unique technology which helps in making the hard surfaces such as that of a toilet bowl, hydrophobic. This technology does not let odour causing liquids to stick to the toilet bowl, and thereby tackles the malodour emanating from such toilet bowls. Such technology also helps in fighting with bacteria longer and thus provides a better long lasting hygienic solution. This technology was provided by using a chemical compound called Silane. The hydrophobic qualities of Silane are said to be well known. It is urged that due to the novelty of the said technology, the defendant applied for a patent for the same through its parent company Unilever PLC and has been granted a patent registration in relation to the same. Further, the defendant through a known independent laboratory, TUV SUD South Asia Pvt. Ltd., tested the said product in comparison to the plaintiff's product. It is urged that as per the test conducted, the defendant's product due to its patented technology fights odour causing fluids from sticking to the toilet bowl in turn resulting in fighting malodour better. The plaintiff's product does not contain any water repellent technology. The defendant upon being satisfied with the performance of its products, "Domex FreshGuard" in order to inform the general public about the benefits and special feature of its product, decided to release a television commercial for the defendant's product showcasing and promoting the same. The story board of the TVC as released and reproduced by the defendant in reply to the application is as follows: -



*VO: ab kya le rahe hai?*



*VO: Toilet Cleaner*



*VO: kyon sa?*



*VO: Harpic*



	<p><i>VO: Kyon?</i></p>
	<p><i>VO: Kyon ki ye toilet saaf kare</i></p>
	<p><i>VO: To Toilet se badbu nahi aayengi?</i></p>
	



VO: Sahi sawal!



VO: aur badbu ke liye



VO: behtar jawab hai  
DOMEX



VO: kyon ki toilet ki badbu  
se ladane ke liye

Disclaimer:  
Rachanatmak Chitran

 <p>रचनात्मक चित्रण क्योंकि टॉयलेट की बदबू से लड़ने के लिए डोमेक्स में है फ्रेशगार्ड टेक्नोलॉजी</p>	<p>VO: DOMEX main hai FRESHGUARD technology</p> <p>Disclaimer: Rachanatmak Chitran</p>
 <p>रचनात्मक चित्रण जो टिके ज्यादा, वो भी पूरे 100 फ्लश तक और बदबू रखे दूर</p>	<p>VO: jo tike jada,</p> <p>Disclaimer: Rachanatmak Chitran</p>
 <p>रचनात्मक चित्रण जो टिके ज्यादा, वो भी पूरे 100 फ्लश तक और बदबू रखे दूर</p>	<p>VO: who bhi pure 100 flushes tak</p> <p>Disclaimer: Rachanatmak Chitran</p>
 <p>रचनात्मक चित्रण जो टिके ज्यादा, वो भी पूरे 100 फ्लश तक और बदबू रखे दूर</p>	<p>VO: aur badbu rakhe door</p> <p>Disclaimer: Rachanatmak Chitran</p>
 <p>डोमेक्स बदबू से लड़े 100 फ्लश तक</p> <p>* सिमुलेटेड टॉयलेट का प्रयोग (जो भी पूरे 100 फ्लश तक और बदबू रखे दूर) मेरी मानिए, चुनिए डोमेक्स फ्रेशगार्ड</p>	<p>VO: Meri maniye, Chuniye DOMEX</p> <p>Disclaimer: simulated toilet use per kiye gaye Swatantra lab test per aadharit, 2021</p>

8. It is stated that as is evident from the aforesaid, there is nothing disparaging stated about the plaintiff's product in the defendant's TVC. The TVC simply states that Domex Fresh Guard fights malodour better. Further, it is urged that the statements made in the defendant's TVC are entirely truthful as the defendant's product Domex FreshGuard contains patented technology under the patent title "Hard Surface Treatment Composition" under Patent No.368377.

9. Regarding the print advertisement, it is stated that it is merely informing the public that its product fights bad smell for longer and also justifies the claim. It is urged that the said advertisement does not say anything negative or disparaging about the plaintiff's product or attempts to mislead the consumers in any manner.

