

Eureka Forbes Limited Vs Kent RO Systems

Court: Delhi High Court

Date of Decision: May 17, 2010

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 39 Rule 1, Order 39 Rule 2

Citation: (2010) 44 PTC 261

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: C. Mukund, G.K. Singh, P.V. Sarvanaraja and Firdaus Wani, for the Appellant; Sudhir Chandra Rajeshwari Hariharan, S.K. Tiwari and Vani Panta, for the Respondent

Judgement

Rajiv Shakdher, J.

IA No. 4600/2010 (under Order 39 Rule 1 & 2 CPC)

1. By this order I propose to dispose of the captioned application. I may only notice the fact that at the proceedings held on 15.04.2010 it had

been agreed before me by counsel on both sides that since the issue involved related to a particular advertisement issued by the defendant, the suit

could perhaps be finally disposed of on the basis of documents and evidence by way of affidavits. Timeline were fixed for completion of pleadings,

filing of affidavits by way of evidence and additional documents, if any. It had been made clear that in the event for some reasons the suit could not

be disposed of then, the plaintiffs application under Order 39 Rule 1 & 2 of the Code of Civil Procedure, 1908 (in short – 1/2 CPC – 1/2) shall be

heard. It appears that even though pleadings have been completed and affidavits of evidence have been filed, the defendant has filed certain

additional documents to which the plaintiffs counsel has an objection. Thus, it is agreed before me by both counsels that the captioned application

be taken up for hearing based on the pleadings filed by both parties. The plaintiff agreed that the defendant could rely on the first set of documents

filed on 03.05.2010.

2. With this prefatory note, let me take up the captioned application for disposal. The scope of controversy falls in a narrow compass. The plaintiff

has impugned the defendant's advertisement which is extracted at Page 19 of the plaint. For a better appreciation of the controversy in issue,

the impugned advertisement is extracted by me here in below:

3. The gravamen of the plaintiffs case is that the impugned advertisement disparages the water purifiers manufactured by it, which are based on

both Ultra Violet (UV) and Reverse Osmosis (RO) technology by comparing them with latest water purifier manufactured by the defendant. In

other words, it is the plaintiffs case that the water purifiers shown in the advertisement, which are evidently based on UV or RO technology, have

been depicted in a poor light as compared to the defendant's product, which is, a combination of RO and UV technology, in addition to its

apparent ability of carrying out ultra filtration (UF), and getting rid of turbidity and dissolved substances (in short TDS).

3.1 The plaintiff contends that they have been in the business of manufacture of water purifier under the super brand aquaguard since 1982, and

consequently as of today, has more than 70% of the market share in water purification segment. It is further contended that it operates in 135 cities

across India, and has also expanded its business to 1515 towns and 400 small towns through its Franchisee Direct Operations (F.D.Os) and a

retinue of 13,000 dealers, spread all over the country. In nutshell, the plaintiffs claim is that UV and RO are synonymous with it. As a matter of

fact, in the plaint there is a reference to various models of the products which are sold under a variety of brands and sub-brands carrying the suffix

UV, RO and UF. Some of these examples being: Aquaguard Total Sensa SMP+ e-boiling-UV+RO+ UF (with Ultra Filtration), Aquaguard

Integra Hi Life (RO+UV+UF/NF), Aquaguard RO (Silver Nano Series), Aquaguard Total RO Reviva, Aquaguard Total RO (Protec+), e.t.c.

3.2 Based on the above, it is contended that the reference to UV and RO in the impugned advertisement could only be directed towards the

plaintiff. It is further submitted that the impugned advertisement shows purifiers based on UV and RO technology in a poor light, as the

advertisement first poses a question as to the purity of the water and then alludes to the water purification machines. The ones which are based on

