(2010) 05 CAL CK 0048

Calcutta High Court

Case No: G.A. No. 489 of 2010 and APOT No. 91 of 2010

Hindustan Unilever Limited		APPELLANT
	Vs	
Procter and Gamble Home Products Limited		RESPONDENT

Date of Decision: May 20, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: (2010) 43 PTC 460

Hon'ble Judges: Mohit S. Shah, C.J; Pinaki Chandra Ghose, J

Bench: Division Bench

Advocate: Anindya Mitra, Pratap Chatterjee, Arijit Banerjee, Neelima Chatterjee, Devajyoti Bhattacharya, Soumya Roy Chowdhury and SouvikMazumdar, for the Appellant;S.K. Kapoor, Ranjan Deb, Ranjan Bachhwat, Ravi Kapoor and K. Zaveri, for the Respondent

Final Decision: Dismissed

Judgement

Pinaki Chandra Ghose, J.

This appeal is directed against an ad-interim order dated 15th February, 2009 passed by the Hon''ble First Court refusing the prayer for injunction as prayed before the Court by the Appellant and the Court has passed the following order:

By virtue of the aforesaid, no disparagement can be attributed to the Respondent.

While deciding such a dispute the perception of an average individual who is reasonably well informed and observant has been considered as the market targeted is not of illiterate persons.

From a reading of the plaint it appears that although the Petitioner has alleged disparagement but the economic loss suffered has not been established. The suit was filed on 27th January, 2010 while according to the plaint the Respondent has telecast its advertisement on and from 1st December, 2009 and the advertorial was

published on 2nd December, 2009. Till the filing of the suit the Petitioner has not been able to show that it has sustained any economic loss by virtue of such advertisement. For no loss evidence or dip in its sales no interim order need be passed at this stage.

The facts of the case briefly are as follows:

On 28th January, 2010, the Appellant/Plaintiff filed a suit being C.S. No. 12 of 2010 (Hindustan Unilever Limited v. Procter and Gamble Home Products Limited) inter alia praying for the following reliefs:

(a) for leave under Clause 12 of the Letters Patent, 1865 and Order II Rule 2 of the Code of Civil Procedure, 1908 and

(b) Decree of mandatory injunction directing the Defendant to deliver up the master tape so that the same may be cancelled and destroyed;

(c) Decree of perpetual injunction restraining the Defendant, its agents, servants and directors from using the said master tape on the basis of which the impugned telecast has been made and from using the same for further telecast in any manner whatsoever;

(d) Decree of permanent injunction do issue restraining the Defendant, its directors, agents and servants from further publishing the advertisements contained in Annexure G and telecasting the impugned television commercials being Annexure F and Annexure H hereto or any other similar advertisement or telecasting;

(e) Decree of perpetual injunction restraining the Defendant, its directors, agents and servants from in any manner disparaging the Plaintiff''s products, namely ''Fair and Lovely'' and ''Pond''s White Beauty'' and in any manner conveying to the public that the Plaintiff''s said products do not operate from within the skin and do not have glowing effect on the skin;

(f) Injunction;

(g) Attachment before judgment;

(h) Costs;

(i) Further and/or other reliefs.

In the said suit on or about 1st February, 2010 the Appellant/Plaintiff took out an application being G.A. No. 243 of 2010 inter alia praying for the following reliefs:

(a) Receiver be appointed to take into custody the master tape on the basis of which the impugned advertisements have been telecast through the major and leading T.V. Channels;

(b) An order of mandatory injunction directing the Respondent to deliver up the master tape so that the same may be cancelled and destroyed;

(c) An order of temporary injunction restraining the Respondent, their agents, servants and directors from using the said master tape on the basis of which the impugned telecast has been made and from using the same for further telecast in any manner whatsoever;

(d) An order of temporary injunction do issue restraining the Respondent, its directors, agents and servants from further publishing the advertisements contained in Annexure G and telecasting the impugned television commercials being Annexure F and Annexure H hereto or any other similar advertisement or telecasting;

(e) An order of temporary injunction restraining the Respondent, its directors, agents and servants from in any manner disparaging the Petitioner''s products, namely ''Fair and Lovely'' and ''Pond''s White Beauty'' and in any manner conveying to the public that the Petitioner''s said products do not operate from within the skin and do not have glowing effect on the skin;

(f) An-interim orders in terms of prayers (a) to (e) above;

(g) Such further or other order or orders be made and/or direction or directions be given as this Hon''ble Court may deem fit and proper.

