

.....plaintiff Vs. Reckitt Benckiser (India) Ltd.

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Court : Kolkata

Decided On : Sep-23-2013

Judge : I. P. Mukerji

Appellant :plaintiff

Respondent : Reckitt Benckiser (India) Ltd.

Judgement :

1 IN THE HIGH COURT AT CALCUTTA Ordinary Original Jurisdiction Original Side G.A.No.583 of 2013 G.A.No.669 of 2013 C.S.56 of 2013 G.A.No.938 of 2013 C.S.87 of 2013 In the Matter of : HINDUSTAN UNILEVER LTD.Plaintiff versus RECKITT BENCKISER (INDIA) LTD..Defendant G.A.No.937 of 2013 C.S.90 of 2013 G.A.No.942 of 2013 C.S.92 of 2013 In the Matter of : RECKITT BENCKISER (INDIA) LTD.Plaintiff versus HINDUSTAN UNILEVER LTD..Defendant For the Hindustan Unilever : Mr.Pratap Chatterjee, Senior Advocate Mr.S.N.Mookerjee, Senior Advocate with Ms.Mousumi Bhattacharyya, Mr.Debnath Ghosh, Mr.A.Bansal, Ms.N.Jhunhunwala, Advocates For the Reckitt Benckiser (India) LTD.: Mr.C.M.Lall, Advocate with Mr.S.Bose, Mr.P.Bose Ms.Nancy Ray, Advocates Heard on :

06. 08.2013 & 7.08.2013 Judgment on :

23. d September, 2013 I.P.Mukerji, J.

Two companies are litigating against one another.

One is Hindustan Unilever Ltd., in short Hindustan., the other is Reckitt Benckiser (India) LTD.in short Reckitt.Four advertisements are involved.

Two have been published by Hindustan, the other two by Reckitt.

Each company alleges that the other, by their advertisements, has disparaged their products.

Hindustan is the owner of the brand names Lifebuoy.

and VIM.It sells kitchen and utensil cleaning liquid in bottles using the mark VIM and also soaps, using the mark Lifebuoy.The kitchen cleaning liquid is yellow in colour and has about 2/3rd share in the market in terms of turnover in quantity and sale value.

Reckitt also manufactures these products, in addition to its well known antiseptic liquid.

Its trade name is Dettol.It has recently introduced a kitchen and utensil cleaning liquid in the market, called Dettol Healthy Kitchen Gel.

It is very vigorously trying to get a foothold in the market by increasing the sale of this gel.

If they succeed, it would displace VIM from its position in the market.

Reckitts product, the Gel, is undoubtedly a kitchen and utensil cleaner but it also has a feature, which is focused very prominently by them in the market.

This feature is its germ killing capacity.

This germ killing capacity is absent in VIM.

VIM has proven germ removal qualities.

So, the whole exercise is to highlight the above germ killing feature and also to highlight the absence of this quality in VIM.

Hindustan does not want intruders into its fortress.

Three interim applications arising out of three advertisements were heard at the interim stage without filing of affidavits.

Two interim applications arising out the second advertisement were heard after exchange of affidavits.

As far as the applications which were heard without affidavits, it was understood that the interim applications were being argued on the available papers and that any order passed at that stage would finally dispose of them.

ADVERTISEMENTS At this stage it is most important to see what the advertisements are about: Two advertisements were published by Reckitt.

Aggrieved by them Hindustan filed two suits.

I will describe the advertisements one by one.

Advertisement - I This advertisement is the subject matter of C.S.No.87 of 2013, connected with which is the interim application G.A.No.938 of 2013.

It is an advertisement in the print media.

It is not a comparative advertisement.

It does not show VIM.It shows a white plate.

It is vertically divided into two halves.

On the bottom left corner of the plate are the words leading dishwash.A magnifying glass is placed over the white plate so that the vertical diameters of the magnifying glass and the plate overlap.

All across the magnifying glass, black marks like black insects can be seen.

They are said to depict gerMs.Then the white plate is shown again with a magnifying glass over it.

At the bottom of the left vertical half of the plate the words Dettol Healthy Kitchen Gel.

are printed.

Over that is the inscription Kills 100X more germs. At the bottom right are printed the words leading dishwash. Two bottles of Dettol Healthy Kitchen Gel, one yellow in colour and one green in colour are also shown.

On the left side of the plate, only one black mark is shown whereas on the right hand side, many such black marks or germs are shown.

The theme of the advertisement is that on the left vertical half of the plate Dettol Healthy Kitchen Gel was applied whereas on the right a leading dishwash.

was applied.

After cleaning with these liquids, it was found that on the left hand side only one germ was left whereas on the right hand side innumerable germs were left.