UV or RO technology are in effect shown as being less effective in treatment of water as against the one manufactured and sold by the defendant

which has a combination of UV, RO, UF and TDS control technology. It is also contended that the impugned advertisement sends out a false

message in as much as it states that a water purification machine, which is based on UV technology, can remove only bacteria and viruses, whereas

the truth is otherwise, which is, that such machine can in addition remove dissolved impurities besides residues, micro organisms, chemicals, such

as chlorine, as also turbidity due to mud particles, amongst others. Similarly, a water purification based on RO technology not only removes

dissolved impurities, but does all that which, a water purification machine based on UV technology can do. It is stated that a water purification

system based on RO technology can also remove minerals as also inorganic salts present in the water. It is the plaintiffs claim that while, it has no

objection to the defendant advertising its own product, which evidently has various attributes but it certainly cannot discredit water purifiers based

on UV or RO technology as such a advertisement campaign directly effects the plaintiff market, in such like, products. The plaintiffs contention is

that the sole purpose of such a campaign launched by the defendant is only to increase the market share of its own product at its cost. The plaintiff

claims that they have spent a lot of money in educating the customers and public at large as to the type of water purification machines that they

require, based on quality of water available in their locality. The argument is that a water purifier based on RO technology may be useful in areas

where the water is hard and turbid, whereas in locations in which it is not so, a water purifier based on UV technology may suffice. The reason

being that: if a water purifier based on RO technology is used in such areas it may exclude from the water the bad as well as good minerals,

therefore, denuding the water of its good qualities and in the long run, it may be harmful to the health of the consumers.

4. The defendant, on the other hand, has averred that there is no disparagement of the plaintiffs products as alleged or at all. It is averred that the

plaintiff has failed to disclose that the UV technology for water purification has been in existence for more than 30 years, and that the plaintiff is not

the inventor of the said technology. It is specifically averred that the plaintiff has sought to convey that UV technology is exclusively associated with

the plaintiffs product and, therefore, by implication disparages UV and RO based water purification machines marketed by the plaintiff. It is

averred that the suit instituted by the plaintiff has been instituted to harass the defendant and to create non existent doubts in the minds of the

consumers. It is averred that the defendant and its predecessor has been in existence since 1999. Since the introduction of the RO technology in

1999, the defendant has been using it for its own water purification machines. The said water purification machines were sold by the defendant

under the mark KENT. A reference has been made in paragraph 4 of the written statement to the various trade marks which have been registered

or applied for. In paragraph 8 a reference has been made to its annual sales as also amounts spent on advertisements--which by no standards are

insignificant. The defendant specifically states that UV and RO technology are not associated with the plaintiffs water purifiers. It is contended that

these are generic words and it cannot be monopolized by a single entity. It is further averred that the copyright registration(s) secured by the

plaintiff are irrelevant to the issue raised in the present suit. In so far as its own machine is concerned, the defendant has averred that even though it

is desirable that the limit of T.D.S in water should not exceed 500 mg per litre, the minimum level of solids that can be present in the water has not

been standardized, and it varies from one geographical location to another. It is further averred that in some cases where water is found to contain

solids of 500 mg per litre, it still contains harmful solids such as arsenic, iron dust etc; of very high levels, which approximate to 200-300 mg per

litre. Therefore, in such cases the levels of TDS are required to be adjusted. The defendant claims that it has invented/devised a new water

purifying machine which can adjust the TDS in water to a desirable limit to cater to the geographical location of the consumer. The defendant, in

respect of this machine, which is also shown in the impugned advertisement, has obtained a patent. The defendant further submits that there is no

attempt to disparage the plaintiffs product; as a matter of fact the advertisement is issued only to promote its own machines and to inform the public

of the benefits of its products and range of products made available by the defendant. It is further averred that the advertisement issued by the

defendant states true facts about different technologies i.e., RO, UV or the combination of RO+UF+UV+TDS. It is claimed by the defendant that

it manufactures all three variants of the water purification machines. The stand, therefore, is: the products depicted in the advertisement are

exclusively the products of the defendant. In this context it is stated that the shape and configuration of the plaintiffs product and that of the

defendant are completely different. (See Para 2(i) and (j) of the reply on merits of the WS) Since the assertions made, in particular, of paragraph

2(j) being relevant are extracted hereinbelow:

The products depicted in the advertisement are exclusively the products of the defendant; the cabinets depicted are those of the defendant. The

advertisement only states facts about various products of the defendant. It is a well known fact that the shape and configuration of the plaintiff's

product and that of the defendant are completely different.

