

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 26.09.2022

+ **FAO(OS)(COMM) 149/2021 and CM Nos. 42068/2021, 42069/2021, 42070/2021 & 42071/2021**

RECKITT BENCKISER (INDIA) PVT. LTD..... Appellant

Versus

HINDUSTAN UNILEVER LIMITED Respondent

Advocates who appeared in this case:

For the Petitioner : Mr C.M. Lall, Senior Advocate with Ms Nancy Roy, Ms Prakriti Varshney, Mr Prashant, Ms Aastha Kakkar, Ms Ananya Chugh and Mr Jawahar, Advocates.

For the Respondents : Mr Amit Sibal, Senior Advocate with Mr Ankur Sangal, Mr Pragya Mishra, Ms Trisha Nag and Mr Kiratraj Sadana, Advocates.

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HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J.

1. The appellant (hereafter 'Reckitt') has filed the present intra court appeal impugning a judgement dated 09.11.2021 (hereafter '**the impugned judgement**') passed by the learned Single Judge in an application preferred by Reckitt under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 (hereafter '**CPC**') in the suit bearing

no. CS(COMM.) 340/2021. Reckitt is aggrieved to the limited extent that the learned Single Judge has rejected its prayer for restraining the respondent (hereafter ‘HUL’) from broadcasting a TV Commercial (hereafter ‘**the impugned TVC-I**’) which according to Reckitt was disparaging its product sold under the trademark ‘HARPIC’, during the pendency of the suit.

Factual Context

2. Reckitt (Reckitt Benckiser India Private Limited) is a company engaged in the manufacturing, packaging, sale and distribution of various fast moving consumer goods. Reckitt’s business comprises of various consumer and healthcare products including antiseptic liquid, toilet care products, surface care products, pharmaceuticals, insecticides and food products.

3. Reckitt states that it has been involved in the manufacturing of a well-known toilet cleaner under the trade mark ‘HARPIC’ in India, since the year 2001. It claims that Harpic is a household name in the category of toilet cleaners and the most widely used toilet cleaner brand in the country. Its use dates back to its original launch in England in 1920 and subsequently it is being sold in over 47 countries worldwide.

4. Reckitt states that on 15.03.1979, it registered the word mark ‘HARPIC’ (Application No. 347055) under Class 3. The said trade mark registration is valid and subsisting as of date. Reckitt also obtained registration for the shape of their bottle used for packaging Harpic branded products in India. It claims that the shape of the bottle is unique

and distinctive. Since its launch, the shape of the bottle has become a source identifier for its product.

5. HUL is engaged in the business of fast moving consumer goods (hereafter ‘**FMCG**’), consisting primarily of manufacturing, marketing and/or selling of various consumer products, including food and refreshments, cosmetics, toiletries, floor cleaners, toilet cleaners, toilet soaps, washing soaps and detergents.

6. HUL also manufactures and markets a toilet cleaner, which is sold under the trademark ‘DOMEX’. The present dispute pertains to certain advertisements launched by HUL for its product Domex. HUL claims that its product is superior in fighting bad odour in comparison to Reckitt’s product Harpic. Reckitt disputes this claim. As stated above, Reckitt has instituted the present action, as it claims that HUL’s advertisement campaign disparages and denigrates its product Harpic.

7. Reckitt has filed the said suit [CS(COMM.) 340/2021], *inter alia*, seeking a decree of permanent injunction restraining HUL from telecasting, broadcasting and publishing five advertisements (referred to as ‘**the impugned advertisements**’). The impugned advertisements includes the impugned TVC-1, three commercials that were available for viewing on the internet channel, YouTube, and an advertisement in print, published in a newspaper. According to Reckitt, the impugned advertisements are denigrating and disparaging the products manufactured by it, and infringes its trademarks. Reckitt also filed an application under Order XXXIX Rule 1 and 2 of the CPC (IA No.