Advertisement - II This is the subject matter of C.S.No.56 of 2013 with which an interim application being G.A.No.583 of 2013 and G.A.No.669 of 2013 are connected.

This is a television advertisement.

The theme of the advertisement is more or less similar to advertisement - I.

The only difference is that a bottle with a yellow liquid with the mark VIM.

is introduced.

It is shown that the left vertical part of the plate which is cleaned by VIM is left with many black marks or germs whereas the right vertical part which is cleaned by Dettol has only one mark or germ left behind.

It is suggested, by use of the symbol 100X, that Dettol kills 100% more germs. The following two advertisements were published by Hindustan.

Being aggrieved Reckitt filed two suits against them.

Advertisement - III This is the subject matter of C.S.No.92 of 2013 connected with which is the interim application G.A.No.942 of 2013.

The scene of this advertisement is a bathroom slab.

The advertisement is divided into two parts.

On the left hand side of the advertisement, a part of the bathroom slab is shown.

On it is kept a Lifebuoy.

soap.

On the right hand side a mug is shown filled with water into which Dettol antiseptic liquid is poured.

It is proven! Lifebuoy gives better germ protection than Dettol antiseptic liquid.

is written over the advertisement.

Thereafter, in very small font, the words while bathing.

are written.

There is also a circle divided into two semi circles, spreading across the advertisement.

The Dettol side shows many marks or gerMs.They are absent on the Lifebuoy side.

Advertisement - IV This is the subject matter of C.S.No.90 of 2013 connected with which is the interim application G.A.No.937 of 2013.

The setting of the advertisement is a kitchen where plates are being washed.

There is a girl child and a bottle of VIM on the kitchen slab.

There is another bottle filled with a liquid, brownish in colour.

The bottle has a blue cap and a white label.

The girl child sits next to this bottle.

A lady walks in and immediately removes the bottle saying that children must be kept away from antiseptics.

Then she expresses an apprehension that if children are to be kept away from antiseptics, how could utensils be washed with them.

Then VIM is projected as a cleaner, having natural ingredients, lemon to clean. THE REAL DISPUTE: The main focus of the advertisement campaign launched by Reckitt is on germ killing., as stated by their learned counsel.

Both their products Dettol Antiseptic Liquid and Dettol Healthy Kitchen Gel contain and are registered as drugs.

So also are their soaps.

The drug which is present as an ingredient has the power to kill gerMs. Dettol Antiseptic Liquid does not act as a cleaning agent.

Dettol Healthy Kitchen Gel has also a cleaning agent with the drug which enables it to be a cleaning agent and a germ killer.

The two products of Hindustan which are the subject matter of these suits do not contain any drug, as an ingredient.

They are said to be cleaning agents only which includes germ clearing capacity.

One of such products is marketed as Lifebuoy.

soap, the principal use of which is for bathing.

The other product is VIM.

used for cleaning the kitchen and utensils.

Both Dettol Healthy Kitchen Gel and Vim are recommended by their respective manufacturers for cleaning dishes, utensils, crockery, cutlery, kitchen slabs, floors and so on.

The thrust of the campaign by Reckitt is that their two products are capable of killing germs completely.

The claim of Hindustan is that although their products are not a drug or a germ killer, they are fully efficacious in removing germs from the surface.

Their product contains the ingredient of lemon, acetic acid which loosens and removes germs from the surface.

The attempt in the advertisements which are in question is to justify the respective advertisements on the basis of truth.

It is said on behalf of Hindustan is that at the dilution level for bathing recommended by Reckitt on the label on the bottle of Dettol antiseptic liquid., which is 1:1500, the substance has no power to kill any gerMs.Lifebuoy bar soap.

on the other hand removes bacteria, even according to the reports relied upon by Reckitt.

Reckitt relied upon a report dated 29th September, 2012 of an organization SGS on the basis of tests carried out using EN1276 standards.

According to them, the report showed that Dettol Healthy Kitchen Gel could achieve a 5 log reduction for four strains of germs whereas VIM could achieve, in similar conditions much less than 2 log reduction.

According to this report Dettol has not hundred times but one thousand times better germ killing capacity than VIM, it was submitted.

Reckitts report was questioned by Hindustan by introducing a counter report by an expert Dr.

Cutler, who carried out tests under EN13697 conditions.

According to Hindustan, relying on Dr.

Cutlers report, using EN1276 standards was not an appropriate method at all because a 5 log reduction was achieved when the substance being tested, diluted in hard water, the contact time being 5 minutes.

Furthermore, being a suspension test it was not the right test because dishes, utensils, crockery, cutlery, kitchen slabs and floors are normally cleaned in running water and not in static water, without much contact time between the water and the surface.

Therefore, the results of the EN1276 test were misleading.

Dr.