(emphasis is mine)

5. In support of his submissions, Mr. Mukund who appears for the plaintiff has contended before me that the impugned advertisement is a case of

direct disparagement. This argument, of course, is premised on the averments made in the plaint that UV and RO based water purification

machines are relatable only to the plaintiff. In support of this submission, the learned Counsel has relied upon the judgment of the Karnataka High

Court in the case of Eureka Forbes Limited v. Pentair Water India Limited 2007 (35) PTC 556 (Kar). In the alternative, Mr. Mukund has

submitted that this Court in several judgments has held disparagement could be both overt or covert, therefore, the reference in the impugned

advertisement to the water purification machines based on UV and RO technology being less useful has resulted in committal of a tort qua the

plaintiff. The plaintiff is thus entitled to seek an appropriate relief from the Court. In support of this submission, the learned Counsel relied upon the

judgment in the case of Dabur India Limited Vs. Emami Limited, and Reckitt Benckiser (India) Ltd. Vs. Hindustan Lever Limited, The last

submission of the learned Counsel was that in any event the statement made in the advertisement is false, in as much as it is a half truth as the water

purification machines based on UV or RO technology do more than what is indicated in the impugned advertisement. In support of his submissions

the learned Counsel has relied upon the standards laid down by the Bureau of Indian Standards (in short BIS) with regard to water purifiers.

Based on the standards laid down by BIS, it was contended that UV based water purifier is mandatorily required to have an activated carbon filter

which enables exclusion of dissolved impurities such as mud solids etc. The argument was that the advertisement therefore incorrectly alluded to

the fact that a UV machine could only destroy bacteria and virus.

6. In rebuttal, Mr. Chandra who appears for the defendant, refuted the arguments of the plaintiff. The main thrust of Mr. Chandra's arguments

was that the impugned advertisement neither overtly or covertly refers nor alludes to the plaintiffs product. It is contended that both UV and RO

technology are available for use by those who are in the business of manufacturing water purification machines, and, therefore, if the plaintiffs

argument was accepted it would amount to accepting its monopoly over a technology, of which, it is not an inventor. The submission of Mr.

Chandra is that in the impugned advertisement the defendant is attempting to demonstrate that it has graduated from machines which are based on

UV and RO technology to a more advanced water purification machine which is a combination of UV, UF, RO and TDS control technology. In

support of his submission, Mr. Chandra referred to the patent that the defendant had acquired in respect of its most advanced machines i.e., the

Mineral RO water purifier (Mineral RO); which it presently manufactures alongwith those which are based solely on UV and RO technology. Mr.

Chandra submitted that the advertisement states only the facts with regard to UV and RO technology and there is no negativity depicted qua any of

the two technologies i.e., UV and RO. In other words, Mr. Chandra's contention is that the plaintiffs action for disparagement is based on a

perception of disparagement which cannot and ought not to be entertained by the Court.

6.1 In so far as the submission of the plaintiff as regards adherence to standards laid down by BIS was concerned, Mr. Chandra submitted that

these standards allude to water purifiers, and not to the technology involved. In any event, it was the learned Counsel's contention that the

standards are not mandatory and only those who want to conform to the said standards are required to adopt the same.

6.2 As regards the contention of the plaintiff that interim order dated 13.04.2005 passed in CS(OS) No. 492/2005 would operate against the

defendant in so far as UV based water purifiers are concerned, Mr. Chandra submitted that it was an ex-parte interim order which did not contain

any reasons and hence, would not come in the way of the Court in dealing with the impugned advertisement. Mr. Chandra concluded by saying

that the plaintiff was being hyper sensitive with regard to the impugned advertisement which neither disparaged nor intended to disparage

the plaintiff's product, as alleged, or at all. In support of his submission, the learned Counsel relied on the judgment of the Division Bench in the

case of Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara - Lee,

6.3 I have heard the learned Counsel for the parties. In view of the discussion above, according to me the following points arise for consideration:

(i) Whether the impugned advertisement overtly or covertly makes a reference to the plaintiff's water purification machines?