10. Regarding the YouTube videos, it is urged that the said videos do not make any reference to the plaintiff's product and show a rough rendering of a generic shape of a toilet cleaner bottle and thereafter proceed to highlight the features of the defendant's product in comparison to the general toilet cleaners. Reference is made to the alleged third party bottles having a generic functional shape. Photos of these generic bottles are reproduced in the reply to the application.

11. It is stressed that the defendant's TVC, print advertisement, and YouTube videos only convey to the consumer the special ability of the defendant's product which is based on the patented technology and the process of doing so does not in any manner denigrate the plaintiff's product. It is further urged that the plaintiff is merely being hypersensitive and is attempting to curb healthy competition within the market. It is stated that the fact that the product of the defendant has steadily gained market share

within a period of less than one year from its launch is the root cause of the present suit. The present suit is anticompetitive in nature and is an abuse of the process of this court.

12. The above matter came up for hearing on various dates and on 30.07.2021 this court in the present application passed the following directions:

“13. I cannot help noticing the third print advertisement, which is as follows:



14. The above advertisement certifies the product of the defendant as superior to that of the plaintiff. It further tends to denigrate the product of the plaintiff. In my opinion, the said advertisement, *prima facie*, at this stage, based on the averments appears to disparage the product of the plaintiff. Balance of convenience would also be in favour of the plaintiff. I accordingly restrain the defendant from publishing the aforementioned advertisement in any forum till they remove all references to the product of the plaintiff 'HARPIC'.

15. As far as the other advertisements are concerned, in my opinion, for the purpose of determining as to whether the said advertisements are disparaging or slandering the product of the plaintiff, a conclusion can be arrived at only after a better and

detailed examination of the reply that may be filed by the defendant.”

13. I have heard learned senior counsel for the plaintiff and learned senior counsel for the defendant. I have also perused the written submissions.

14. The plaintiff seeks an injunction to restrain the defendant from publishing, broadcasting or putting in public domain the five noted advertisements above, i.e. TVC, Social Media and Print Advertisement.

15. I may first see the legal position in this regard.

16. Learned senior counsel for the parties have sought to rely upon various judgments. I will confine myself to the relevant ones.

17. Reference may be had to the judgment of a Co-ordinate Bench of this court in the case *Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd., 2013 SCC OnLine Del 3186*. In the said judgment, the matter pertains to whether the impugned advertisements misuse the plaintiff’s registered trade mark ‘Colgate’ and are disparaging the goodwill and reputation of the plaintiff’s toothpaste Colgate Dental Cream Strong Teeth and as to whether the impugned advertisements tarnish, slander and defame the worth and reputation of the plaintiff’s brand and products. The Co-ordinate Bench held as follows:

“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.”

18. Against the above noted judgment of the Co-ordinate Bench, in FAO(OS) 396/2013, titled ‘*Colgate Palmolive Company Ltd. & Anr. v. Hindustan Unilever Ltd.*’, decided on 10.12.2013, the Division Bench of this court held as follows:

“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.

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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.

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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.

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

Powerll (freely translated means —in comparison to Colgate New Pepsodent Germi Check has 130% Germ Attack Powerll) 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. ll 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.”

19. Reference may also be had to the judgment of another Division Bench of this court in *Dabur India Ltd. v. M/s Colortek Meghalaya Pvt. Ltd. & Anr. (2010) SCC OnLine Del 391*. That matter related to manufacturing and marketing of a mosquito repellent cream under the brand name of odomos by the appellant. The defendant was also manufacturing a mosquito repellent cream under the brand name of ‘Goodnight Naturals’. The Co-ordinate Bench of this court rejected the application for injunction and hence, the appeal. The Division Bench held as follows:

“10. In *Tata Press Ltd. v. MTNL & Ors., (1995) 5 SCC 139* (paragraph 25) the Supreme Court held that “commercial speech” is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. However, what is “commercial speech” was not defined or explained. In fact, it does not appear to be possible to clearly define or

explain “commercial speech” and, in any event, for the purposes of this case it is not necessary for us to do so. The reason for this is that the Supreme Court has said in *Tata Press Ltd.* (paragraph 23 of the Report) that advertising as a “commercial speech” has two facets thereby postulating that an advertisement is a species of commercial speech. The Supreme Court further said as follows:-

“23. ....Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech" ....."

