

In Re: Mcdowell and Co. Ltd.

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Feb-07-1997

Judge : S Chakravarthy

Appellant : In Re: Mcdowell and Co. Ltd.

Advocate for Def. : Sri. S. S. Kumar, Shri. S. S. Kumar, Shri. S. S.Kumar

Judgement :

1. A question which is the concern of the society and consumers at large is whether advertisements published by or on behalf of manufacturers and marketing bodies need to be reined in and if so to what extent. The concern has its root in the advertisements having the capacity to leave certain impressions in the mind of the readers of the same and the consumers that could be misleading with possible pernicious consequences of loss and damage to them. The instant case is a manifestation of such a concern and this Commission has the responsibility of testing the allegedly pernicious advertisement in terms of its capacity to mislead the gullible consumers.

2. This enquiry commenced with an advertisement that appeared at page 66 in The Illustrated Weekly of India of date November 23, 1986.

McDowell and Co. (hereinafter referred to as "respondent") which is engaged in the business of manufacturing whisky, cologne and other products is reported to have inserted and published the said advertisement to promote the sale of whisky manufactured by it though it apparently related to cologne. The advertisement

depicts a bottle on which is engraved "McDowell's Diplomat Cologne". The same advertisement carries the picture of Ms. Dimple Kapadia, a film actress. Underneath the picture is the caption "what makes him my choice is his choice . .

. Diplomat". The Commission came to the prima facie view that the said advertisement though apparently refers to cologne, leaves a misleading impression on the readers that the message is in regard to the good quality and usefulness of whisky manufactured by it under the brand name "Diplomat". Furthermore, the caption in the advertisement gives an impression that Ms. Dimple Kapadia likes those people who choose to drink "Diplomat" whisky. It also gives a misleading impression about the quality and usefulness of "Diplomat whisky", 3. A notice of enquiry (NOE) was, therefore, issued on February 2, 1988, under Sections 36B(d), 36A and 36D of the Monopolies and Restrictive Trade Practices Act, 1969, charging the respondent with having indulged in certain unfair trade practices within the meaning of Section 36A(1)(i) and (vi) of the Act. A copy of the preliminary investigation report prepared by the Director-General (Investigation and Registration) was also communicated to the respondent.

4. The respondent filed a detailed reply to the notice of enquiry in which it had taken preliminary objections besides a defence on the merits. A summary of its "reply is given below under the broad headings of "Preliminary objections" and "Defence on the merits".

1. The product advertised is "Diplomat Cologne", a perfume and not "Diplomat Whisky". The respondent not having advertised "Diplomat Whisky", the notice of enquiry is bad in law.

2. Certain baseless inferences have been drawn from the caption in the impugned advertisement. The humour or hyperbole contained in the advertisement is not to be "disregarded or misunderstood".

3. None of the alleged trade practices in the notice of enquiry has in any way caused loss or injury to any consumer.

4. The cologne advertised is neither a drug within the meaning of Section 2(b) nor a magic remedy within the meaning of Section 2(c) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1959. Nor is it an article or substance capable of being used for maintaining or improving the capacity of human beings for sexual pleasure as mentioned in Section 3(b) of the said Act.

5. It is not open to the Commission to treat the contraventions or supposed contraventions of other statutes as unfair trade practices under the Monopolies and Restrictive Trade Practices Act, 1969, when specific remedies and punishments for such contraventions are provided in those enactments.

6. The allegation that the message in the advertisement leaves a misleading impression on the readers on the quality and usefulness of the whisky manufactured by the respondent under the brand name "Diplomat" is incorrect and baseless.

7. The word "cologne" is written conspicuously in the impugned advertisement. The size of the cologne bottle, as appearing in the advertisement, is much smaller than the size of the "Diplomat whisky" bottle. It is inconceivable that any consumer or reader of the advertisement would be so naive as to misconstrue the advertised product. Even the outlets for distribution of cologne and whisky are different.

8. It is inconceivable that consumers are so bereft of common sense and intelligence that they would expect that Ms. Dimple Kapadia or any other film star would be attracted to them merely because of the preference for a particular product of her alleged liking, as advertised.

9. In the present day business world, advertisements are becoming indispensable for gaining a foothold and popularity among consumers and in this context film stars are a popular medium of advertisement for sale of products. Advertising phrases and expressions are meant to secure a competitive edge for the marketed brand. Catchy expressions are not forbidden by law, if they can be seen as humorous or hyperbolic.