(ii) If the answer to the first issue is in the affirmative, then does the impugned advertisement disparage the plaintiff's product?

(iii) If the answer to the Issue Nos. (i) and (ii) is in the affirmative, is the plaintiff entitled to an injunction?

(iv) Is the impugned advertisement in line with the observations made by the Division Bench of this Court in the case of Dabur India Limited

(supra) made in paragraph 23 at page 284 of the judgment.

Point No. I

7. The plaintiff's argument that there is a direct reference to its product or at least in the alternative an indirect reference to it, is according to me

untenable. The reason for this is that this argument is entirely pivoted on the premise that the use of UV or RO technology in relation to water

purifiers is relatable only to the plaintiff. In my view, nothing could be more inaccurate. UV technology as the literature produced by the plaintiff

itself would show the use of UV rays in the treatment of water. This process is also known as electronic boiling. These ultra violet rays are

supposedly more intense than the normal sunlight and hence, help in eliminating water borne disease caused from bacteria, viruses and protozoas.

Similarly, a water purifier which is based on RO technology involves usage of membranes which, act as filters to help remove contaminants from

the water. RO is also referred to as "hyper filtration"--a technology which is commonly used by companies which trade in bottled water, amongst

others. The fact that the plaintiff has obtained registrations or has filed applications for registrations of trade mark which bear suffixes like UV and

RO alongside the mark could not, in my view, lead to a conclusion that UV and RO are related to plaintiff's products. It is not disputed by the

plaintiff that the defendant has also been using marks which advert to the RO technology or to both RO and UV technology. The examples being:

KENT Mineral RO Water Purifier (logo), Mineral RO, KENT Ultra Violet Water Purifiers (logo), KENT Mineral RO Double Purification

Technology RO+UV+Minerals (logo). This apart, the plaintiff has referred to a document at Page 122 which alludes to a water purifier evidently

manufactured by Philips. The said document bears the following statement: "Philips Intelligent Water Purifier, with advanced UV technology and

Activated Carbon to purify water". Therefore, in my view, this submission of the plaintiff cannot be accepted.

8. In view of my finding at Point No. I, Point No. II does not arise for consideration, however, since arguments have been advanced by the

counsels that there is a generic disparagement of water purifiers based on UV and RO technology, I shall deal with it. Before I deal with specifics

of this case, I may only advert to the principles as to what an action of this kind entails. An action of this kind is really in the nature of "trade libel".

The trade libel is variedly referred as "malicious falsehood" or "injurious falsehood". The Courts, however, have been using the expression

malicious falsehood to describe a tort of the kind involved in the present case as against "trade libel" as these expressions perhaps present a

narrower scope of the tort. For a plaintiff to succeed in an action for malicious falsehood he would have to plead and prove that the statement

made in the impugned advertisement is untrue. The statement is made maliciously i.e., without just cause or excuse and the plaintiffs have suffered

damage by such an action of the defendant.

8.1 In my view, if one were to literally accept what UV technology or RO technology can achieve what is stated in the impugned advertisement, is

prima facie not false. It is not in dispute that ultra violet rays are used to electronically boil water which results in destructions of bacteria and

viruses. Similarly, treating water by use of RO technology results in removal of dissolved impurities. Therefore, by itself there is no case for

disparagement because what is stated is prima facie correct. This is more so, when seen, in the light of the averments made by the defendant that

what they are seeking to do is to compare their own water purification machines which are based on UV or RO technology, with a more advanced

version manufactured by it. In this connection it is alluded that the outline of the water purifier shown under the heading UV and RO are those of

the defendant's product, and not that of the plaintiff. This is not crucially disputed by the plaintiff in the replication. The counsel for the plaintiff,

on the other hand, submitted that the advertisement should be more explicit, in as much as, it should indicate in so many words that the machines

shown under the caption UV and RO are those which belong to the defendant (Kent). In my view, such an argument really skirts the real issue,

which is that the water purification machines shown in the impugned advertisement are those which the defendant manufactures. If it is so, then the

plaintiff's submission to the contrary has to be rejected. The plaintiff, in any event, as noticed above, has not denied the said assertion. The plaintiff

would have to live with the stand taken.