3. The case of the Appellant is that by telecasting television commercials in respect of "fairness cream", the Respondent has disparaged the Petitioner''s fairness cream. It is the case of the Appellant that due to research work done by the Appellant the Appellant invented in 1972 that Niacinamide reduces the pigment melanin and obtained patent in the year l972 being Patent No. 133669 dated 17th July, 1972 entitled "Niacin containing skin lightening compositions". Since 1992 the Appellant has been marketed internationally a cream known as "Fair and Lovely" which was accepted by the consumers at large.

4. In the year 2007, the Appellant also launched another range of skin lightening products under the brand name "Pond''s White Beauty". On expiry of the Patent the use of Niacinamide operated in that public domain.

5. It is the case of the Appellant that the Respondent is seeking to launch a fairness cream for the first time in the Indian markets and for such purposes has taken recourse to advertisement through television channels. It further alleges that the advertisement on the satellite channels tends to slander the Appellant''s goods. The products of the Appellant as well as of the Respondent is in the same field of "fairness cream" and by the said advertisements the Respondent is seeking to disparage the Appellant''s goods which they are not entitled to do in law. Such disparagement is not by name, but is so subtle that it communicates to the viewer that like products of others are lacking in something. It is also stated that the said product is the result of a new technique which enables the "fairness cream" of the Appellant to permeate deep into the skin to have the required effect. According to

the Appellant, this representation is false as Niacinamide is the only component which has the lightening effect and the products both of the Appellant and the Respondent contain Niacinamide.

6. Mr. Anindya Mitra, learned Senior Advocate, appearing on behalf of the Appellant contended that the fairness cream applied on face is a Skin Lightness product of the Hindustan Unilever Ltd. (hereinafter referred to as HUL) held 70% of market share in respect of the fairness cream now available in the market. The purpose of using such cream is to produce glow from within the skin. The cream will go inside the first layer of skin and carry out cleansing operation and thereupon there will be glow from within, which will make the face look fairer and brighter.

7. He further submitted that in the year 1989, by introduction of Niacinamide, a process HUL invented and patented which expired in April, 2009 and introduced the said product in the market. In the impugned TVC of the Respondent it has been alleged that new technique has been invented by the Respondent in respect of the fairness cream of the Respondent.

8. He also contended that the Appellant''s representation has been made to the consumer and the Respondent has adapted the patented process of HUL, after its expiry. Niacinamide used in both products. Therefore, it cannot be stated to be a new technique. It has further been alleged by the Respondent that their fairness cream goes inside the skin and produce glow from within, but other fairness cream does not at all go inside the skin. The Respondent''s advertisement falsely shows that other fairness creams do not go inside the skin and do not even remain on the skin. Consequently, there is no question of producing glow from inside the skin. Such advertisement is nothing but a clear negative disparagement of the product of the Appellant. It has further contended that the fairness creams of the Respondent as a well as of the HUL are manufactured with Niacinamide. The advertisement of the Respondent on other fairness creams does not have any effect even on outer skin and it is like applying cream on the face covered with plastic mask do not cover the tough skin. According to Mr. Mitra, the disparagement is worse than saying bad. Therefore, the message in other fairness cream is useless and wholly ineffective as fairness cream. It is not fit for the purpose for which purchased by consumer.