Cutler came to the conclusion that VIM was as efficacious as Dettol.

Hindustan introduced a report by Bhawans Research Center, Mumbai dated 18th February, 2013.

This agency tested for final microbial load on the plate post washing.

and came to the conclusion that after washing by VIM and Dettol Kitchen Gel, the germ count on the plate was the same.

Hindustan relied on another report of Queen Mary University of London which doubted the EN1276 test results and the assertion that Dettol Gel killed 99.9% invisible germs on a dish surface.

SUBMISSIONS: I think it is my duty to recount the special submissions made by the parties pertaining to each advertisement.

ADVERTISEMENT - I (G.A.938 of 2013 connected with C.S.87 of 2013)
PLAINTIFF: The reference to leading dishwash.

in the advertisement, necessarily pointed at VIM, by innuendo.

This is so because Vim has a 2/3rd share of the market in terms of volume sale and sale turnover.

Therefore, it would be clear to any ordinary and reasonable person that the reference to leading dishwash.

must necessarily refer to VIM.Hence, VIM.

is identified in this advertisement and disparaged by it.

A critical analysis was made by the test report by SGS dated 29th September, 2012 being Annexure K of the application G.A.938 of 2013 at page 69 thereof.

It was said that the type of test that was carried out was E.N.1276.

It was a suspension test and carried out by a virtually undiluted liquid for a period of 5 minutes.

Suspension for a period of 5 minutes was not the usual mode of cleaning utensils, the bathroom slab of the kitchen and so on.

The method used in the test carried out by Bhawans Research Center at the instance of Hindustan which begins at page 127 of the said application is more reliable.

According to this report dated 18th February, 2013, after washing by Dettol Healthy Kitchen Slab Gel, the percentage reduction of germs was 99.99% whereas while cleaning with Vim the reduction was 99.95%.

They also relied on a report of HUL London, Queen Mary University of London which doubted that Dettol could kill 99.9% gerMs.According to the plaintiff VIM liquid contains surfactants which loosen the bacteria from the surface on which they are used by reducing the ability of the organism to bind with the surface.

DEFENDANT The defendant made comprehensive submissions with regard to advertisements I and II which I will deal with while dealing with the special submissions with regard to Advertisement II ADVERTISEMENT II (G.A.583 OF

201.AND G.A.669 OF 201.connected with CS 5.OF 2013.PLAINTIFF; The advertisement directly attacked the product VIM of the plaintiff.

The effect of the advertisement is that after a wash with Dettol a plate becomes germ free whereas after a similar wash with VIM the plate is full of gerMs.That is the impression formed by a reasonable man.

The suspension test is a misleading test as it is not the proper test to be carried out when dishes, utensils etc are washed in running water.

VIM contains the constituent of lemon, acetic acid which is a very powerful cleaning agent.

DEFENDANT: What was highlighted in the two advertisements was the germ killing capacity of Dettol Kitchen gel.

In the case of Hindustan Lever Ltd versus Reckitt Benckiser India Ltd and ors decided by the Delhi High Court on 17th November, 2006, it was held that Dettol was 10 times more efficacious than soaps without actives.

In other words Dettol had ten times more germ killing power than a product like VIM, without actives.

As far as advertisement I or II are concerned, the justification of Reckitt is that they have the right to tell the truth to the consumeRs.The foundation of its right is partly S.

29 (8) and S.

30 of the Trade Marks Act, 1999, as conceived by Reckitt.S.29 (8) and S.

30(1) of the said Act are inserted below: 29.

Infringement of registered trade marks.

- (8) A registered trade mark is infringed by any advertising of that trade mark if such advertising - (a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matteRs.or (b) is detrimental to its distinctive character;

or (c) is against the reputation of the trade mark.

30. Limits on effect of registered trade mark.

- (1) Nothing in section 29 shall be construed as preventing the use of a registered trade mark by any person for the purposes of identifying goods or services as those of the proprietor provided the use - (a) is in accordance with honest practices in industrial or commercial matters and (b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.

This provision provided an exception to the concept of infringement.

Section 29 (1) of the Act dealing with infringement, inter alia, stipulates that when a registered mark is used by a person not entitled to the use thereof, he infringes that mark. S.29 (8) provides that it is infringed by advertising if it is unfair or dishonest or detrimental to its character or reputation.

The exception provided in Section 30 is that one can use the mark of another for the purpose of identifying the goods with a proprietor, but such use had to be honest and no unfair advantage or detriment to the repute of the trade mark was to be caused.

Hence, comparative advertisement is permitted, provided the advertisement was honest, fair and not detrimental to the goods.

The publication of this kind of an advertisement was also justified on another ground.

The law relating to commercial speech.

was invoked.

In this branch of law advertisement was held to be a type of commercial speech.