8999/2021) seeking interim injunction, restraining HUL from publishing or airing the impugned advertisements. The said application was disposed of by the impugned judgement

8. The learned Single Judge found that the advertisement published in the newspaper and the three commercials available for viewing on YouTube appeared to disparage Reckitt's products. However, the court did not accept that the impugned TVC-1 indicated a *prima facie* case of disparagement. Accordingly, the learned Single Judge restrained HUL from publishing or broadcasting four of the impugned advertisements (one published in print and three available for viewing on the YouTube Channel) but declined Reckitt's prayer to interdict HUL from broadcasting the impugned TVC-1.

9. The present appeal is confined to the decision of the learned Single Judge to decline Reckitt's request to interdict the impugned TVC-1.

10. In view of the above, the only controversy that arises in the present case is whether the *prima facie* view of the learned Single Judge that the impugned TVC-1 does not disparage Reckitt's products or infringes Reckitt's trademark is palpably erroneous and warrants interference by this Court.

Submission of Counsel

11. Mr Lall, learned senior counsel appearing for Reckitt, submitted that on a plain viewing of the impugned TVC-1, it is *ex facie* clear that

it not only seeks to promote HUL's product 'Domex' but disparages Reckitt's product Harpic. He submitted that the clear message of the advertisement is that Harpic is ineffective as a toilet cleaner; it is ineffective to combat bad odour.

12. He referred to the decisions of this Court in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*¹ and *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd.*². On the strength of the said decision, he contended that although puffery and hyperbole to promote one's product is permissible, it is not open for any person to denigrate or disparage the goods of another.

13. He submitted that as clarified by this Court in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*³, it is impermissible for any advertiser to make any untruthful statement in its advertisement. And, the impugned advertisements were untruthful.

14. He also referred to the decision of the Madras High Court in *Gillet India Ltd. v. Reckitt Benckiser (India) Pvt. Ltd.*⁴ and contended that in a suit for disparagement, it would be necessary that the disparaging advertisements be restrained as pecuniary compensation at a later stage would be insufficient to compensate the loss suffered and damage caused due to disparagement.

¹ 167 (2010) DLT 278 (DB)

² (2014) 206 DLT 329.

³ Supra Note 1

⁴ 2018 SCC OnLine Mad. 1126

15. Mr Sibal, learned senior counsel appearing for HUL, countered the aforesaid submissions. He also referred to the decisions of this Court in *Colgate Palmolive Company & Anr. v. Hindustan Liver Ltd.*⁵ as well as *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*⁶ and contended that the law relating to disparagement is well settled. He contended that the learned Single Judge had correctly applied the law and found that the impugned TVC-1 was not disparaging. He submitted that the said view is a plausible one, if not the correct one, and therefore, did not warrant any interference in these proceedings. He referred to the decision in *Wander Ltd. And Anr. v Antox India P. Ltd.*⁷ and contended that it is impermissible for the Appellate Court to interfere with the discretion exercised by the learned Single Judge unless it is shown that the discretion was exercised arbitrarily, capriciously or perversely. He submitted that in the present case, the learned Single Judge had rightly applied the law and declined the interim injunction as, in his view, the impugned TVC-1, viewed as a whole, did not disparage and denigrate Reckitt's product.

Reasons and Conclusion

16. In *Tata Press Limited v. Mahanagar Telephone Nigam Limited*⁸, the Supreme Court authoritatively held that commercial speech is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. Although the said

⁵ Supra Note 2

⁶ Supra Note 1

⁷ 1990 Supp. SCC 727

⁸ (1995) 5 SCC 139

decision was rendered in the context of publication of ‘Tata Press Yellow Pages’ – which was a buyer’s guide comprising of a compilation of advertisements given by businessmen, traders and professionals duly classified according to their trade business or profession – the court also accepted, in unambiguous terms, that advertisements were a part of commercial speech. It is, thus, necessary that fair amount of latitude be available to advertisers. [See: *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*⁹].

17. However, such protection cannot be extended to misrepresentation or where the advertisements fall foul of the validly enacted law. In cases where competing rights are involved, finding an apposite balance is necessary. In *Tata Press Limited v. Mahanagar Telephone Nigam Limited*¹⁰, the Supreme Court noted the decision of the US Supreme Court in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*¹¹, whereby the Court had held that the Virginia statute that proscribed a pharmacist from advertising the price of prescription drugs, violated the First amendment protection. However, the Court also observed that “*untruthful speech, commercial or otherwise, has never been protected for its own sake.*” and that it saw no obstacle for a State to deal effectively when the commercial speech is “*deceptive or misleading*”.

