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

\+ **FAO 323/2022**

Reserved on : 16.12.2022
Pronounced on : 09.01.2023

IN THE MATTER OF:

DABUR INDIA LIMITED ..... Appellant

Through: Mr. Jayant Mehta, Sr. Advocate with Ms. Kripa Pantid, Mohd. Sazid Rayeen, Mr. Christopher and Mr. Raghav Bhatia, Advocates.

versus

THE ADVERTISING STANDARDS COUNCIL OF INDIA ..... Respondent

Through: Ms. Avni Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

CM APPL. 54630/2022 (Exemption)

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

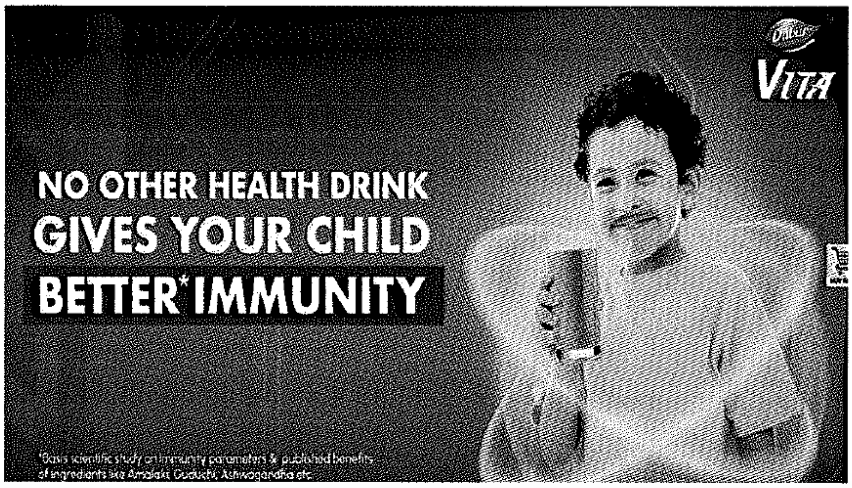
CAV 453/2022

With the appearance of Ms. Avni Singh, learned counsel for the caveator/respondent, caveat stands discharged.

FAO 323/2022

1. By way of present appeal filed under Order XLIII Rule 1(r) read with Section 104 CPC, the appellant (plaintiff therein) has assailed the order dated 22.09.2022 passed by the Trial Court in CS DJ 102/2022, whereby its application under Order XXXIX Rules 1 and 2 CPC was dismissed.

2. The appellant filed the underline suit for declaration, permanent and mandatory injunction wherein it was claimed that it is a company having amongst other business of mass production of Ayurvedic Medicines. It was also claimed that it is the first legal entity in India to provide healthcare through scientifically tested and automated production of formulations based on traditional ayurvedic science. Besides ayurvedic medicines, it also manufactures and markets wellness/healthcare products including the product in question 'Dabur Vita' – a health food drink. The product was statedly launched in September, 2021 and claimed to be an 'Ayurvedic Medicine (Balya Poshak)' i.e., an 'Ayurvedic Proprietary Medicine' under the Drugs and Cosmetics Act, 1940. It was claimed that the ingredients of the product promote immunity and the product itself offers double superior benefits of growth and immunity with superiority on taste compared to others in Milk Food Drinks Category. It was further claimed that on the basis of studies conducted through independent and accredited research organizations who carried out evaluation of immunomodulatory and antioxidant effect of the product, the appellant issued an advertisement of the product on its website www.daburvita.com as well as its social medial handles i.e., on Facebook and Instagram.



3. The respondent is stated to be a voluntary self-regulatory council governed by its own self-regulation code called ASCI Code under which mechanism is available to deal with complaints against advertisements.

4. The respondent received a complaint from third party against use of following claims by the appellant in the above advertisement: -

Claim 1: 'India's Best Immunity Expert'.

Claim 2: 'No Other Health Drink Gives Your Child Better Immunity'.

