

(2016) 03 DEL CK 0289

DELHI HIGH COURT

Case No: CS (OS) No. 104 of 2016

Dish TV India Limited

APPELLANT

Vs

Advertising Standards Council of
India

RESPONDENT

Date of Decision: March 2, 2016

Acts Referred:

- Cable Television Networks (Regulation) Act, 1995 - Section 20

Citation: (2016) 68 PTC 6

Hon'ble Judges: Mr. Vipin Sanghi, J.

Bench: Single Bench

Advocate: Mrs. Prathiba M. Singh, Senior Advocate with Mr. T. Bhatia, Kunal Vats and Nikhita, Advocates, for the Plaintiff; Mr. Sandeep Sethi, Senior Advocate with Ms. Avni Singh, Advocate, for the Defendant

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

Mr. Vipin Sanghi, J.—Cav. Nos. 198-199/2016

Since the caveator has appeared, the caveats stand discharged.

I.A. No. 2925/2016

2. Learned counsel for the plaintiff states that the court fee has been deposited. The registry shall examine the same and report with regard to its sufficiency before the next date. Application stands disposed of.

I.A. No. 2924/2016

3. Exemption allowed, subject to all just exceptions. Compliance be made within six weeks. The application stands disposed of.

4. Issue summons in the suit and notice in the application returnable on 11.08.2016. The same are accepted by learned counsel for the defendant. Written statement/reply be filed within 30 days. Replication/rejoinder be filed within 30 days thereafter.

5. The plaintiff assails the order dated 23.02.2016 passed by the defendant/Advertising Standards Council of India (ASCI), concluding that the claim made by the plaintiff "Set Top Box matlab Dish TV" is misleading by ambiguity, and implies that the consumer may have only one option. The submission of learned senior counsel for the plaintiff is that the plaintiff has not misled the consumers to the effect that its set top box is the only set top box available in the market. The submission is that a perusal of the advertisements in question, as a whole, would itself show that the consumer shown in the said advertisement is enquiring as to "which" (kaun sa) set top box should she get. The relevant words used in the advertisement are "Aap hi bataiye in ab kaunsa set top box lagwaun". To this, she receives an answer - "Simple ... set top box matlab Dish TV.. !.... Kyunki Dish tv hai 10 crore logon ki pasand ... aur india ka sabse barosemandh DTH brand bhi yehi hai ...".

6. The submission is that the aforesaid conversation in the advertisement shows that the consumer is aware that there are several brands available as she is asking for "kaunsa set top box lagwaun", i.e. which set top box should she get, and in answer to the said query, the response of the celebrity (on the TV screen) is, inter alia, that Dish TV has been chosen by 10 crore people, and also that it is India's most trusted DTH brand. This itself conveys that Dish TV is not the only brand of set top box available in the market. Similar is the position with regard to the other advertisements.

7. Learned counsel submits that the plaintiff is entitled to puff up its product in the advertisement, as it is a part of free speech. In this regard, she has placed reliance on several decisions, namely, *Tata Press Ltd. v. MTNL & Ors.*, (1995) 5 SCC 139; *Glaxosmithkline Consumer Healthcare Ltd. v. Heinz India (P) Ltd.*, MIPR 2010 (3) 314, and; *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr.*, 167 (2010) DLT 279.

8. Learned counsel submits that under the Direct to Home (DTH) Broadcasting Service Regulations, 2007, particularly Regulation (4), it is provided that every DTH Operator shall, in the option given to the consumer, provide for, inter alia, refund of security deposit or advance payment, if any, after appropriate and reasonable adjustments in case of return of DTH customer premises equipment. Thus, it is not correct for the defendant to observe in its order that set top box is not a commodity which a consumer can switch easily.

9. On the other hand, the submission of Mr. Sethi, learned senior counsel for the defendant is that, firstly, this court has no territorial jurisdiction to deal with the

present suit inasmuch, as, the defendant is situated in Mumbai. The impugned order has been passed at Mumbai. He, therefore, submits that no part of cause of action has arisen in Delhi. He further submits that the defendant is a self-regulating body and it merely makes recommendations, which are not binding on the Government of India to whom they are sent. He submits that the cause of action would arise in favour of the plaintiff only when the said recommendation is acted upon by the Government under Section 20 of the Cable Television Networks (Regulation) Act, 1995.

10. Mr. Sethi submits that the advertisement in question is misleading inasmuch, as, it conveys that the plaintiff's product, namely, Dish TV is the only product available as a set top box. He submits that an unwary consumer would be misled into so believing.

11. Mr. Sethi has also placed reliance on Regulation 7 of the Cable Television Networks Rules, 1994 which contains the advertising Code. Sub-regulation (9) of Regulation 7 states that "No advertisement, which violates the Code for self-regulation in advertising, as adopted by ASCI, Mumbai have public exhibition in India, from time to time, shall be carried in the cable service". He has also drawn the attention of the court to the Code formulated by the defendant ASCI, which provides in Chapter-I (4) that advertisements shall neither distort facts, nor mislead the consumer by means of implication or omission. Advertisements shall not contain statements or visual presentation which directly, or by implication, or by omission, or by ambiguity, or by exaggeration, are likely to mislead the consumer about the product advertised, or the advertiser, or about any other product or advertiser.

12. Mr. Sethi submits that this rule of the Code formulated by the defendant stands violated by the advertisement of the plaintiff in question.