Point No. III

9. In view of my findings in respect of Point Nos. I and II, I am of the view that plaintiff is not entitled to injunction as prayed for. The learned

Counsel for the plaintiff in support of his submissions apart from what was stated also referred to the interim order dated 13.04.2005 passed in

CS(OS) No492/2005, based on which, the learned Counsel for the plaintiff has submitted that the defendant cannot violate the interim order by

comparing the water purifying system based on UV technology with the others in the impugned advertisement. Mr. Mukund in this regard also

brought to my notice the fact that an interlocutory application being IA No. 3027/2005 was moved by the defendant for vacating the said interim

order on which notice was issued on 20.04.2005. The said application according to the learned Counsel is pending adjudication. In my view, the

contention of the learned Counsel for the plaintiff is erroneous for the reason that the ex-parte order which operates against the defendant is qua a

different advertisement. The fact that the plaintiff has filed a fresh suit demonstrates the fallacy in the argument. The issuance of the advertisement

which is subject matter of the dispute in the present suit gave rise to a fresh cause of action, which is why, the plaintiff filed the instant suit and the

captioned application seeking injunction. If it was so covered by the earlier suit and the order passed therein, it would have perhaps have

proceeded to file an application for contempt for seeking enforcement of the said order. Therefore, in my view, this submission cannot be

accepted.

10. In so far as the judgments cited by the learned Counsel for the plaintiff are concerned, on facts, in my view, they are not applicable. What is

observed in Dabur India Limited v. Emami Limited in principle holds good. On facts the present case is distinguishable. Similarly, the case of

Reckitt Benckiser (India) Limited v. Hindustan Lever Limited on facts is not applicable. A perusal of the facts would show that there was a

reference to the plaintiff's product in as much as the shape and colour were referred to by implication since the defendant had adopted the

shape and the colour of "dettol soap". Such is not the situation in the present case. In so far as the judgment of the Karnataka High Court in the

case of Eureka Forbes Limited v. Pentair Water India Limited is concerned, the same is based on the premise that Aquaguard and UV technology

are synonymous. With respect, I am not able to bring myself to agree with the view expressed therein.

Point No. IV

11. However, I am afraid in respect of the last issue I have not been able to persuade myself that the defendant ought not to clearly indicate in the

impugned advertisement as to what are the other attributes of a water purification machines which are based on UV and RO technology. This issue

attains greatest significance in the instant case in view of the fact that it is the defendant's stand in the written statement that the comparison of its

latest machine is with its own water purification machines which are based on UV and RO technology. It is not the stand of the defendant that its

own water purification machines which are based on UV and RO technology have limited attributes, as indicated in the impugned advertisement.

Therefore, in a sense it is beyond the grey areas to which the Division Bench of this Court has alluded to in the judgment of Dabur India

Limited v. Emami Limited. In my opinion, it would help the cause of a common consumer if the defendant in line with its own stand indicates the

other attributes of its water purification machines which are based on UV and RO technology. The defendant cannot argue that its water

purification machines do not contain an activated carbon filter and hence, are incapable of removing other impurities apart from destroying bacteria

and viruses. I would imagine same is the case with its water purification machines which are based on RO technology. A good example is that of

the machines manufactured by Philips to which I have made a reference hereinabove. I, therefore, direct that the defendant shall make suitable

amendments in the impugned advertisement to bring to fore the other attributes of the water purification machines shown under the caption UV and

RO in the impugned advertisement. The order dated 15.04.2010 passed by me is accordingly modified. The captioned application is disposed of

with the aforesaid observations. This arrangement shall obtain during the pendency of the suit.

12. Needless to say any observations made hereinabove will not come in the way of decision on merits.