5. In the complaint, it was alleged that the claim 'India's Best Immunity Expert' is a superlative claim that seeks to undermine the benefits consumers may get from any/all other products available in the market. It was further alleged that the claim is superlative and comparative in nature and does not have adequate scientifically verifiable comparative studies. Therefore, the same is violative of Guideline 1.4, Chapter-I of the ASCI Guidelines - Truthful and Honest Representation, which states '*Advertisements shall not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers*.' Similar objections were raised with respect to the other claim i.e., 'better immunity'. It was alleged that by claiming thus, the appellant has deliberately disparaged other health drinks available in the market without any factual substantiation.

6. Based on the observations of the Fast Track Complaints Panel (FTCP), ASCI, the impugned communication dated 04.02.2022 was issued by the respondent. The payer for injunction, against the said communication, sought by way of an application filed under XXXIX Rules 1 and 2 CPC was dismissed by the impugned order.

7. Mr. Mehta, learned Senior Counsel for the appellant while assailing the impugned order contended that the Trial Court failed to appreciate that the claims made by the appellant were only laudatory and an advertiser is permitted to make such claims thereby puffing its products. He submits that by boasting its product, the appellant by no way can be held to have disparaged, denigrated or defamed other products available in the market.

8. Learned Senior Counsel submitted that, in case, the impugned communication dated 04.02.2022 is not stayed there is a likelihood that the Ministry of Information & Broadcasting may initiate some action against the appellant. In support of his submissions, learned Senior Counsel has also placed reliance on the decisions in M/s. Teleshop Teleshopping *v.* The Advertising Standards Council of India & Another, **Suit No. 497/2014** (High Court of Bombay), Century Plyboards (India) Ltd. *v.* Advertising Standards Council of India reported as **1999 SCC OnLine Bom 444**, Wander Ltd. and Another *v.* Antox India P. Ltd. reported as **1990 Supp SCC 727**, Colgate Palmolive Company and Anr. *v.* Hindustan Unilever Ltd. reported as **(2014) 57 PTC 47 (DB)** and Reckitt Benckiser (India) Limited *v.* Hindustan Lever Limited reported as **(2008) 151 DLT 650**.

9. *Per contra*, Ms. Avni Singh, learned counsel for the respondent has defended the respondent's communication well as the impugned order passed by the Trial Court by submitting that in the advertisement, the appellant has made absolute claims relating to child immunity in the peak covid time in the year 2020. She submitted that the appellant itself is a member of the respondent organization and governed by the ASCI Code, 2006. While laying stress on the self-regulatory mechanism under the Code, it is submitted that no cause of action has arisen till date as the impugned communication, *inter alia*, requesting the appellant to withdraw its claims relating to the product, is not statutory but only recommendatory in nature. Though, the respondent has probably yet not conveyed its recommendation to the Ministry, the appellant itself informed about the same through its letter dated 06.10.2022. It is further submitted that the while the impugned order was passed on 22.09.2022,

the present appeal has been filed only on 13.12.2022 and thus the appellant has failed to show that either a *prima facie* case or balance of convenience is in its favor. In support of her submissions, learned counsel has placed reliance on Metro Tyres Ltd. *v*. The Advertising Standards Council of India & Anr. reported as **2017 SCC OnLine Del 7504** and Moonshine Technology Private Limited & Anr. *v*. The Advertising Standards Council of India, **CS (OS) 553/2022** (High Court of Delhi). She further submitted that the order relied upon by the appellant in Century Plyboards (India) Ltd. (Supra) was passed *ex-parte*, and the same was later, set aside by the Division Bench.