The right to make commercial speech was a fundamental right of speech and expression guaranteed by Article 19 of the Indian Constitution.

This was akin to the 11th amendment of the American Constitution.

There was great encouragement to speak the truth in public interest.

Unless a statement made was absolute untrue or made with reckless disregard to truth or malicious, it was not actionable.

On the strength of the above law and authority it was said by learned counsel for Reckitt that it had the absolute right to speak the truth about Hindustans products.

As long as the statement was true it did not matter.

ADVERTISEMENT - III: (G.A.942 of 2013 connected with C.S.92 of 2013)
PLAINTIFF: Comparison should be like to like.

It was pointed out on behalf of Reckitt that like was compared with unlike.

The reference was made to a direction of the European Council Directive 1006/114/12th December, 2006, which provided that like could not be compared with unlike.

Dettol Antiseptic Liquid which was recommended as a supplement to soap for bathing and which was not a soap was being compared with Lifebuoy soap.

Dettol Antiseptic Liquid was not used as a cleaner at all but it was more efficacious as a germ killer.

On the other hand Lifebuoy soap was only a cleaner and did not have antiseptic qualities.

Moreover, Dettol Antiseptic Liquid was a drug within the meaning of Drugs and Cosmetics Act, 1940.

It was also covered under the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.

Hence, Reckitt had to be very careful with the advertisement of Dettol products.

This could not be used by Hindustan to publish misleading advertisements extolling its product and denigrating the products of Reckitt.

There is also infringement of the trade mark Dettol, by the advertisement because it is contrary to honest practices in the trade and is detrimental to its distinctive character and reputation as provided in Section 29 (8) of the Trade Mark Act, 1999 read with Section 30 of the Act.

Of the more reason why Dettol should not be compared with Lifebuoy because it is a drug under the Drugs and Cosmetics Act, 1940.

The advertisement tends to misbrand Dettol under Section 17 by the false statement made.

The words while bathing.

were printed in very small font.

DEFENDANT: Mr.Chatterjee, learned Senior Advocate submitted that according to the use of the product Dettol, the plaintiff recommended that one tea spoon of Dettol was to be added to a bucket of water which means that the proportion of Dettol and water would be 1:1500.

According the above report Dettol was effective if it was present in proportions or dilutions less than 1:300.

Therefore, while bathing.

Dettol was absolutely useless.

No statute prohibits comparison of like with like.

ADVERTISEMENT - IV: (G.A.937 of 2013 connected with C.S.90 of 2013)
PLAINTIFF: The reference to an antiseptic is the reference to Dettol antiseptic liquid because it has 85% market share.

Therefore, the colour can be easily identified with Dettol.

Identification with Dettol is easier by the use of the bottle the shape of which is similar to the Dettol Antiseptic Liquid bottle containing the amber colour liquid.

A non-antiseptic (VIM) is compared to an antiseptic product dettol.

The representation that antiseptic liquid is dangerous is wrong.

It is true that it is not to be ingested particularly by children.

But, even childrens toys are cleaned with them.

Vim also has a warning that it should be kept away from children.

Dettol Healthy Kitchen Gel is a disinfectant as well as drug.

The reference to antiseptics as dangerous had the potential to cause multiple reactions in different types of people, prejudicial to the plaintiff.

The De minimis principle argument in copyright infringement cannot be imported into the law of disparagement.

DEFENDANT: The bottle does not resemble the Dettol bottle.

The colour of the cap is blue and the label white.

There is truth in the content of the advertisement.

Dettol is an antiseptic and should be kept away from children.

Truth is an absolute defence in disparagement.

Vim has germ removal capacity.

It loosens the protein which aid surface binding.

Weakening the ability of the bacteria to bind to the surface, it thereby helps their removal.

The plaintiff could not claim any monopoly in the colour brown or amber.

It was suggested that a single meaning as understood by an ordinary reasonable man should be given to the advertisement.

The bottle was shown for less than one second.

The principle of de minimis applied, that is to say it had minimum effect.

FORMULATION OF LEGAL PRINCIPLES: I am only referring to those authorities cited by the parties which I consider relevant.

Normally, an advertisement is not taken seriously.

It is considered a puff. In the case of *Timothy White versus Gustav Mellin*, (1895 AC 155), this is what Lord Herschell had to say: After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion, these particular goods, Vances food..

The principles of law governing disparagement of goods seem to be well entrenched and only need to be elucidated.

The law, in its most general terms relating to disparagement of goods was laid down by the House of Lords in the above case.

The House opined as follows: a) A trader can laud his product.

b) He can even say that his product is the best in the world.

c) He can declare that his product is better than his rivals and in what respect it is better.

d) He cannot say that his rivals product is bad, injurious or deleterious or make an intentional misrepresentation to mislead customers. (Lord Shand at Page

171) e) In order to succeed, the plaintiff has to prove special damages.