11. Earlier, the Supreme Court referred to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, (1975) 421 US 748 and observed in paragraph 15 that it is almost settled law in the United States that though “commercial speech” is entitled to the First Amendment protection, the Government was completely free to recall “commercial speech” which is false, misleading, unfair, deceptive and which proposes illegal transactions.

12. In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*, (1999) 7 SCC 1, the Supreme Court observed in paragraph 36 of the Report that a distinction would always have to be made and latitude given for an advertisement to gain a purchaser or two. This latitude cannot and does not mean any permission for misrepresentation but only a description of permissible assertion. In this context, reliance was placed by the Supreme Court on Anson’s *Law of Contract* (27th Edn.) which says that commendatory expressions are not dealt with as serious

representations of fact. The view remains the same in the 28th Edition (page 239). “A similar latitude is allowed to a person who wants to gain a purchaser, though it must be admitted that the borderline of permissible assertion is not always easily discernible.”

13. The Supreme Court recognized and applied in Colgate Palmolive (India) Ltd. the rule of civil law, “simplex commendatio non obligat” – simple commendation can only be regarded as a mere invitation to a customer without any obligation as regards the quality of goods. It was observed that every seller would naturally try and affirm that his wares are good enough to be purchased (if not better than those of a rival).

14. On the basis of the law laid down by the Supreme Court, the guiding principles for us should be the following:-

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

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

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

To this extent, in our opinion, the protection of Article 19(1)(a) of the Constitution is available. However, if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection.

15. There is one other decision that we think would give some guidance and that is Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd. & Another, 2003 (27) PTC 305 (Del.) (DB). In this decision, a Division Bench of this Court held that while boasting about one’s product is permissible, disparaging a rival

product is not. The fourth guiding principle for us, therefore, is: (iv) While glorifying its product, an advertiser may not denigrate or disparage a rival product. Similarly, in Halsbury's Laws of England (Fourth Edition Reissue, Volume 28) it is stated in paragraph 278 that "[It] is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product." This view was followed, amongst others, in Dabur India Ltd. v. Wipro Limited, Bangalore, 2006 (32) PTC 677 (Del). "[It] is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to that of the defendant."

16. In Pepsi Co. it was also held that certain factors have to be kept in mind while deciding the question of disparagement. These factors are: (i) Intent of the commercial, (ii) Manner of the commercial, and (iii) Story line of the commercial and the message sought to be conveyed. While we generally agree with these factors, we would like to amplify or restate them in the following terms:-

(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.

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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. 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.

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20. Learned counsel for the Appellant submitted before us that since his client has over 80% of the market share in the country and a 100% market share in some States, the obvious target of the commercial is the product of the Appellant. In our opinion, this argument cannot be accepted. The sub-text of this argument is an intention to create a monopoly in the market or to entrench a monopoly that the Appellant claims it already has. If this argument were to be accepted, then no other mosquito repellent cream manufacturer would be able to advertise its product, because in doing so, it would necessarily mean that the Appellant's product is being targeted. All that we are required to ascertain is whether the commercial denigrates the Appellant's product or not. There is nothing in the commercial to suggest a negative content or that there is a disparagement of the Appellant's product. The commercial merely gives the virtues of the product of the Respondents, namely, that it has certain ingredients which perhaps no other mosquito repellent cream has, such as tulsi, lavender and milk protein. 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.

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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.”