9. Mr. Mitra, Learned Senior Advocate, therefore, drew our attention to the proposition of law as laid down by the Hon''ble First Court and submitted that the Court has correctly laid down the proposition of law that while puffing the product, one cannot rubbish the product of others, in fact, the Court do not apply the said proposition of law in the facts and circumstances of this case. The Court also can pass the order on the basis of incorrect proposition of law that question of economic loss has to be considered and established.

10. He further pointed out that TVC refers to outer layer of skin and not inner layer is nothing but ex-facie wrong and perverse in law. It has also been stated that the

other creams work only on outer layer and not in the inner layer. Therefore, the representation in respect of other creams is true as held by the Hon''ble First Court is wholly incorrect and on the basis of incorrect assumption the Court held that there is no disparagement. Denigration as useless not fit for the purpose by use is severe disparagement.

11. Mr. Mitra also submitted that by virtue of comparison no attempt can be made to indicate that HUL''s product is inferior. It is stated that the Court came to the conclusion on the basis of the proposition that Petitioner has not been able to establish any economic loss by virtue of TVC.

12. The stage to establish economic loss has not yet been reached. He also submitted that impact is gradual and not instantaneous.

13. He further submitted that TVC 2 was published on 15.12.2009. It is not necessary at this stage to establish the economic loss that has been suffered if there is a likelihood of loss which is enough to get an injunction at this stage.

14. In support of his contention he relied upon a decision of this High Court in the case of Reckitt and Colman of India Ltd. v. Jyothi Laboratories Ltd. and Ors., 1999 (2) CLT 230.

15. Mr. Mitra further submitted that when it is disparagement in comparative advertisements, the answer will be when demerit or specific defect is shown. In the instant case, it is shown falsely and he relied upon the following decisions in support of his such contention:

1. S.C. Johnson and Son, Inc. and Another Vs. Buchanan Group Pty. Ltd. and Others,

2. Glaxo Smith Kline Consumer Health Care Limited Vs. Heinz India Private Limited and Others,

3. 2009 (2) CHN 479 (Horlicks v. Complan);

4. 2009 (29) PTC 1 (Dabur India Limited v. Emami Limited);

5. 1996 (16) PTC 393 (Del) (Reckitt and Colman of India Ltd. v. Kiwi T.T.K. Ltd.);

6. Colgate-Palmolive (India) Limited Vs. Anchor Health and Beauty Care Private Ltd.,

7. Dabur India Limited Vs. Colgate Palmolive India Ltd.,

8. 2007 (35) PTC 556 [Kar] (Eureka Forbes v. Pentair Water India Pvt. Ltd.)

16. He also contended that the generic reference includes all rival products which fall within the category in fairness cream.

17. Mr. S.K. Kapoor, learned Senior Advocate appearing on behalf of the Respondent contended that it is settled law that an essential ingredient of a disparagement action is that there must be a statement in disparagement of the Plaintiffs products

and that statement must be false and injurious. He also contended that this ingredient is essential for the Plaintiff to succeed in a disparagement action. The Plaintiff must prove that there is a statement contained in the advertisement complained of which disparages his goods and causes him damage or is likely to cause him damage. Without proof of this ingredient, an action for disparagement cannot succeed at all.

18. He also submitted that this principle was stated by the House of Lords in Timothy White v. Gustav Mellin, (1895) AC 154 (pages 157, 165, 167 and 171) and has been adapted and applied in innumerable Indian cases. The principle Indian case on the point is the decision of Barin Ghosh, J., of this Hon''ble Court in the case of Reckitt and Colman of India Ltd. v. M.P. Ramchandran, (1999) 19 PTC 741 (Cal) where at page 746 the learned Judge summarized the law in the following terms:

A tradesman 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. "He also submitted that the learned Judge went on to say that if there is no defamation to the goods or to the manufacturers of such goods, no action lies. The Division Bench of this Court presided over by S.S. Nijjar, C.J., (as His Lordship then was) approved of the same and followed these principles in, the case of Heniz India Private Limited v. Glaxo Smithkline Consumer Healthcare Limited, (2009) 2 CHN 479 (Horlicks v. Complan). He further drew our attention to the following decisions:

1. (1899) 1 QBD 86 (Hubbuck and Sons, Limited v. Wilkinson, Heywood and Clark, Limited;

3. Reckitt Benckiser (India) Limited Vs. Cavin Kare Pvt. Ltd.,

4. Glaxo Smith Kline Consumer Health Care Limited Vs. Heinz India Private Limited and Others,

19. He further contended that the TV commercials of the Defendant plainly do not refer to the products of the Plaintiff at all. There is neither a direct nor an indirect reference to the products of the Plaintiff or to the Plaintiff. He also contended that there is nothing to connect any remark or any aspect of the commercials with the Plaintiff at all. Therefore, according to him no action lies in this matter, since there is no disparagement to the goods.

20. He further submitted that the term "new" ["Naya"] which has been used by the Defendant in respect of its products in the TV channels only to convey that it is a new product of the Defendant.

21. He also contended that Niacinamide is actually vitamin B-3. Therefore, there cannot be any work to place on record that Niacinamide is the invention of the HUL. It would be evident from the TV commercial that the Defendant has merely

extended an invitation to consumers to try a new method by using the Defendant''s fairness cream.

22. He also submitted that considerable criticism was directed towards a mask which was shown in one of channels of the TV commercials. It is respectfully submitted that it is difficult to understand how the use of the concept of mask is in any way derogatory or disparaging so far as any product of the Plaintiff is concerned. In fact, the concept of mask has been used by the Plaintiff itself in its other advertisements and by several other manufacturers of cosmetics products. The mask device is used to emphasize the quality of the Defendant''s products. It has nothing to do with the Plaintiff or any products of the Plaintiff at all. Hence, he submitted that simply no case has been made out by the Petitioner.

23. He further submitted that this Hon''ble Court has repeatedly laid down the principle that as an Appellate Court it will not interfere with the exercise of discretion of the Trial Court on any factual matters simply on the ground that after assessing the materials it would have itself arrived at any different conclusion from that of the Trial Court unless, of course, it finds such conclusions to be wholly perverse. That is not the case here. This principle is even more emphatically applied when the case is at ad-interim stage and parties have not even completed their affidavits and produced their evidences. It is respectfully submitted that in the present case, the Trial Court exercised a conscious discretion after the full consideration of the materials on record and no ground has been shown warranting interference with the determination of the case by the Trial Court.

24. Mr. Kapoor further contended that regarding the decisions cited on behalf of the Plaintiff it is respectfully submitted that in disparagement actions, the tests are well settled and sole question to be decided is whether the advertisement complained of disparages the product of the Plaintiff or not? This is a factual aspect which has to be proved in each case. It is accepted by the Plaintiff that the proposition of law applied by the Trial Court was the correct proposition of law. Here the Trial Court found against the Plaintiff on the factual aspects of the instant case.

25. Therefore, the cases cited on behalf of the Plaintiff in the cases of Reckitt and Colman of India Ltd. (Supra); Glaxo Smith Kline Consumer Healthcare Limited (Supra); Heinz India Private Limited (Supra); Dabur India Limited (Supra); and Dabur India Limited v. Colgate Palmolive India Limited (Supra) - are all distinguishable on facts. In each of these cases the Court had come to a positive finding that the product of the Plaintiff had been identified either directly or indirectly. In cases where injunction was granted, the Plaintiffs product had been identified either directly by name or by display of a packet or some other matter which made it clear that the Plaintiffs product was targeted by the disparaging advertisement.

26. In these circumstances, he submitted that no case has been made out and the appeal is wholly unmeritorious and should be dismissed.