⁹ Supra note 2

¹⁰ Supra note 8

¹¹ 48 L.Ed.2d 346 (1976)

18. In *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*¹², this Court referred to the earlier decisions of the Supreme Court and culled out the guiding principles required to be followed. The guiding principles are set out in the following words:

“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.”

19. This Court had also referred to an earlier decision in *PepsiCo. Inc. And Ors. v. Hindustan Coca Cola Ltd.*¹³ and had restated the principles to be borne in mind while addressing an allegation of

¹² Supra Note 1

¹³ 2003 (27) PTC 305 Del.

disparagement. The principles as restated in the said decision are set out below:

- “(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.”

20. It is also relevant to mention the decision of the Calcutta High Court in *Reckitt and Colman India Ltd. v. M.P. Ramchandran and Anr.*¹⁴. In that decision, which was rendered in the context of comparative advertisements, the court set out the following propositions:

¹⁴ 1999 (19) PTC 741

- “(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 competitor’s, 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.”

21. In *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*¹⁵, this Court noted that in the case of *Tata Press Limited v. Mahanagar Telephone Nigam Limited*¹⁶ the Supreme Court had held that “*false, misleading, unfair or dispositive advertising is not protected*”

¹⁵ Supra Note 1

¹⁶ Supra Note 8

commercial speech.” Accordingly, this Court clarified that propositions (a), (b) and (c) stated by the Calcutta High Court in ***Reckitt and Colman India Ltd’s v. M.P. Ramchandran and Anr.***¹⁷ case (as reproduced above) were no longer good law. This clarification was rendered in context of statements of fact and not statements or assertions that are apparent puffery or hyperbole. The propositions as stated in ***Reckitt and Colman India Ltd. v. M.P. Ramchandran and Anr.***¹⁸ are good law when considered in the context of puffery as contrasted with statements that hold out representations of facts. Such representations of facts are required to be true and not misleading. Puffery and exaggerated opinions are merely intended to attract the attention of targeted customers; such statements are neither intended as representations or warranties, nor accepted as representation of facts. Puffery and hyperbole are not tested on the anvil of accuracy or truth. There is an element of creativeness, which finds expression in puffery and hyperbole. Freedom of such expression is a cherished facet of Article 19(1)(a) and the decision in ***Tata Press Limited v. Mahanagar Telephone Nigam Limited***¹⁹ or in ***Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.***²⁰ cannot be read as stifling such expression or creativeness.

22. In ***Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd.***²¹, this Court once again examined the law on disparagement and held that

¹⁷ Supra Note 14

¹⁸ Supra Note 14

¹⁹ Supra Note 8

²⁰ Supra Note 1

²¹ Supra Note 2

whereas it is open for a person to exaggerate the claims relating to its goods or services and embellish their virtues or benefits; it is not open for a person to denigrate or disparage the goods of another person.

23. This Court also referred to the following passage from the decision of the Chancery Division in the case of *De Beers Abrasive Products Ltd. and Others v. International General Electric Co. of New York Ltd. and Another*²²:

“the law is that any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival’s goods..... “The best tailor in the world,” “The best tailor in this town,” and “The best tailor in this street,” none of the three committed an actionable wrong 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 X’s” 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 X’s, because X’s are absolute rubbish.” then it is established by dicta of Lord Shand in the House of Lords in *White v. Mellin [1895] A.C. 154, 171*, which were accepted by Mr. Walton as stating the law, the statement would be actionable.”

