

(2013) 05 DEL CK 0412

Delhi High Court

Case No: CS (OS) No. 375 of 2013

Reckitt Benckiser (India) Ltd.

APPELLANT

Vs

Hindustan Unilever Ltd.

RESPONDENT

Date of Decision: May 14, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2
- Constitution of India, 1950 - Article 19(1)(a)

Citation: (2013) 5 AD 94 : (2013) 3 ILR Delhi 2002 : (2013) 55 PTC 156

Hon'ble Judges: M.L. Mehta, J

Bench: Single Bench

Advocate: C.M. Lall, with Ms. Nancy Roy, Ms. Ekta Sarin and Mr. Jawahar Lal, for the Appellant; Sandeep Sethi, with Ms. Rukmani Bobde and Mr. Kumar Shashank, for the Respondent

Judgement

M.L. Mehta, J.

I.A. 3267/2013 (under Order XXXIX Rule 1 & 2, CPC)

1. This is a suit for commercial disparagement. The plaintiff has sought an interim injunction restraining the defendant from publishing advertisements or using any depiction or any other indica which disparages the goodwill and reputation of the plaintiff's product sold under the trade mark DETTOL HEALTHY KITCHEN. A brief summary of the controversy is as follows. The plaintiff's case is that it has been involved with the manufacture of the famous antiseptic liquid under the trademark DETTOL for over 70 years and is a market leader of this segment with approximately 85% of the market share in India. Recently, the plaintiff has come up with a new product DETTOL HEALTHY KITCHEN Dish and Slab Gel", which is purportedly the first kitchen cleaner with an active ingredient (Lactic Acid) which helps kill germs. The plaintiff claims that the product has clinically been proven to have germ killing capabilities and is claimed to be much more efficacious than ordinary kitchen

cleaners.

2. To promote their new product, the plaintiff came out with an advertising campaign on television comparing the germ killing capabilities of its product and the defendant's VIM LIQUID. In addition, the plaintiff also introduced a print advertising campaign. Both these advertisements purportedly contained truthful statements about the germ killing capabilities of the two competing products. Admittedly, the defendant herein filed a suit against the plaintiff for disparaging advertisement before the Calcutta High Court vide Suit No. TN 50 of 2013. However, the Court passed a consent order in this matter allowing the plaintiff to continue with the impugned television advertisement subject to small variations.

3. The plaintiff contends that in retaliation, the defendant came out with an advertisement published in the Sunday Times Edition dated February 24, 2013, in which the defendant has purportedly disparaged the plaintiff and its brand DETTOL. It is contended that in the advertisement, the defendant has maliciously equated its product to a "Harsh Antiseptic". The question asked in the initial portion of the advertisement is:

A Harsh Antiseptic or the power of 100 lemons - which one would you choose to clean your child's tiffin?

The plaintiff alleges that this reference in the advertisement was clearly directed to the plaintiffs brand DETTOL being referred to as a Harsh Antiseptic. The plaintiff contends that an attempt has been made to misrepresent to the consumers that the plaintiffs DETTOL ANTISEPTIC LIQUID and DETTOL HEALTHY KITCHEN have the same ingredients. It also contends that the defendant has attempted to misrepresent that the plaintiff has done nothing but repackage its Antiseptic Liquid as DETTOL HEALTHY KITCHEN and the reference to "harsh antiseptic" in itself is denigrating of the plaintiffs brand DETTOL.

4. The plaintiff contends that to further worsen the misrepresentation, the defendant's advertisement mentions:

An Antiseptic is for cleaning wounds and floors. Would you use to clean the utensils your family eats from?

It contends that this statement further established the target brand to be that of the plaintiffs DETTOL ANTISEPTIC LIQUID which is extensively advertised for the use in cleaning wounds and floors, particularly in hospitals. The plaintiff has also sought to clarify that DETTOL ANTISEPTIC LIQUID and DETTOL HEALTHY KITCHEN have entirely different formulations. Though both the products have efficient germ killing capabilities, DETTOL ANTISEPTIC LIQUID contains chloroxylenol (PCMX), whereas DETTOL HEALTHY KITCHEN is said to contain Lactic Acid.

5. The plaintiff also contends that the advertisement thereafter mentions

NO ONE REMOVES GREASE BETTER*

NO ONE REMOVES GERMS BETTER*

This claim is said to contain a disclaimer in very fine print stating

*compared to leading brands tested under lab conditions on selective organisms and as per lab cleaning test/consumer test.