13. In rejoinder, Ms. Singh submits that this Court has jurisdiction to entertain the suit, as the impugned order passed by the defendant ASCI requiring the plaintiff to withdraw the advertisements in question, would affect the plaintiff all over the country, including in Delhi, where the said advertisements are aired or viewed. Learned counsel submits that there are several other suits, which have been entertained by this Court and which are pending against the defendant ASCI. She submits that the said issue of jurisdiction would require further detailed submissions, which may be heard and decided at an appropriate stage.

14. Since learned senior counsels have advanced the aforesaid submissions, it is necessary to consider the same at this ad interim stage, while making it clear that the opinion of this Court being formulated herein is merely tentative. The defendant is yet to file the written statement and reply to this application, and its documents. The prima facie view of the Court formed at the interim stage may, therefore, undergo a change once the written statement/reply and documents have been filed by the respondent and further hearing arguments by the applicant.

15. Firstly, prima facie, I do not find the impugned advertisements to be, in any manner, misleading by ambiguity and by implication that the consumers have only one option, namely, to buy only the plaintiffs Set Top Box (STB). The plaintiff has placed on record the printouts of, what may be claimed to be, the screenshots of the said advertisements. The celebrity on the TV screen informs and warns the viewers that the date for installing the STB has already passed, and that the viewers would not be able to watch their favourite shows. The celebrity tells the viewers that if they want to view their favourite TV serials, they should immediately install STB in their homes. She also informs that the TV/programmes serials could stop any moment. On this, the viewer/Bahu expresses an alarm and disbelief/dismay and states:

"Bahu: Nai nai! (she pleads out) Serials ke bina din kaise katenge hamare" (Whispering). Aap hi bataiyein abkaunsa set top box lagwaun"".

16. To this, the celebrity on the TV screen responds by stating:

"Simple ... Set top box matlab Dish TV.! Kyunki Dish tv hai 10 crore logon ki pasand ... aur India ka sabse bharosemandh DTH brand bhi yehi hai ...".

17. The other commercial/advertisement of the plaintiff is more or less on the same lines. While examining the impact of an advertisement on a consumer, the entire advertisement/commercial would have to be seen and it may not be proper to pass judgment on the basis of what it shows or conveys in a small portion of it. The said TV commercials show that the consumer is seen posing the question to a celebrity as to "which" STB should she/he install. This question, itself, impliedly conveys that the consumer is aware of the fact that there are several brands of STBs available in the market. Thus, the consumer watching the commercial/advertisement is also being conveyed that there are several STB brands in the market. The answer to the said query given by the celebrity, inter alia, is: "Simple Set Top Box matlab Dish TV!". The celebrity is not seen conveying that Dish TV is the "only" STB available in the market. She goes on to state, to the effect, "Because Dish TV is the choice of 10 Crore people and that it is India's most trusted DTH brand". These statements clearly convey that, firstly, there are other STBs/Digital TV service providers, as the population of the country - to everyone's knowledge, is not merely 10 Crore, and secondly, the statement that it is India's most trusted DTH brand, also shows that there are other brands as well but the brand of the plaintiff is the most trusted one.

18. The plaintiff has pointed out that there are several other advertisements of similar nature, such as "Thanda matlab Coca Cola" and "Digitisation ka matlab Tata Sky". Thus, the use of the phrases "A matlab B" is not generally understood colloquially to mean that a particular product "A" is available only with the brand "B". What it conveys is that "A" is the popular and favourite choice of the consumers in respect of the product "B". The advertisements in question convey the choice of the celebrity on the TV screen in respect of STB, as the brand of the plaintiff. This aspect appears to have been completely omitted from its consideration by the ASCI.

19. Secondly, I am also of the prima facie view that the defendant ASCI is not correct in observing that purchase of a STB is a one-time purchase. As noticed herein above, it is open to every consumer, who gets a STB installed, to get a refund of the security and the cost of the STB from the service provider - such as the plaintiff, and to switchover to another service provider.

20. Prima facie, it also appears to me that the ASCI being a self-regulatory body, its mandate is primarily to regulate the activities of its own members, and not those who are not its members. The plaintiff is not a member of the defendant ASCI. It fixes standards & guidelines applicable to its own members. It is described by ASCI itself - in the Code formulated by it as:

"a voluntary Self-Regulation council, registered as a not-for - profit Company under section 25 of the Indian Cos. Act. The sponsors of the ASCI, who are its principal members, are firms of considerable repute within Industry in India, and comprise Advertisers, Media, Ad. Agencies and other Professional/Ancillary services connected with advertising practise. The ASCI is not a Government body, nor does it formulate rules for the public or the relevant industries."

21. It cannot seek to pass judgment in respect of acts and conduct of those, who are not its members. The Code for Self-Regulation in Advertising formulated by the ASCI, cannot be thrust upon non-members.

22. The decisions relied upon by the learned senior counsel for the plaintiff recognise and preserve the plaintiff's right to commercial speech in advertising.

23. So far as the aspect of territorial jurisdiction is concerned, even though the defendant is situated in Mumbai and the impugned order has been issued from Mumbai, it needs examination whether this Court would have jurisdiction to deal with the present suit in the light of the fact that the effect of the said order would be felt by the plaintiff on an all-India basis, including in Delhi. This issue, apart from other issues, would, therefore, have to await further hearing in the matter.

24. For the aforesaid reasons, the operation of the impugned communication dated 23.02.2016 issued by the defendant ASCI shall remain stayed till the next date.