10. I have heard learned counsels for the parties and perused the material placed on the record.

11. It is borne out from the record that the complaint received by the respondent was examined by the FTCP. After hearing the parties, the complaint was upheld vide communication dated 04.02.2022. Relevant excerpt of the proceedings and conclusion of FTCP as noted in the communication, reads as under:

> *"**The FTCP Decision***
> *The FTC Panel viewed the Website advertisement (https://www.daburvita.com/) Instagram advertisement (https://www.instagram.com/daburvitaofficial/), Facebook advertisement (https:/www.facebook.com/DaburVita-100302762404733). The FTC Panel carefully considered the submissions of both the advertiser and the complainant, and deliberated upon the matters raised.*
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> *Claim - "India's Best Immunity Expert" - the FTC Panel observed that the pre-clinical trial report (Animal Experiment Study on mice) is the basis for the claim made. The FTC Panel discussed that though the trial supports the claim of immunomodulating and antioxidant*

effect, the equality of the effect on mice to that of humans cannot be justified as there are enough findings that depict harms and outweigh benefits. Hence the consideration of the same as equal to humans is not a valid substantiation. The claimed benefits of ayurvedic ingredients added to any formulation need to be established through structured clinical trials on human subjects following the principles of Good Clinical Practices. An in-vitro/in-vivo study on mice is not enough proof that the same results would be delivered by the formulation, when consumed by human subjects. Furthermore, whether the quantities of herbs added to a formulation are actually delivering the claimed benefit on consumption by human subjects can only be proven through a clinical trial. The literary sources regarding the three ingredients (Amalaki, Guduchi, Ashwagandha) are well supported and established in the context of immunity which is acceptable but there is no clarity about its presence and percentage in the said formulation.

The FTC Panel further observed that the advertiser had done a Cyclophosphamide induced immunosuppression study. The FTC Panel deliberated that this is a standard experimental model only to understand whether a given formulation is working or not. Furthermore, it is also to measure the toxic effects of a formulation in order to see if it was safe or could potentially affect any vital organ. However, once found to be effective this would require a clinical evaluation to demonstrate the desired efficaciousness of the product because the action of any ingredient in Ayurveda is dependent not only on the product being consumed but on many other parameters like, how you take the product, when you take, for how long you take the product, and what are the additional things that you take along with the product etc. The FTC Panel discussed that individually the ingredients in the product are proven to be immune boosters and therefore the advertiser can promote the ingredients that helps in boosting immunity. The Panel further opined that since the formulation is not tested, and it is known in Ayurveda

when ingredients are mixed together they will react in different ways and the formulation might not be as effective as the individual ingredients; a product claim of "India's Best Immunity Expert" is not adequately substantiated. The Panel added, since these ingredients are all safe the advertiser could have conducted a clinical study in humans.

Based on this assessment, the FTC Panel concluded that the claim, "India's Best Immunity Expert" was inadequately substantiated. The claim is misleading by exaggeration and is likely to cause widespread disappointment in the minds of consumers. The said claim in the advertisement contravened Chapter I, 1.1, 1.4 and 1.5 of the ASCI Code. This complaint was ***UPHELD.***

Claim - "No other health drink gives your child better immunity" - the FTC Panel noted the advertisers' submission that they had conducted a study on the leading products in the market that comprised 93% of the market share to make this claim. The panel viewed the table of the findings of the study and discussed that the advertiser's product did not appear to be in a leading position for all the parameters examined. The advertiser explained that on a cumulative score their product had the minimum score which is the best outcome for a ranking score like the one in the study. The Panel opined, while that might be true, it was not clear if each of those parameters had equal weightage when it comes to bettering a child's immunity. For example, for IgG and IgM Levels, Dabur Vita's position was 6th and 5th respectively in comparison to other competitive products. The FTC Panel further discussed that the advertiser did not provide data to prove that their product can deliver better immunity than all other similar products by way of clinical studies evidencing the same. A robust, multi-centre clinical studies/market research studies are required to establish such a claim. In the absence of such studies the claim even if it is not naming any particular brand appears to be denigrating the entire category of

health drinks by calling Dabur Vita better than any other health drink for your child's immunity.