6. The plaintiff contends that this is a false statement because it is clinically tested that its product was more efficacious at germ killing than the defendant's product, as evidenced from the SGS Report filed by the plaintiff. The plaintiff also submits that despite being more effective in respect of germ killing, it also has a toxicology report declaring that the plaintiffs DETTOL HEALTHY KITCHEN does not result in any human health concern.

7. The plaintiff contends that this advertisement campaign by the defendant is outside the parameters of allowed competitive advertising and blatantly denigrates the reputation and goodwill of the plaintiffs brand. And that the defendant being in the same sector as that of the plaintiff is well aware of the goodwill and reputation attached to the plaintiffs brand DETTOL and is aiming at illegally destroying this reputation for its own commercial benefits thereby causing an irreparable injury to the plaintiff. It is also contended that the defendants are attempting to increase the market share of their product VIM LIQUID by defaming and disparaging the worth and reputation of the plaintiffs product because, the plaintiffs product is a new entrant into the same market sector as the defendant's.

8. The plaintiff, relied on the cases of [Reckitt Benckiser \(India\) Limited Vs. Hindustan Unilever Limited](#), ; Reckitt Benckiser South Africa (PTY) Ltd. v. Hindustan Unilever South Africa (PTY) Ltd.; Reckitt Colman of India Ltd. v. M.P. Ramchandran & Anr., 1999 PTC (19) 741 ; [Paras Pharmaceuticals Ltd. Vs. Ranbaxy Laboratories Ltd. and Others](#), ; [Reckitt and Colman of India Ltd. Vs. Jyothi Laboratories Ltd. and Others](#), ; [Dabur India Limited Vs. Emami Limited](#), ; [Dabur India Limited Vs. Colgate Palmolive India Ltd.](#), ; [Eureka Forbes Ltd. Vs. Pentair Water India Pvt. Ltd.](#), ; [Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara - Lee](#), ; [Colgate Palmolive \(India\) Ltd. Vs. Hindustan Lever Ltd.](#), ; [Chemfab Alkhalis Limited, Gnananda Place, Kalapet, Pondicherry Vs. S. Balasubramanian, Editor, "Junior Vikadan", 757, Anna Salai, Madras-2 and Vasan Publications \(P\) Limited, 757 Anna Salai, Madras-2](#) .

9. In response to these allegations, the defendant has filed a reply stating that the impugned advertisement made no reference to DETTOL HEALTHY KITCHEN Dish & Slab Gel. The defendant submits that the ad-campaign only sought to inform the consumers that harsh antiseptics were not fit for cleaning utensils. And that the impugned advertisement uses the term HARSH ANTISEPTIC by which they mean those antiseptics which are particularly strong in concentration and that the plaintiffs product, by their own classification does not fall under the category of

"harsh antiseptic" and therefore, the complaint of the plaintiff was baseless and frivolous.

10. The defendant contends that merely because the plaintiff sold antiseptic liquid did not rationally imply that the impugned advertisement denigrated or disparaged the kitchen and slab gel of the plaintiff. And that the plaintiff has not filed any conclusive evidence to show that the overwhelming majority of consumers associate the term "harsh antiseptic" in reference to the plaintiffs products. Further, the defendant submits that it is entitled to puff its products; and that the plaintiff cannot be hypersensitive to such a puffery. And that the advertisement campaign was purely intended to promote their product to be superior to those of other competitors which was within their fundamental right of free speech and expression as guaranteed under Art. 19(1) (a) of the Constitution. The defendant submits that the advertisement was in line with the principles as postulated by Advertising Standards Council of India (ASCI). It is also claimed that the plaint is a retaliatory action made out of vengeance against the suit filed by the defendant against the plaintiff in the Calcutta High Court.

11. In furtherance of its contentions, the defendant has relied upon the cases of [Imperial Tobacco Co. Vs. Albert Bonnan](#), ; [Reckit Benckiser \(India\) Limited Vs. Naga Limited and Others](#), ; Marico Ltd. v. Adani Wilmar Ltd., CS (OS) Nos. 246 and 319 of 2013; Reckitt Benckiser South Africa (PTY) Ltd. v. Hindustan Unilever South Africa (PTY) Ltd.; Reckitt Colman of India Ltd. v. M.P. Ramchandran & Anr., 1999 PTC (19) 741 ; [Paras Pharmaceuticals Ltd. Vs. Ranbaxy Laboratories Ltd. and Others](#), ; [Dabur India Limited Vs. Emami Limited](#), ; [Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara - Lee](#), and [Colgate Palmolive \(India\) Ltd. Vs. Hindustan Lever Ltd.](#), .