20. Reference may also be had to the judgment of the Co-ordinate Bench of this court in the case of *Dabur India Limited v. Emami Ltd., 2019 SCC OnLine Del 9022*. That was a suit filed by the plaintiff seeking permanent injunction against the defendant from broadcasting, printing and publishing the ‘ZANDU CHYAVANPRASHAD’ advertisement which was said to be disparaging and injurious to the goodwill and reputation of Chyawanprash including the plaintiff’s DABAR CHYAWANPRASH. The court held as follows:

“16. Another notable case dealing with comparative advertising is *Reckitt & Colman of India Ltd. v. M.P. Ramchandaran & Anr 1998 SCC Online Cal 422*, wherein it has been held as under:-

“11. From the law discussed above it appears to me that the law on subject is as follows:

I) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.

II) He can also say that his goods are better than his competitors', even though such statement is untrue.

III) 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.

IV) 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.

V) 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.”

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28. From the reading of the above noted judgement, it emerges that the Court has to necessarily examine the intent and overall effect of the advertisement. The "look and feel" of an advertisement and the message conveyed by the story line to an average person, are the critical factors which assist the Court to come to a right conclusion. If one were to view the proposed modified print advertisement, it can be clearly discerned that the Plaintiff's product is not the subject matter of comparison. The comparison is with Chyawanprash as a generic product. As discussed earlier the law permits comparison. While making a comparison, a competitor can declare his goods to be the best in the world even though the declaration is untrue, however, while claiming that its goods are better than his competitor, he cannot say that the competitor's goods are bad. Thus, puffery is allowed, but slander and defamation of the goods of the competitor is impermissible. The proposed Print advertisement is only making a comparison with the generic product "Chyawanprash" where a declaration is being given that the product of the Defendant does not contain sugar. The impugned advertisement in its modified version is highlighting the benefits of the sugar free variant. Plaintiff's contention that Chyawanprash has been shown to be bad or unhealthy is misplaced. The way I see it, the modified advertisement only gives the information and a choice or option to the viewers/consumers who would like to buy a product that is giving the benefit of Chyawanprash without sugar. The

comparison in the present case is inevitable. The benefit of a product without sugar can be best showcased by juxtaposing with the variant that has sugar in it. The question whether the sugar free variant is indeed a healthier option, is being left for the consumer to decide. But, certainly it cannot be said that the advertisement is in any manner implying disparagement of “Chyawanprash” generically.”

21. The broad legal position that follows from the above judgments of the Division Bench of this court are that the advertisement must not be false, misleading, unfair or deceptive. There may be some grey areas but these need not necessarily be taken as serious representation of facts but only as glorifying one’s product. If advertisement extends beyond the grey areas and becomes false, misleading, unfair or deceptive advertisement, it would not be entitled the benefit of any protection. In comparative advertising, the comparing of one’s goods with that of the other and establishing the superiority of one’s goods over the other is permissible. However one cannot make a statement that a good is bad, inferior or undesirable as that would lead to denigrating or defaming the goods of the other.

22. I may see the facts of this case. The TVC frames have been reproduced as above. I have also perused the TVC in court. A perusal of the TVC as a whole shows that it essentially seeks to claim that to remove bad odour, DOMEX is a better solution. It does not denigrate, disparage or malign the product of the plaintiff. Vehement submissions are made by learned senior counsel for the plaintiff to urge that the said TVC depicts a departmental store which is virtually full of the defendant’s product DOMEX while on the other hand, the product of the plaintiff is shown in a small corner. It is also urged that a perusal of the TVC shows that the person

in question first picks up a HARPIC bottle and on questioning from her child is shown to get confused and picks up the DOMEX bottle. In my opinion, the advertisement as a whole does not seek to *prima facie* denigrate the product of the plaintiff, nor does it disparage the product of the plaintiff. As noted above, an advertiser has to be given enough room to play around in the advertisement. A plaintiff ought not to be hypersensitive to such an advertisement. In my opinion, the plaintiff has failed to make out any *prima facie* case regarding the TVC.

23. The second, fourth and fifth advertisements are as follows:





It is stated that in the above advertisement, the HARPIC bottle is clearly identifiable and termed as an ‘ordinary toilet cleaner’.