The FTC Panel concluded that the claim, "No other health drink gives your child better immunity" was inadequately substantiated. The claim is misleading by exaggeration and is likely to cause widespread disappointment in the minds of consumers. The claim is also denigrating all other products in the health drink category. The said claim in the advertisement contravened Chapter I, 1.1, 1.4, 1.5 and Chapter IV, 4.1 (e) of the ASCI Code. This complaint was ***UPHELD.***

We therefore request you to withdraw the claims as objected to across all media, including, but not limited to YouTube, Print, TVC, digital media etc. Kindly inform all Media by ***8th February, 2022*** *to stop the release of the said Ads, and ensure its implementation by* ***15th February 2022.*** *May we have your assurance of compliance by* ***15th February, 2022.***

ASCI has introduced an "Independent Review Process" (IRP), as a mechanism for advertisers / complainants who are not satisfied with the recommendations of the CCC / FTCP, to seek a fresh view in the matter. You may, therefore, in case you are not satisfied with the above recommendation of the FTCP, submit the matter for Review by the IRP within 10 business days i.e. by ***18th February 2022.***

The ASCI also monitors all advertisements for compliance post conveying the UPHELD complaint recommendation taken by the FTCP of ASCI. If the Ad against which a complaint has been Upheld reappears without appropriate modification or withdrawal of the objected claims, then the same would be reported to the concerned Government authorities."

12. The FTCP findings are quite damning of the claims made by the appellant about its product. According to FTCP, the claims made by the

appellant are not backed by science. It is observed by FTCP that though the ingredients that constitute the appellant product are individually known to be immunity boosters however, their collective efficacy is yet not established and the trials conducted by the appellant on mice are found to be scientifically inadequate to claim the same results on humans. According to FTCP, the appellant must go through a process of clinical trials to empirically prove the claims made by it.

Going by the FTCP observations, the appellant has not even substantiated its first claim about the efficacy of the product on humans let alone the second, equally audacious claim that its product is better than the other similar products in the market-by other manufacturers. FTCP has observed that the product in question, on competitive ranking, as per the appellant's own comparison, does not rank at the top, vis-à-vis competitors, on all the parameters. On some parameters, it is ranked as low as 5th and 6th.

13. The appellant has made light of the FTCP findings by questioning the respondent's authority in the matter, being a voluntary society of its members of which, admittedly, appellant itself is a member. It is pertinent to note that the respondent acts as a self-regulatory body that the advertisement industry has set-up for itself. Advertisement industry thrives on creativity and freedom of expression and would loathe a Government dictated regulation. Not many industries enjoy a self-regulated regime. It would be unfair on the part of the appellant, who is a member of the respondent, to enjoy the privileges of self-regulation and in the same breadth question the authority of the respondent to enforce its code. In any case, it is also noteworthy that norms laid down by the respondent have been recognized as 'advertising code' and accorded

legal sanctity in the Cable Television Networks Rules, 1994 (hereinafter, referred to as '*the Rules*'). Rule 7(9) of the Rules provides that no advertisement which violates the code of self-regulation in advertising, as adopted by the respondent shall be permitted to be carried in the cable service. Though the Rules are not applicable to the advertisement in question as the same is not telecast on Cable TV and is restricted to the appellant's own website and social media, however the sanctity accorded to the respondent's code is clearly established, only to answer the appellant's contention apropos the respondent's authority to enforce its code.

14. Learned Senior Counsel for the appellant contended that in the advertisement in question, no attempt is made to disparage or undermine the products of the competitors in the market. No specific reference to any product is made nor any comparison is drawn in the advertisement to show comparative superiority of the appellant's product over other products. In this regard, he has referred to the observations in Colgate Palmolive Company and Anr. (Supra) and Reckitt Benckiser (India) Limited (Supra) to contend that in the absence of the aforesaid two factors, the advertisement in question is a purely harmless puffery or boast, and as per acceptable norms of the advertisement industry.

15. The appellant's contention is misplaced. The advertisement makes a very emphatic and confident claim that 'No other health drink gives your child better impunity'. This catch phrase is the centerpiece of the advertisement by which the customers are told that all other products in the market are inferior to the appellant's product. Even if the competitors have not been named, but clearly the intent is to run down the

competition, that too, with a claim whose scientific basis has been doubted by FTCP.