To obtain an order of injunction he has to satisfy the Court that damages have been suffered or will be suffered in future.

(Speech of Lord Watson) f) Some speeches in White versus Mellins seem to suggest that in the case of downright disparagement of another's goods, without proof of actual or future damages, an action in disparagement will lie.

A passage from the speech of Lord Shand suggests that in such a case even a pleading of special damage is not necessary.

I cannot help but read some illuminating passages from these judgments.

Lord Herschell: But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are.

Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods.

If an action will not lie because a man says that his goods are better than his neighbours, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect.

Just consider what a door would be opened if this were permitted.

That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments.

The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure - whether a particular article of food was in this respect or that better than another.

Indeed, the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better.

Lord Watson: Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade: it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance.

Lord Shand: If there had been in this case an imputation of intentional misrepresentation for the purpose of misleading purchasers or a statement that Mellins food was positively injurious, or that it contained deleterious ingredients, and would be hurtful if it were used, I think there would have been a good ground of action; and if the authorities have not settled the law otherwise, I should even say that an averment of special damage ought not to be necessary.

Hence a trader, without reference to the goods of any other trader can extol the qualities of his product.

A trader is permitted to compare his goods with those of another trader.

He can make this comparison by highlighting the qualities and efficaciousness of his goods without stating or commenting on the qualities and efficaciousness of his rivals goods.

Take the example of Reckitt lauding its product, Dettol and at the same time showing the mark of the product VIM in the advertisement without making any comment on it.

They are permitted to do so (See Timothy White versus Gustav Mellin and Reckitt & Colman of India LTD. versus M.P. Ramchandran & Anr.

reported in 1999 (19) PTC 741.

See also the case of Heinz India versus Glaxo Smithkline reported in 2009 (2) CHN 479). This is a kind of comparative advertisement conceptualised in Section 30 of the Trade Marks Act, 1999.

But the provision warns that such depiction shall not, inter alia, be unfair or detrimental to the repute.

of the trade mark.

(See *Lorreal SA versus Belhre NV* [2010].RPC 23. In other words the reputation of the goods cannot be lowered.

Moreover the use of the mark has to be honest.

(See *307 Barclays Bank Plc versus RBS Advanta* reported in [1996].R.P.C.307) A trader may be allowed to compare his product with that of another, in an advertisement.

Generally advertisements are taken as a hyperbole by the reasonable people.

Another English case which is oft cited is *De Beers Abrasive Products LTD. and others versus International General Electric Co of New York LTD.* and another reported in [1975].2 ALL.ER.

599. It is a Queens Bench decision given by Walton J.

I think this case is important for the proposition that if a trader presents a product, along with a proper scientific test, properly carried out in the laboratory, any person is to take this information seriously.

Similarly, is an advertisement taken, backed up by scientific reports.

The advertisements are to be taken seriously, although ordinarily an amount of hyperbole is to be expected in the description of goods, properties and services in an advertisement.

An ordinary reasonable man takes it with a large pinch of salt. Walton J in *De Beers* case remarked: Where, however, the situation is not that the trader is puffing his own goods, but turns to denigrate those of his rival, then, in my opinion, the situation is not so clear cut.

Obviously the statement: My goods are better than Xs is only a more dramatic presentation of what is implicit in the statement: My goods are the best in the world.

Accordingly, I do not think such a statement would be actionable.

At the other end of the scale, if what is said is: My goods are better than Xs, because Xs are absolute rubbish, then it is established by dicta of Lord Shand in the House of Lords in *White V Mellin*, which were accepted by counsel for the defendants as stating the law, the statement would be actionable.

Between these two kinds of statements there is obviously still an extremely wide field; and it appears to me that, in order to draw the line, one must apply this test, namely, whether a reasonable man would take the claim being made as being a serious claim or not.

A possible alternative test is to ask whether the defendant has pointed to a specific allegation of some defect or demerit in the plaintiffs goods.

This is, I think, the test favoured by the learned editors of the last few editions of *Salmond on Torts*.

It follows that comparing the qualities of ones product with those of another is only permitted, if it is in the nature of a puff. This is so because while making a serious comparison of the qualities of a rival product, one may directly or indirectly denigrate another product: Counsel for the plaintiffs, on the other hand, accepts that a mere puff by any trader of his own products is not actionable, but says that the matter becomes quite different if the trader descends to particularize precisely why his product is better than his rivals or his rivals is w ORS. than his; and, he says, fairly read, what Tech-Data/I in the present case is doing is to say in substance not merely that MBS-70 is superior to DEBDUST, but that DEBDUST is not proper for its purpose.