12. I have heard the arguments of the Ld. Counsels for both parties and also perused through the documents placed on record including the impugned newspaper advertisement. I am of the considered view that prima facie the impugned advertisement subtly yet certainly targets the plaintiffs brand DETTOL and its product DETTOL HEALTHY KITCHEN. I have arrived at this conclusion for the following reasons.

13. With regards to comparative advertising, the law is well settled. This Court in the case of Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. and Godrej Sara-Lee, (Supra), while referring to the law laid down by the Supreme Court, has shaped the following guiding principles regarding puffery of a product:

(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 representation of facts but only as glorifying one's product.

14. This Court in Dabur-Colortek also considered the finding of the Division Bench of this Court in [Pepsi Co., Inc. and Others Vs. Hindustan Coca Cola Ltd. and Another](#) , and added a fourth prong to this test, i.e.

(iv) While glorifying its product, an advertiser may not denigrate or disparage a rival product.

15. A Ld. Single Judge of this Court, in the Marico Case (supra), while observing the principles laid down by the Division Bench in the Dabur-Colortek Case (supra), stated that the generic disparagement of a rival product, without specifically identifying or pin-pointing the rival product is objectionable. It was held that, in view of the law laid down in [Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Others](#) , false, misleading, unfair and deceptive advertising is not protected under "commercial speech". It was additionally observed that earlier judgments, which held that a tradesman is entitled to declare his goods to be the best in the world even though the declaration is untrue and to say that his goods are better than his competitors, even though such statement is untrue, is no longer good law. The Division Bench in the Dabur-Colortek Case (supra) also held that while hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if it does so, it must have some reasonable factual basis for the assertion made and that it is not permissible for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or that his goods are better than that of a rival.

16. The Ld. Single Judge in the Marico Case has also placed reliance on an earlier finding of a Division bench of this Court in the Pepsi Co. Case (supra) wherein it was held that comparative advertising is permissible as long as while comparing own with rival/competitors product, the latter's product is not derogated, discredited, disgraced, though while comparing some amount of, showing down" is implicit; however the same should be within the confines of De Beers Abrasive v. International General Electric Co., 1975 (2) All ER 599, which Courts in India have frequently referred to. The case sums up the law relating to false advertising causing injury to rival traders group pithily as under:

the law is that any trader is entitled to puff his own goods even though such puff as a matter of pure logic involves the denigration of his rival's good...Notices...reading "the best tailor in the world", "the best tailor in this town" and the "best tailor in this street" do not commit an actionable offence. Where however, the situation is not that the trader is puffing his own goods but turns to denigrate the goods of his rival...then the situation is not so clear-cut. 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" and would not be actionable. However, the statement "my goods are better than X's because X's are absolute rubbish" would be actionable.

17. Moreover, the subsequent Division Bench in Dabur-Colortek echoed the same view as under:

In Pepsi Co. it was held that certain factors have to be kept in mind while deciding a question of disparagement. These factors are (i) intent of the commercial; (ii) manner of the commercial; and (iii) storyline of the commercial and the message sought to be conveyed. While we agree with these factors, we would like to amplify or restate them in the following terms:-

(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 unfavorable 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.

18. At this juncture, it must be borne in mind that this Court at this stage should take only a prima facie opinion and not render any final finding on the correctness or otherwise of the claims in the advertisement of the defendant. While both the plaintiff and defendant have produced various lab reports to corroborate the "germ killing" and "germ removal" capabilities of their respective products, this is not the stage in this suit for me to determine the veracity of the claims made in the adverts. It is only for me to determine if the impugned advertisement makes a reference, either express or implied to the product of the plaintiff and denigrates it. Though the defendant has vehemently contended that its advertisement is not directed towards the plaintiffs product and is directed towards general awareness of the customers regarding the inappropriate usage of antiseptic in washing utensils, it is common knowledge that the plaintiffs brand DETTOL is synonymous with the term antiseptic in the FMCG market in India. The plaintiff has also furnished Google image results for the search term "antiseptic", wherein the plaintiffs products constitute the majority of the search results. Though I am not squarely relying on the finding of this Court in the case of [Reckitt Benckiser \(India\) Ltd. Vs. Hindustan Lever Limited](#), it is pertinent to note that the Court has observed the existence of the notion that all DETTOL products are antiseptic. In the Dettol Case, it was observed by this Court thus-