The said advertisement allegedly depicts an ordinary toilet cleaner and claims that the product of the defendant is much superior. It was stated by learned senior counsel for the defendant that the bottle represented in the advertisement as an ordinary toilet cleaner does not in any manner pertain to the plaintiff’s product as it is a generic bottle used by various toilet cleaners in the market. The defendant has also sought to rely upon their patent which is a subject matter of patent No.368377 to claim that the patent of the defendant results in a product which is a unique solution containing Silane which ensures that the surface of the toilet bowl becomes hydrophobic and does not let any odour causing liquids to stick to the toilet bowl thereby fighting malodour emanating from such toilet bowls. It is urged based on this that the defendant is only narrating actual facts i.e. the technical superiority of its product.

24. The above plea was denied by the learned senior counsel for the plaintiff who submitted that the said shape of the bottle is registered by the plaintiff and that the said act clearly seeks to denigrate and defame the product of the plaintiff. He has also stated that the alleged patented product

of the defendant does not in any manner, enhance the quality of the product of the defendant. It is urged that the said contention of the defendant is a false representation as no such extra cleaning takes place on account of the noted product.

25. I may look at the plaint in question. Relevant portion of para 17 of the plaint which spells out the registration of marks by the plaintiff reads as follows:

Trade Mark	Class	Registration No.	Date of Registration
	3	3491010	22.02.2017
<p>Goods:</p> <p>Preparations for cleaning toilets, preparations for cleaning fabrics, scouring preparations, cleaning preparations, soap (disinfectant), all being goods included in class 3.</p>			
	5	3491007	22.02.2017
<p>Goods:</p> <p>Disinfectant, Pharmaceutical preparations, Medicinal Preparations, Antiseptic Preparations, Anti Bacterial Preparations, Veterinary and Sanitary preparations, Medicated toiletries, all being goods included in class 5.</p>			
Harpic Bottle & Cap	3	3491009	22.02.2017

			
<p>Goods:</p> <p>[Class: 3]          Preparations for cleaning toilets, preparations for cleaning fabrics, scouring preparations, cleaning preparations, soap (disinfectant), all being goods included in class 3</p>			

A comparison of the bottles depicted in the impugned print advertisement, being the second, fourth and the fifth advertisements, prima facie show that the same is deceptively similar to the mark that has been duly registered by the plaintiff in class 3 on 22.02.2017 and in class 5 on the same date. In view of this fact, it is manifest that the said three advertisements, namely, the second, fourth and the fifth seek to depict a mark, which is deceptively similar to the mark of the plaintiff and further seeks to announce that the said cleaner contained in the depicted bottle is an ordinary toilet cleaner and is apparently unable to remove the stains / malodour in a toilet.

26. The defendant however, relies on its patented product to state that its claim in the advertisement is correct. In my opinion, these are disputed questions of facts. The onus to prove that the toilet cleaner of the defendant is technically superior to that of the plaintiff is an issue for which the onus is on the defendant. At this stage, without evidence having being led, it is not possible to conclude that the product of the defendant is superior to that of the plaintiff as claimed by defendant.

27. A bare perusal of the second, fourth and fifth advertisements shows

that prima facie the said advertisements seek to denigrate and malign the product of the plaintiff as contained in the alleged generic bottle.

28. As far as the 3<sup>rd</sup> print advertisement is concerned, I have already passed an interim injunction in favour of the plaintiff on 30.07.2021. I see no reason to change my said view.

29. The averments made in the four advertisements, namely, second, third, fourth and fifth, in my opinion, *prima facie*, at this stage, appear to disparage the product of the plaintiff. As noted above, the defendant while promoting its product cannot be permitted to denigrate or disparage the product of a rival. Balance of convenience is also in favour of the plaintiff. I accordingly restrain the defendant from publishing the four advertisements on any forum till they remove all references to the product of the plaintiff i.e. 'HARPIC' or the bottle in question, which is deceptively similar to the registered mark of the plaintiff.

30. With the above directions, the present application is disposed of.

**NOVEMBER 09, 2021/v**

**JAYANT NATH, J**