16. The appellant has also contended that the advertisement by its very nature mean a creative puffing up of a product to get the audience's attention to the superlative qualities of the product. It is submitted that an element of hyperbole is permissible, and a minute evaluation of catch phrases used in the advertisements is not a correct way of judging the product. In view of the position highlighted by this Court in Colgate Palmolive Company and Anr. (Supra) and Reckitt Benckiser (India) Limited (Supra), there is no doubt that creative freedom with an element of hyperbole is permitted. However, there is very thick line that divides a harmless hyperbole and misleading claims made in advertisements, especially, when the products relate to human consumption and claims are made about the superlative qualities of the products on human health. According to this Court, on a *prima facie* view, the advertisement in question falls in the latter category. At this stage, when the efficacy is yet to be established as per the established norms, the claims made in the advertisement may well be misleading. FTCP, in its expert opinion, has doubted the claims made by the appellant for the reasons already extracted above.

17. At this stage, it is also pertinent to note that the petitioner has neither filed any review application, as provided under the advertisement code, nor sought any relief in the suit to set-aside the FTCP findings. Only a declaration is sought to declare that the claims made in the advertisement are truthful and they do not violate any advertisement code. The truthfulness of the claim will be established after trial. At this interim stage, there is already an adverse finding based on scientific

opinion against the appellant. There is no *prima facie* case that the appellant could claim to be in its favor. Balance of convenience too is against the appellant since it is always safe to err on the side of caution and not permit a claim to be made about a product that concerns human health. No irreparable harm can possibly be suffered by the appellant since there is no embargo on sale of the product in question and it is only the way the product is sought to promoted by way of the advertisement in question has been found to be misleading.

18. As noted above, in its suit, the appellant has not even sought a declaration to set aside the order dated 04.02.2022, wherein findings have been made against the appellant's product and advertisement in question. Curiously, the prayer sought for in the suit is an injunction decree restraining the respondent/defendant from creating impediments in the broadcast of the advertisement in question. Rather, a declaratory decree is sought in the suit, to declare that the advertisement in question is truthful and its does not violate any advertisement code.

The interim reliefs sought for in application filed under Order XXXIX Rules 1 and 2 CPC in the suit by the appellant, are, *inter-alia* as under:

(a) Restraining the operation of the order dated 04.02.2022;

(b) Restraining the respondent from creating impediments in the broadcast of the advertisement in question;

(c) A direction to be passed, as an interim order, to declare that the advertisement in question is truthful and does not violate any advertisement code;

(d) Direction to the respondent not to publish the order dated 04.02.2022.

With these inchoate prayers, the Trial Court has rightly refused to restrain the respondent/defendant, on the ground that the appellant could not show that the respondent/defendant tried to interfere with the broadcast of the advertisement in question. In the considered opinion of this Court, no ground for interference is made out with the impugned order passed by the Trial Court. Pertinently, it is the appellant's own case that the respondent does not have the authority to block the broadcast of the advertisements and that it could only send its recommendations to the Government of India to issue necessary directions. The decision to block the broadcast rests with the Government and not the respondent. No evidence was produced before the Trial Court to show that the respondent tried to exceed its remit by sending communications to broadcasters directly requesting them to stop the broadcast of the advertisement in question. Regarding other prayers, namely, to restrain the operation of the order dated 04.02.2022 is concerned, it may be noted that the appellant has not sought a final relief in the suit to set-aside the order dated 04.02.2022 or the findings of the FTCP, based on which order dated 04.02.2022 was passed. In the absence of a final relief being sought, interim relief to stay the operation of the order dated 04.02.2022 could not have been granted.

19. The appellant's reference to the decision in M/s. Teleshop Teleshopping (Supra) is of no avail as the same related to an order passed against a non-member without affording a hearing. Similarly, the reliance by the appellant on the decision in Wander Ltd. and Another (Supra) is also misplaced as in the captioned case, the Supreme Court observed that the appellate Court would not normally interfere with the exercise of discretionary power by the Court of first instance unless it was exercised

in an arbitrary, capricious, or perverse manner where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. In the present case, this Court has found no justifiable reasons to interfere with the impugned order.

20. For the aforesaid reasons, the impugned order is upheld and the instant appeal is dismissed.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 09, 2023
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