It is true that the plaintiffs soap-DETTOL Original-is not an antiseptic soap whereas the soap shown in the advertisement has been referred to as "an ordinary antiseptic soap". An argument was advanced on the part of the defendant that because of this,

the soap shown in the advertisement did not and could not refer to the plaintiffs soap. The learned counsel for the plaintiff submitted that the reference to an antiseptic soap in the said advertisement is, in fact, a further pointer to the plaintiffs product, although, the plaintiffs soap-DETTOL Original-is not an antiseptic soap. According to him, this is so because of the well-known fact that the plaintiffs antiseptic liquid product has been utilised for years in homes as well as in hospitals for various cuts and wounds and other antiseptic purposes. The public at large, therefore, carry an impression, right or wrong, in their minds that all DETTOL products are antiseptic. The defendant, being aware of this, has specifically shown an antiseptic soap so that the viewers of the advertisement shall immediately be directed towards the plaintiffs DETTOL products. This, along with the other features mentioned above, clearly establishes the link between the soap shown in the advertisement and the plaintiffs soap. I agree with these submissions.

(emphasis supplied)

19. As observed in the DETTOL Soap Case, for reasons right or wrong, the public at large carry an impression in their minds that all DETTOL products are antiseptic. Therefore, the usage of the term antiseptic in the impugned advertisement directs the viewers of the advertisement to the plaintiffs brand or product. However, the defendant has contended that it has deliberately used the term "harsh antiseptic" to connote antiseptic which is concentrated.

20. I do not find any merit in the defendant's submissions that the term "harsh antiseptic" did not refer to the plaintiffs brand or product, but was used to connote an antiseptic which was concentrated. I am of the opinion that the usage of the term "harsh antiseptic" in fact refers to an antiseptic which is harsh, wherein the term "harsh" is used as an adjective. If the defendant chose to convey to the consumers a general warning regarding the harmful effects of antiseptic products which were concentrated, the term "concentrated antiseptic" would have conveyed it more aptly without any negative connotation as attached with the word "harsh". By using the adjective "harsh" along with the indicative word "antiseptic" with respect to cleaning utensils from which food is consumed, the defendant is trying to connote the consumers that the plaintiffs product, DETTOL HEALTHY KITCHEN, has the same effect as that of its other product DETTOL ANTISEPTIC LIQUID. Such a linkage between the two products with completely different formulations misleads the consumers and deters them from purchasing the plaintiffs product, thereby affecting them prejudicially.

21. With respect to the defendant's argument that the plaintiff has not established conclusively that the overwhelming majority of consumers associate the term "harsh antiseptic" in reference to the plaintiffs products, I have seen the media reports filed by the plaintiff. It is prima facie clear from the reports carried out in leading press agencies such as Business Standard, as well as internet and social media such as indiatelevision.com, firstpost.com, twitter.com and other blogging

sites, the public is aware that the impugned advertisement is directed towards the plaintiffs brand/product and perceived as the response of the defendant to a new entrant in the kitchen cleaners market.

22. Relying upon the ratio of Dabur-Colortek, Pepsi-Co. as well as Be Beers, the defendant's claim that "NO ONE REMOVES GREASE BETTER; NO ONE REMOVES GERMS BETTER" can be considered to fall within the purview of permissive comparative advertising. However, by stating that, "An Antiseptic is for cleaning wounds and floors. Would you use to clean the utensils your family eats from? An antiseptic is for cleaning wounds and floors. Would you use it to clean the utensils your family eats from?", the defendant is to that extent impliedly referring to the plaintiffs product by appealing to the consumer's perception that the plaintiffs product must be a "harsh antiseptic"; and thereby denigrating the plaintiffs product. I am of the considered opinion that the plaintiff has made out a prima facie case and demonstrated that the irreparable injury and balance of convenience lies with it. Therefore, I hereby pass an interim order restraining the defendant to the extent indicated above from publishing the impugned advertisement or any other similar advertisement or depiction aimed at disparaging the goodwill and reputation of the plaintiffs brand DETTOL or its product DETTOL HEALTHY KITCHEN in all media including print and/or electronic media. Ordered accordingly.