10. The respondent has neither transgressed any limits laid down by law or ethics nor indulged in any unfair trade practice.

11. The product "Diplomat cologne" is not manufactured by the respondent but by Carews Pharmaceuticals Pvt Ltd. and marketed by the respondent.

5. The Director-General filed a rejoinder to the aforesaid reply of the respondent. After the pleadings were completed, the following issues were framed : 1. Whether the notice of enquiry is not maintainable for the preliminary objections as given in the reply to the notice of enquiry 2. Whether the respondent is indulging in the unfair trade practices as alleged in the notice of enquiry 3. If the answer to issue No. 2 be in the affirmative, then whether the said trade practices are prejudicial to public interest or to the interest of any consumer or consumers generally 6. The Director-General submitted in evidence five documents and one annexure and these were marked exhibits A-1 to A-6 after they were admitted by the respondent- There was no oral evidence on behalf of the Director-General.

7. Two witnesses were examined on behalf of the respondent, namely, Shri A. S. Wadhwa, its General Manager (Sales), and Shri Gurinder Pal Singh, a distributor of the respondent company for "Diplomat Cologne".

Both the witnesses filed their affidavits in evidence and were cross examined by counsel for the Director-General.

8. I gave a hearing to Sri O. P. Dua, counsel for the Director-General, and Sri S. S. Kumar, counsel for the respondent.

9. Shri O. P. Dua, styling the matter as surrogate advertisement observed that the cologne bottle depicted in the impugned advertisement resembles an actual whisky bottle of the respondent. He inferred that the readers of the advertisement and the consumers may mistake the cologne bottle for a whisky bottle. Shri Dua queried as to whether the respondent was justified in incurring an expenditure of about Rs. 25 lakhs for selling perfume bottles worth about Rs. 1 lakh. This, according to him, gives rise to the inference that the advertisement indeed was only to promote the sale of whisky bottles through the stratagem of surrogate

advertising.

10. He drew my attention to the observations of the Supreme Court in *Lakhanpal National Ltd. v. MRTPC* [1989] 66 Comp Cas 519 ; [1993] 1 CTJ 345, dated May 2, 1989, which merits reproduction (at page 524) : "The definition of 'unfair trade practice' in Section 36A mentioned above is not inclusive or flexible, but specific and limited in its contents. The object is to bring honesty and truth in the relationship between the manufacturer and the consumer. When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such representation made by the manufacturer on the common man Does it lead a reasonable person in the position of a buyer to a wrong conclusion The issue cannot be resolved by merely examining whether the representation is correct pr incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly, a statement which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively too than a literally correct statement. It is, therefore, necessary to examine whether the representation, complained of, contains the element of misleading the buyer." (emphasis added) 11. Shri S. S. Kumar, counsel for the respondent, met the argument of Shri Dua by observing that the ratio of the Supreme Court's observations is that substantial falsity is not only necessary but also adequate to establish a misrepresentation.

12. I have carefully perused the impugned advertisement. The bottle depicted in the advertisement clearly has on its face the expression "Cologne" printed. The print is bold and in red colour which even a casual reader is unlikely to ignore. Nor is the reader likely to be misled that what is advertised is whisky and not cologne. Furthermore, the respondent in its reply in para 7 has made a categorical averment that the size of the cologne bottle is much smaller than the bottle of "Diplomat Whisky".

13. Shri Dua sought to discredit Shri A. S. Wadhwa, a witness of the respondent, and its General Manager (Sales). According to Shri Dua, the cross-examination of

Shri Wadhwa, has shown that his deposition cannot be relied upon. I have perused the affidavit of Shri Wadhwa and his deposition during the cross-examination. I am unable to find anything that indicts his veracity. His affidavit at paras 3, 4, 5 and 7 categorically states that the size of the cologne bottle is not comparable to that of "Diplomat Whisky" and that the expenditure incurred by the respondent for promoting its cologne was with the objective of securing a foothold in the fiercely competitive market.

The witness also added on oath that the expenditure incurred by the respondent in respect of the impugned advertisement was for the promotion of "Diplomat cologne" and not for any collateral purpose.

14. After taking into consideration the evidence on record and the pleadings, I am inclined to agree with the respondent. A reader of the advertisement is unlikely to be misled with the expression "cologne" staring on the face of the bottle. In a manner of speaking, the allegation belittles the modicum of intelligence in the readers and consumers.