.(De Beers Case) Hence, a trader should not be permitted to advertise facts, data, figures, deficiencies etc. of the products of another, especially a rival, directly or indirectly by an innuendo.

This is so, because, one must presume a constant bias in the mind of such a trader towards his rival.

When one presumes this constant bias, one would expect that the representations that are made, seriously about a rivals product are bound to be false, misleading, unfair or deceptive.

This is more so because one is not in a proper position to make an impartial appraisal of a rivals product.

Madan B.

Lokur, J in Dabur India LTD.versus Wipro Limited reported in 2006 (32) PTC 67.(Del) accepted the proposition that if a trader claimed his product to be superior directly or indirectly he had to claim his rivals product to be inferior.

But it is the degree of defamation which mattered.

The person aggrieved should not be too sensitive in these matteRs.This decision is about puff tolerance levels being within reasonable limits.

In the unreported judgment of Hindustan Unilever LTD.versus Reckitt Benckiser (India) LTD.& Ors., delivered by A.K.Sikri J.

of the Delhi High Court on 17th November, 2006, on a detailed consideration of the authorities on the subject, substantially the same principles of law were reiterated: 5.

This principle of law, therefore, stands firmly established that disparaging advertisement, whereby the product of the competitor is denigrated, is not permissible.

Law would consider any slanderous complaint or comment to be an actionable injury which the courts would step in to prevent in appropriate cases.

Thus, in a given case the court is required to find out as to whether the advertiser is merely trying to promote his product for which even he is allowed to puff up his product and can even go to the extent of saying that his goods are better than his competitors, but at the same time he cannot brand the competitors product as bad.

Keeping in view the aforesaid principles it is to be examined whether in the present case the impugned advertisement has crossed the Laxmanrekha.

The learned Judge went on to remark, and in my opinion this remark is most important: Further, in any case, when it is not disparaging any product in particular, such a claim would, at best, be merely puffing the defendants product Dettol, which is permissible.

P.C.Ghose J.

for the Division Bench of our Court in Hindustan Unilever Limited versus Procter & Gamble Home Products Limited reported in 2010 (43) PTC 46.spoke as follows: 31.

It is a common practice to indulge in making puff.

of their own products to eliminate the competition from rivals.

Making puff.

is permissible in law but disparagement of the goods of the rival would be illegal.

According to Mr.Mitra, the puffing of ones product is only limited to unbelievable claims which can be said to be harmless.

In other words, mere puffing of ones product is not expected to be taken seriously by the public watching the advertisement.

The advertisement ceases to be mere puff.

when the advertisement claims that what is stated in the advertisement is correct.

In such circumstances, the advertisement makes an assertion on behalf of the advertiser and does not remain a mere puff..

In Glaxo versus Heinz decided by the Delhi High Court on 12th November, 2010 Rabindra Bhat J said: 22.

In determining the meaning in the impugned advertisement, the Court has to take into account the fact that the public expects a certain amount of hyperbole in advertising.

The test is whether a reasonable man would take the claim being made, as one made seriously.

The more precise and specific the claim, the more likely it was that the public would take it seriously.

The Court will have to do what an ordinary man would do - take it with a large pinch of salt.

The cases of Timothy White versus Gustav Mellin and Reckitt & Colman of India LTD. versus M.P. Ramshandran & Anr.

held that a trader could compare the advantages of his goods over the goods of others. Comparison cannot transcend the boundaries of puffing. Serious comparison is not permitted, as it invariably tends to denigrate another product.

It follows that the defence of truth or justification in the law of defamation, is not available in actions alleging disparagement of goods and services and arising out of comparative commercial advertisements, in my opinion.

As I have held that serious comparative advertisement should not be made, as it would invariably denigrate the product of a manufacturer, while lauding the product of another, I take no note of the test reports filed by the parties, containing data regarding the germ killing or germ removal capacity of Dettol and VIM.

Very fortunately or unfortunately the multiple meaning rule in Ajinomoto Sweeteners Europe SAS versus Asda Stores LTD. reported in 2010 FSR 30. that a word may be damaging for one but innocuous for another and so on, and hence the one suffering damages can claim it in an action for malicious falsehood, is not part of our law yet.

Our Supreme Court has applied the old objective test of that of a reasonable man, in cases of malicious falsehood, in which category an action for disparagement of

goods falls.

In *M/S.Lakhanpal National LTD.versus M.R.T.P.Commission* and another reported in AIR 198.SC 169.the case was under the Monopolies and Restrictive Trade Practices Act.

A representation may be apparently correct in the technical sense but may have the effect of misleading the buyer by using tricky language.

Therefore, it was essential to consider whether the representation misled the buyer.

The yardstick was that of a reasonable man.