24. In a comparative advertisement, it is open for an advertiser to embellish the qualities of its products and its claims but it is not open

²² 1975 (2) All ER 599

for him to claim that the goods of his competitors are bad, undesirable or inferior. As an illustration, in a comparative advertisement, it is open for an advertiser to say his goods are of a good quality but it is not open for an advertiser to send a message that the quality of the goods of his competitor is bad. As observed by the Chancery Division in the case of *De Beers Abrasive Products Ltd. and Others v. International General Electric Co. of New York Ltd. and Another*²³, it is open for a person to claim that he is the best seller in the world or a best seller in the street but it is not open for him to denigrate the services of another. Thus, it is not open for an advertiser to say “*my goods are better than X’s, because X’s are absolutely rubbish*”. Puffery and Hyperbole to some extent have an element of untruthfulness. If a tailoring shop claims that he provides the best tailored suits in the city, the same may be untruthful. However, it is apparent to anyone who reads or hears this statement that it is puffery. Such statements or taglines are neither held out nor understood as a representation of unimpeachable fact. It is obvious that the person availing services from the tailoring shop, as mentioned above, cannot maintain an action of misrepresentation. However, when it comes to statements made by an advertiser in respect of the goods of his competitors and other persons, the latitude available to an advertiser is restricted. Whilst it is open for the tailoring shop to state that it provides the best tailored suit in the city; it is not open for it to advertise that the other tailoring shops in the street lack the necessary skill and their suits are ill tailored.

²³ Supra Note 22

25. A comparative advertisement would always involve the statement that the goods of the advertiser are better in some aspects than that of the competitor. But there is line that an advertiser cannot cross. He cannot disparage or defame the goods of his competitor.

26. There may be cases where certain features of an advertiser's product may be demonstrably better than the features of his competitor. In such cases, it is permissible for an advertiser to advertise and highlight these features. The message must clearly be to highlight the superior features of his product while ensuring that the product of his competitor is not disparaged or defamed.

27. In the facts of the present case, the learned Single Judge examined the impugned TVC-1 and concluded that the advertisement did not denigrate Reckitt's product. The Court also observed that an advertiser has to be given "*enough room to play around*" in the advertisement and Reckitt ought not be hypersensitive to an advertisement.

28. We have visually seen the advertisement and have little doubt that HUL has crossed the permissible limit. There is no cavil that an advertiser must have enough elbow-room to advertise its products. But in the present case, HUL has clearly crossed the line. It not only claims that its products are better than Reckitt's but it also, *prima facie*, disparages Reckitt's product.

29. It is relevant to refer to the storyboard of the impugned TVC -1. The same is set out below:

 <p>अब क्या ले रहे हैं?</p>	<p><i>VO: ab kya le rahe hai?</i></p>
 <p>टॉयलेट क्लीनर</p>	<p><i>VO: Toilet Cleaner</i></p>
 <p>कौन सा?</p>	<p><i>VO: kyon sa?</i></p>



VO: Harpic





VO: Kyon?




	
	<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*

 <p>और बदबू के लिए बेहतर जवाब है डोमेक्स</p>	<p><i>VO: behtar jawab hai DOMEX</i></p>
 <p>रचनात्मक चित्रण क्योंकि टॉयलेट की बदबू से लड़ने के लिए डोमेक्स में है फ्रेशगार्ड टेक्नोलॉजी</p>	<p><i>VO: kyon ki toilet ki badbu se ladane ke liye</i></p> <p><i>Disclaimer: Rachanatm ak Chitran</i></p>
 <p>रचनात्मक चित्रण क्योंकि टॉयलेट की बदबू से लड़ने के लिए डोमेक्स में है फ्रेशगार्ड टेक्नोलॉजी</p>	<p><i>VO: DOMEX main hai FRESHGUARD technology</i></p> <p><i>Disclaimer: Rachanatm ak Chitran</i></p>

	<p><i>VO: jo tike jada,</i></p> <p><i>Disclaimer: Rachanatm ak Chitran</i></p>
	<p><i>VO: who bhi pure 100 flushes tak</i></p> <p><i>Disclaimer: Rachanatm ak Chitran</i></p>
	<p><i>VO: aur badbu rakhe door</i></p> <p><i>Disclaimer: Rachanatm ak Chitran</i></p>