15. This leads us to the other main charge in the notice of enquiry that the photograph of Ms. Dimple Kapadia, a film actress, with the caption underneath the photograph "What makes him my choice is his choice . . . Diplomat" leaves an impression which is misleading about the quality and usefulness of "Diplomat whisky". The notice of enquiry further alleges that the caption gives an impression that Ms. Dimple Kapadia likes those people who like "Diplomat Whisky". Shri S. S.Kumar, counsel for the respondent, observed that such advertising phrases and expressions as in the caption are designed to establish a competitive edge for a marketed product. He added that popular film stars constitute an effective medium of advertisement for sale of products particularly consumer goods. He drew attention to para 6 of the affidavit of Shri A. S. Wadhwa, General Manager (Sales) of the respondent, wherein he has stated that the respondent has selected Ms.

Dimple Kapadia as a model in the advertisement in order to attract the attention of the readers and consumers considering that popular film stars do have their own image and appeal with the consuming public.

16. Shri S. S. Kumar, counsel for the respondent, argued that advertisement is a part of marketing strategy and is the life blood for free media. Surrogate advertisement, according to him, is not banned by any law.

17. It is true that advertising is the corner stone of our economic system. The Supreme Court in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.* [1995] 3 CTJ 677 ; AIR 1995 SC 2438, dated August 3, 1995, has observed that low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales and volume sales are dependent upon advertising. The apex court in that case concluded that "commercial speech" cannot be denied as a right to a person because that person is a businessman.

18. The impugned advertisement is in the nature of "commercial speech" and the respondent has a right to publish the same unless it has a tendency to mislead the readers and consumers. It looks very improbable, nay inconceivable that readers of the advertisement would expect that Ms. Dimple Kapadia or any other film star would be attracted to them merely because of the use or preference for one particular product of her alleged liking, as advertised.

19. Dealing with the charge in the notice of enquiry that the advertisement for cologne is indeed an advertisement for whisky through surrogate caricaturing, Shri S. S. Kumar, counsel for the respondent, argued that the Monopolies and Restrictive Trade Practices Act, 1969, will not come into play when there is another legislation regulating liquor advertisements. He cited an observation of the Commission, *Phipson and Co., In re* [1993] 1 CTJ 167, dated July 3, 1989, that "Doubtlessly Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969, will come into play not as a legislation super-ordinary or supererogatory to the relevant law concerning liquor advertisements but only where the quality, standard or composition and uses and benefits of a product are given out to be such as are not possessed by it".

20. On a perusal of the impugned advertisement, an element of humour or hyperbole, if present, cannot be held to be a misrepresentation but it is just a matter of "puffing up". Neither the picture of Ms. Dimple Kapadia nor the caption underneath the same can be held to mislead any reader of the advertisement nor

for that matter a consumer of the product. There is no reference to whisky in the impugned advertisement implicitly or explicitly.

21. It was rightly argued by Shri S. S. Kumar, counsel for the respondent, that even if the impugned advertisement is a kind of a surrogate advertisement, there cannot be any indictment against the respondent. unless it is established that public interest has been prejudiced. He ably argued that no evidence has been led by the Director-General on prejudice to public interest. He cited the decision of this Commission in Arora Contractors and Builders Pvt. Ltd., In re, [1994] 2 CTJ 64, dated November 12, 1993, to support his contention that before a "cease and desist" order is passed under Section 36D(1) of the Act, it has to be proved affirmatively that the unfair trade practice is prejudicial to public interest. Prejudice cannot be presumed to exist in the unfair trade practice itself.

22. While I agree with Shri S. S. Kumar on this contention, the deposition of Shri Gurinder Pal Singh, a distributor of the respondent, categorically states that he did not receive any adverse comments or complaints from the retailers or the consumers regarding the manner of the impugned advertisement. Nothing in his cross-examination contradicts this statement, though Shri Dua, counsel for the Director-General, pointed out that the said witness does not even know the purpose or use of the product in question, namely, "cologne".

23. The inescapable conclusion that arises out of the aforesaid discussion is that the charges in the notice of enquiry have not been established. The first issue on the maintainability of the notice of enquiry was not addressed by either party and has, therefore, not been discussed in this order. The respondent is held not to have indulged in the alleged unfair trade practices. The notice of enquiry shall stand discharged.

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