This concept of the reasonable man was also upheld in the case of *Colgate Palmolive (India) LTD.versus Hindustan Lever LTD.*reported in (1999) 7 SCC 1.

In the law of defamation, a defamatory material is always as understood by the reasonable man which was important, as stated in the case of *Slim And Others versus Daily Telegraph LTD.And Others* reported in (1968) 2 Q.B.157, *Ramesh s/o Chotalal Dalal versus Union of India And Others* reported in (1988) 1 SCC 68.(Para

13) and S.

Rangarajan Vs.P.Jagjivan Ram And Others reported in (1989) 2 SCC 57.(Para 20).*M.J.Zakharia Sait versus T.M.Mohammed* reported in [1990].3 SCC 39.para 36 and 37.

The same principle is incorporated into the law of disparagement.

Now, the argument that comparative advertisements can be supported by the Right to Freedom enshrined in Article 19 (1) (a) of our Constitution, has to be analysed.

Advertisement is a type of commercial speech.It is, undoubtedly, a part of the fundamental rights guaranteed by our Constitution to the citizens.

More particularly, it falls under Article 19 (1) (a) of those rights.

The Supreme Court recognised this in the case of *Tata Press LTD. versus Mahanagar Telephone Nigam LTD.* reported in AIR 199.SC 2438.

I will read the following passage from this judgment: 22.

Advertising as a commercial speech.

has two facets.

Advertising which is no more than a commercial transaction, dissemination product - of is nonetheless information regarding the 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., in relation to the publication and circulation of news papers. This Court in *Indian Express Newspapers case* MANU/SC/0340/1984: [1986].159 ITR 85.(SC). *Sakal Papers case* MANU/SC/0090/1961: [1962].3 SCR 84. and *Bennett Colemans case* MANU/SC/0038/1972: [1973].2 SCR 757. has authoritatively held that any restraint of curtailment of advertisement would affect the fundamental right under Article 19 (1) (a) on the aspects of propagation, publication and circulation.

23. Examined from another angle, the public at large has a right to receive the commercial speech. Article 19 (1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech.

So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through the advertisements.

The protection of Article 19 (1) (a) is available to the speaker as well as to the recipient of the speech.

The recipient of commercial speech.

may be having much deeper interest in the advertisement than the businessman who is behind the publication.

An advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.

24. We, therefore, hold that commercial speech.

is a part of the freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution.

The Supreme Court equally added: 17.

Unlike the FiRs. Amendment under the United States Constitution, our Constitution itself tays (sic) lays down in Article 19 (2) the restrictions which can be imposed on the fundamental right guaranteed under Article 19 (1) (a) of the Constitution.

The commercial speech.

which is deceptive, unfair, misleading and untruthful would be hit by Article 19 (2) the Constitution and can be regulated/prohibited by the State.

The Madras High Court in the case of Colgate-Pamolive (India) Limited versus Anchor Health and Beauty Care Private LTD. reported in 2009 (40 PTC 65. (Mad) aired the view that consumers had the right to know and to receive information and that corresponding rights had to be matched and balanced. The right to commercial speech., in my opinion, gives a right to a trader to advertise his product, to give all kinds of information regarding it to the consumers to highlight its qualities and

benefits and so on.

But I find nothing, in the existing law to permit, a serious comparison by a trader of his product with the product of another.

This would invariably result in the denigration of the latter product or in the consumer being prejudiced by it against the other product, as held earlier.

When this happens, immediately the commercial speech.

becomes unfair.

In fact, the Division Bench of Delhi High Court in Dabur India LTD.versus M/S.Colortek Mekhalaya PVT.LTD.& ORS.decided on 2nd February, 2010 approved a passage from Ansons Law of Contract (27th Edn.) that commendatory expressions regarding a product are not to be taken as serious representations of fact.

In other words advertisements lauding a product are not to be taken as a representation of fact with regard to the product at all.

Hence, an action for misrepresentation would not lie.

It follows, as stated in the De Beers case that generally advertisements are not taken seriously by the people.

This was reiterated by another Division Bench of the Delhi High Court in the case of Pepsi Co.Inc.

versus Hindustan Coca-cola LTD.& Anr.

reported in 2003 (27) PTC 30.(Del).In my judgment comparison should not be more than a puff.Serious comparison invariably tends to denigrate another product and is not permitted.

Otherwise, the Courts would be reduced to, a machinery for advertising rival productions by obtaining a judicial determination which of the two was better., as rightly observed in White versus Mellin about 120 years ago.

e).CONCLUSIONS: ADVERTISEMENT No.- I Although the advertisement does not show VIM, the reference to a leading dishwash would lead any reasonable person to think that the dishwash being referred to was VIM.

This is because VIM has about 2/3rd share of the market and admittedly other dishwash available are quite insignificant compared to VIM.