	<p><i>VO: Meri maniyе, Chuniye DOMEX</i></p> <p><i>Disclaimer: simulated toilet use per kiye gaye Swatantra lab test per aadharit, 2021</i></p>
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30. The advertisement begins with the mother and a child shopping in a departmental store. The mother is looking for household goods. It is also apparent that the mother is shown to be a regular customer who purchases Harpic (Reckitt’s product) and is looking for the same. This is clear because the child quizzes her “*Ab kya le rahe hain?*”, which freely translated means “what are we buying?”. The mother responds by informing him that they are buying a toilet cleaner. This conversation is in the backdrop where HUL’s product Domex is shown lining a number of shelves while Reckitt’s product (Harpic) occupies a relatively small portion of a single shelf and shares the same with other products.

31. The mother then picks up a bottle of Harpic – apparently because that is what she is looking for – and puts it in her shopping cart. At the time, she also informs the child that she is buying Harpic.

32. The child then quizzes her “*Kyon*” (freely translated “why”). The child is curious and wants to know why his mother is buying Harpic. While he is asking this question, another shopper who prefers Domex is shown to be drawn into the exchange between the mother and child. She too has a quizzed and a concerned look. Apparently, the message is why the mother is buying Harpic. The mother then responds to the child by saying “*Kyoki ye toilet saaf kare?*” Freely translated means “because this cleans the toilet”. In response to this, the child holds his nose and with a disturbed look (bordering an expression of disgust) and questions his mother: “*to toilet se badbu nahi aayegi*”, which freely translated means “whether the toilet will not emanate bad odour”. The look on the child’s face while holding his nose is a strong message. The mother’s facial expression changes to one of concern. She is disturbed by her child’s question. She picks up a Harpic bottle and looks at it, concerned and somewhat confused. At the same time, the other shopper, who is Domex’s loyal customer, turns around and says to the child that he has raised the correct question [“*sahi sawal*” freely translated “the correct question”]. She then picks up a bottle of Domex from one of the shelves where it is displayed, presents it forward and states “*Behtar jawab hai DOMEX*”.

33. On a plain viewing, it is clear that the message sent by the advertiser is that Harpic does not address the problem of bad odour. The astonished expression of the child and his gesture of holding his nose while asking the question whether the toilet will not stink and the mother of the child getting concerned and worried, sends out a clear

message that if you use Harpic, the toilet will continue to stink because the mother, who is otherwise regularly using Harpic, has not been able to address the problem of foul odour persisting in their toilet. The latter part of the impugned TVC-1 then shows a toilet bowl with discolouration possibly reflecting bad odour and the voice over saying “*Kyoki toilet ki badbu se ladne ke lie DOMEX me hai fresh guard technology*”. The remaining part of the impugned TVC-1 is about the product Domex and its quality to combat bad odour for a longer period of time.

34. The impugned TVC-1 not only projects a message that Domex fights odour for a longer period of time, it also sends a clear message that Harpic does not address the problem of foul smell that emanates from toilets. The manner in which the impugned TVC-1 is structured, first, sends a message that Harpic only cleans without addressing the problem of bad odour and thereafter, sends the message that whoever chooses Harpic would have to live with their toilets smelling foul. This is a message that disparages Reckitt’s product and, in our view, cannot be permitted.

35. The finding of the learned Single Judge that the impugned TVC-1 does not denigrate Reckitt’s product is erroneous and cannot be sustained. The latitude available in advertising is wide but does not extend to denigrating the product of one’s competitor.

36. By an order dated 01.12.2021 passed by this Court, HUL was restrained from airing the impugned TVC-1. We make the said order absolute. The same shall continue till disposal of the suit.

37. We clarify that the observations made by this Court, howsoever emphatic, must be read as *prima facie* observations solely for the purposes of deciding whether an interim injunction should be issued restraining the telecast of the impugned TVC-1 till the disposal of the suit. None of the observations or views expressed should be construed as final or dispositive of the Reckitt's claim in the suit. The learned Single Judge shall proceed to decide the suit uninfluenced by any observations or *prima facie* finding of this Court.

38. The appeal is, accordingly, disposed of in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 26, 2022
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