27. After analyzing the facts of this case, it appears that the storyboard of the Hindi version of the advertisement with its English translation has been filed. The storyboard of TVC 1 is nothing but puffing up of the Respondent''s product. The storyboard of TVC 2 is what has to be examined:

The first frame opens with a question--"Kya aapki fairness cream sirf upar se kaam karti hain" The English translation of which is - "Does your fairness cream work only on the surface".

This question is followed by -"Jaise ye kaam kare sirf upar se, andar se nahin". The English translation of which is - "like this which works only on the surface, not from within".

28. It appears to us from the reading of the aforesaid that a comparison is sought to be drawn between the Respondent''s fairness cream and other fairness creams available in the market.

29. Mr. Mitra, learned Senior Advocate appearing on behalf of the Appellant tried to impress upon us by relying upon a decision reported in S.C. Johnson and Son, Inc. and Another Vs. Buchanan Group Pty. Ltd. and Others, and held that the impugned advertisement prima facie does seem to denigrate the Plaintiffs'' product and, therefore, the Court should restrain the Defendants, the Respondent herein from using the impugned advertisement.

30. After analyzing the decisions we have to come to the conclusion whether a clear attempt has been made by the Appellant to denigrate the product of the Appellant. Mr. Mitra further tried to impress upon us by relying upon the decision in the case of 2009 (40) PTC 653 (Colgate Palmolive (India) Ltd. v. Anchor Health and Beauty Care Private Ltd.) that the unfair trade practice has been adopted through the advertisement. According to Mr. Mitra, there is nothing new in the product of the Respondent as it also contains Niacinamide and, therefore, tends to mislead the public. His further contention is that the use of the word "Nayatarika" (New Technique) is also a false representation made to the public.

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 one''s product is only limited to unbelievable claims which can be said to be harmless. In other words, mere puffing of one''s product is not expected to be taken seriously by the public watching the advertisement. The advertisement ceases to be a 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".

32. We have considered the submissions made by the learned Advocates for the parties and taken up the pleadings of the parties in extenso. We have also perused

the documentary material attached to the pleadings of the parties.

33. At the outset, we were invited to view the advertisement on the computer and we have had the advantage of viewing the advertisement. In our opinion, the advertisement clearly shows that a comparison which is sought to be drawn between the Respondent''s cream and other fairness cream without giving any name. In doing so it does not appear to us that in anyway the Respondent tried to denigrate the product of the Appellant nor it has given a message to the viewer that the product of the Appellant is bogus one or bad of displaying the Appellant''s Tube by using the phrase "sirf upar se kaam karti hain... andar se nahin" is nothing but a comparison with its competitor in general. There is no indication that the Appellant''s product is inferior in qualify than that of the Respondent. In 1999 PTC (19) 741 (supra) the Court has laid down five principles as a guiding factor for grant of an injunction of the nature as prayed for herein which are as follows:

I. A tradesman is entitled to declare his goods to be best in the world even though the declaration is untrue.

II. He can also say that my goods are better than his competitors'', even though such statement is untrue.

III. 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 the others.

IV. He, however, cannot while saying 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 word he defames-his competitors and their goods, which is not permissible.

V. If there is no defamation, to the goods or to the manufacturer of such goods no action lies, but if there is such defamation, then the court is also competent to grant an order of injunction restraining repetition of such defamation. "Therefore, after taking into account the principles settled by the Court it appears to us that such comparison which has been made by the Respondent is permissible under the law. In fact, we have noticed that in the following frame it refers to the epidermal layer. The said epidermal layer is the outer skin. It would also be evident from the said advertisement that it is only confined to the said layer and not the dermis layer (inner also). Therefore, in our considered opinion, the representation made in respect of other creams cannot be said to be denigrated by such advertisement of the Respondent.

34. In the facts and circumstances of this case, we do not find at this stage that disparagement has been done by viewing the said advertisement on T.V. Channels by the Respondent and in our considered opinion, the Respondent has acted within the principles laid down by the Court and hence, we do not find that there is any

illegality or irregularity in the order so passed by the Hon''ble First Court. Furthermore, we have also considered in the facts and circumstances of the present case as to whether the advertisement falls within the realm of puffing or within the realm of disparagement.