Undisputedly, the law relating to innuendo in defamation, applies to cases of disparagement of goods.

Therefore, the above special circumstance is known to people who have knowledge of dishwash.

Any reasonable person belonging to this body of persons having several knowledge, would readily believe applying the principles in M.J.Zakharia Sait versus T.M.Mohammed reported in (1990) 3 SCC 39.(Paragraph 37).that the reference to leading dishwash refers to VIM.

Thereafter, showing germs and proclaiming that Dettol Healthy Kitchen gel kills 100X more germs than the leading dishwash or VIM shows that the content of the advertisement was not meant to be a puff but a serious comparative advertisement.

Proclaiming that Dettol Healthy Kitchen Gel kills 100X more germs is permitted within the rule enunciated by White versus Mellin reported in 1895 AC 154.

But showing application of Dettol Healthy Kitchen Gel whereby nearly 100% of the germs are killed and at the same time showing application of VIM whereby no germs are killed or removed, certainly denigrates VIM.

Failure to show the germ removal capacity of VIM, without killing them, as declared by Hindustan makes the advertisement one sided, hence unfair and devoid of honest intention.

This kind of comparison also lowers the reputation of the mark VIM.

Therefore, this advertisement is also hit by Section 30 of the Trade Marks Act, 1999.

In those circumstances I pass an order of injunction restraining the defendant company from showing the above advertisement or any version or adaptation thereof in any form of media till the disposal of the suit.

The application G.A.No.938 of 2013 with C.S.No.87 of 2013 is allowed accordingly.

ADVERTISEMENT No.- II This advertisement makes a direct comparison of the two products Dettol Healthy Kitchen Gel and VIM.

The theme of the advertisement is not puffing but a very serious one.

For the self-same reasons as indicated by me in respect of advertisement I, I pass an order of injunction restraining the defendant company from showing this advertisement or any version or adaptation thereof in any form of media until the disposal of the suit.

The application G.A.No.583 of 2013 with C.S.No.56 of 2013 and G.A.No.669 of 2013 are disposed of by this order.

ADVERTISEMENT No.- III This advertisement does not show the product of the plaintiff in the proper perspective.

The use of the defendants product is predominantly for cleansing.

The plaintiffs product Dettol Antiseptic liquid is predominantly for germ eradication.

It is not declared to be used as a cleanser.

The defendant, however, claims that its product has germ removing capacity.

Moreover, the plaintiffs product is recommended for use as a supplement to bathing soap, gel etc. Showing the plaintiffs product in an inappropriate dilution and context and then, declaring that it has no germ protection capacity whereas the defendants product Lifebuoy Soap had nearly 100% germ removal capacity, was

in my opinion disparaging the defendants product.

That too, showing the context while bathing.

in small font.

Therefore, the advertisement was unfair, prejudicial to Reckitt not with honest intention and aired at lowering the reputation of the defendants trade mark, offending Section 30 of the Trade Marks Act, 1999.

In those circumstances I pass an order of injunction restraining the defendant from showing the above advertisement or any version or adaptation thereof in any media till the disposal of the suit.

The application G.A.942 of 2013 connected with C.S.92 of 2013 is allowed.

ADVERTISEMENT No.- IV Whatever may be the contentions of the learned counsel for the defendant, the emergence of the bottle with an amber liquid, in the little plot of the advertisement, would convey to any reasonable person, having knowledge of Dettol Antiseptic Liquid and dishwash, for the reasons given for advertisement I that the bottle referred to Dettol Antiseptic Liquid.

Hence, Dettol was referred to by innuendo.

Furthermore reference to Antiseptic.

and the dangerous nature of antiseptics when consumed would always have prejudicial effects on any consumer of dishwash and would deter him or her from buying Dettol Kitchen Gel.

It would deter some to a little extent.

It would deter others to a great extent.

Therefore, this advertisement also was a comparative advertisement, trying to make a serious comparison of two products of two manufacturers and declaring one to be safe and superior.

By doing so the defendant has denigrated the product of the plaintiff, in the way conceptualised in the De Beers case.

Furthermore, in my opinion, this advertisement is also unfair, not with honest intention and tends to lower the reputation of the said goods of the defendant.

Hence, it is hit by Section 30 of the Trade Marks Act, 1999.

In those circumstances I pass an order of injunction restraining the defendant from showing the advertisement or any version or adaptation thereof in any form of media until disposal of the suit.

The application being G.A.No.937 of 2013 connected with C.S.90 of 2013 is allowed.

All existing interim orders in the above five applications inconsistent with this order, are vacated.

Urgent certified photocopy of this

JUDGMENT / ORDER

, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Signed copy of the operative part be issued.

(I.P.MUKERJI, J.)

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