35. We have also considered the decisions of the House of Lords and we find after considering the case of ''Timothy White'' the House of Lords which laid down the proposition that a trader can legitimately say that his goods are better than any other goods in the market as such a statement would be treated as a mere trading puff and would be so regarded by the purchasing public.

36. The Hon''ble Division Bench of this High Court in 2009 (2) CHN 479 (Heinz India Private Limited v. Glaxo Smithkline Consumer Healthcare Limited and Ors.) held as follows:

What emerges from the aforesaid discussion by the House of Lords as a principle seems to be that a tradesman can say that his goods are better than those of the rival. In that sense, better would mean in regard to the purpose for which the goods are intended. In so doing it is permissible to emphasise one or the other qualities being better than the quality of the rival product. Every extravagant statement may imply disparagement of the goods of others in the same field. Such disparagement is not actionable. In order to constitute actionable disparagement, the Plaintiff must show, that the Defendant''s representations were made about the Plaintiffs goods, the statements were untrue and they were disparaging the goods of the Plaintiff and that they have caused special damages to the Plaintiff.

37. It is further held by the House of Lords that in cases where the statement falls between the extremes, in order to draw the line, one must apply the test, 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 Defendants have pointed to a specific allegation of some defect or demerit in the Plaintiffs goods. These observations clearly tend to show that in case the claim would be seen by a reasonable man as a serious assertion and the assertion is false, the action would lie. In "Dabur India Ltd. case" (supra) a learned Single Judge of the Delhi High Court held that "It is one thing to say that the Defendant''s product is better than that of the Plaintiff and it is another thing to say that the Plaintiffs product in inferior to that of the Defendant. This will always happen in a case of comparison. It is permissible for an advertiser to proclaim that its product is the best." On the other hand, "disparagement of a product should be defamatory or should border on defamation. In other words, the degree of disparagement must, be such that it would tantamount to, or almost tantamount to defamation." In Pepsico Inc. (supra) again a learned Single Judge of the Delhi High Court has held that "it is well known law that merely puffing is not dishonest and mere ''poking fun'' at a competitor is a normal practice of comparative advertising and is acceptable in the market." It is further observed that "In order to succeed in an action, the Plaintiffs have to establish the following key

elements:

1. A false or misleading statement of fact about a product.

2. That statement either deceived, or had the capacity to deceive, a substantial segment of potential consumer, and 3. The deception was material, in that it was likely to influence consumer''s purchasing decisions.

It is also held in the case of Reckitt and Colman of India Ltd. v. Kiwi T.T.K., 1996 PTC (16) 393 (Del) as follows:

The settled law on the subject appears to be that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. How ever, a manufacturer is not entitled to say that his competitor''s goods are bad so as to puff and promote his goods. It, however, appears that if an action lies for defamation an injunction may be granted.

38. We have examined the entire issue on the basis of well-recognized principles of law as indicated above. On a prima facie view of the advertisement it is apparent that no intention has been shown by the Respondent to disparage or denigrate or to defame product of the Appellant.

39. At this ad-interim stage it appears to us that the rival claims of the parties are still in fluid state. In our opinion, discretion has not been shown to have been exercised by the Hon''ble Trial Court arbitrarily or capriciously or perversely ignoring the settled principles of law regulating the grant of refusal of injunction in a these cases.

39. Accordingly, we do not find at this stage any illegality or irregularity in respect of the order so passed by the Hon''ble First Court and accordingly, we do not find any reason to interfere with the discretion so exercised by His Lordship in refusing the interim relief.

40. We see no justification to interfere with the impugned order of the Hon''ble Judge and we find no merit in this appeal.

41. For the reasons stated hereinabove, the appeal is dismissed.

42. All parties concerned are to act on a xerox signed copy of this order on the usual undertakings.

43. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

44. I agree.