

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 18th April, 2013

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CS(OS) 246/2013

MARICO LIMITED

..... Plaintiff

Through: Mr. Neeraj Kishan Kaul, Sr. Adv.
with Ms. Anuradha Salhotra, Mr.
Sumit Wadhwa & Mr. Zeeshan Khan,
Advs.

versus

ADANI WILMAR LTD

..... Defendant

Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr.
Neil Hilderth & Ms. Pratibha
Shreedhar, Advs.

AND

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CS(OS) 319/2013

MARICO LIMITED

..... Plaintiff

Through: Mr. Neeraj Kishan Kaul, Sr. Adv.
with Ms. Anuradha Salhotra, Mr.
Sumit Wadhwa & Mr. Zeeshan Khan,
Advs.

versus

ADANI WILMAR LIMITED

..... Defendant

Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr.
Neil Hilderth & Ms. Pratibha
Shreedhar, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.2129/2013 in CS(OS) No.246/2013 & IA No.2745/2013 in CS(OS) No.319/2013 (both of the plaintiff under Order 39 Rules 1&2 of the CPC).

1. The plaintiff in these two suits for permanent injunction restraining the defendant from broadcasting, printing and publishing advertisement of its product cooking oil under the brand name FORTUNE, averred by the plaintiff to be disparaging the goodwill and reputation of the plaintiff's product, also a cooking oil in the brand name SAFFOLA, and for damages, claims interim injunction restraining the defendant from publishing, printing, airing, broadcasting the impugned advertisement.

2. CS(OS) No.246/2013 with respect to advertisement on television came up first before this Court on 8th February, 2013 when summons/notice thereof was issued. The plaintiff soon thereafter instituted CS(OS) No.319/2013 with respect to advertisements in the Print Media and summons/notice thereof was also issued on 18th February, 2013. The counsels for the parties were heard for the purpose of interim relief from 25th February, 2013 till 18th March, 2013 when orders on these applications were reserved.

3. It is the case of the plaintiff:-

- (i). that the plaintiff and the defendant are competitors in the cooking oil segment;

- (ii). that the plaintiff's cooking oil sold under the Trademark SAFFOLA is a blended oil sold in four variants with composition (a) of SAFFOLA GOLD of 80% Refined Rice Bran Oil (RBO) and 20% of Refined Safflower Seed Oil; (b) of SAFFOLA TASTY of 60% Refined Corn Oil and 40% of Refined RBO; (c) of SAFFOLA ACTIVE of 80% of Refined RBO and 20% of Refined Soybean Oil; and, (d) of NEW SAFFOLA of 60% of Refined Safflower Seed Oil (Imported, High Oleic) and 40% of Refined RBO;
- (iii). that the defendant's product Fortune RBO is claimed to be composed only of RBO;
- (iv). that the plaintiff's product SAFFOLA has been disparaged by television commercials and print advertisements issued by the defendant by making patently false, unsubstantiated and misleading claims and statements in respect of Fortune RBO as being, (a) the 'healthiest oil in the world'; (b) healthier than the plaintiff's SAFFOLA brand edible oil; (c) 100% RBO being 100% healthy; and, (d) good not only for the heart, but also good for cholesterol immunity, skin and hormones;
- (v). that the disclaimers purportedly made in the advertisement of the defendant's being not visible, being vague and factually incorrect and misleading;

- (vi). the advertisements directly compare the defendant's product with the plaintiff's product in a malicious manner;
- (vii). that the advertisements are unfair, disparaging and cause irreparable harm and damage to the reputation and standing of the plaintiff;
- (viii). that the false and misleading health claims and statements in the advertisement are *prima facie* unlawful, being violative of the Food Safety and Standards Act and Rules;
- (ix). that the impugned advertisements are not in fair competition;
- (x). that the advertisements aforesaid have been published by the defendant to gain an unfair advantage over the plaintiff by dishonestly misleading the consumers of the plaintiff into believing that RBO is the healthiest oil in the world and the plaintiff's product which is a blend of RBO and Safflower Seed Oil/Corn Oil/Soya Bean Oil being less efficacious as it does not contain 100% RBO;
- (xi). that the claims of the defendant in the advertisement being without any reference to any research or scientific study;
- (xii). that the claims of the defendant in its advertisement being also violative of Section 24 of the Food Safety and Standards Act, 2006;

(xiii). that the advertisement is comparative in nature and puffs up the product of the defendant without any basis.

4. The senior counsel for the plaintiff has argued:-

(a). that the judgments of the Courts have though held puffing up of own product in advertisements to be not bad but only so long as it does not disparage the product of another;

(b). that the television advertisements of the defendant clearly compare the product of the defendant with the product of the plaintiff in as much as though the Trademark of the plaintiff is not shown or referred but the container of the product with which comparison is made is the same as the distinctive container/carton of the product of the plaintiff, leaving no manner of doubt in the minds of the viewers that the comparison of the product of the defendant is with the product of the plaintiff;

(c). that the defendant is claiming its product to be better for the reason of having the highest Oryzanol content - however under the Food Act and the Notifications thereunder, RBO is mandatorily required to have Oryzanol content of not less than one percent - since the product of the plaintiff is a blend of RBO and other oil, the same is bound to have less Oryzanol than the product of the defendant composition whereof is only of RBO; it is argued that the defendant thus, by providing 1000

mg Oryzanol in every 100 gm of its oils is just complying with statutory requirements and without disclosing so is deriving a mileage;

- (d). that the claim of the defendant of the health benefit of Oryzanol projected in its advertisements having been upheld, is false;
- (e). that the documents relied upon by the defendant in support of the health benefits claims advertised by it are from sponsored agencies or from articles in the newspapers and which have no authenticity;
- (f). from the documents filed by the defendant itself being a Paper presented by Mr. Michihiro Sugano and Mr. Etsuko Tsuji titled ***RBO and Cholesterol Metabolism*** presented at VIIth Asian Conference of Nutrition it is shown that the finding is of blend of 7 parts of RBO with 3 parts of Safflower Oil unexpectedly enhancing the cholesterol-lowering potential of RBO. It is thus argued that the claim of the defendant in its advertisements of 100% RBO being better than the blended oil of the plaintiff is false and misleading;
- (g). that the plaintiff had also lodged a complaint against the said advertisement with the Advertising Council of India and which complaint was partly allowed;
- (h). that once the documents of the defendant itself show the falsity of the claim of the defendant of pure RBO being more effective

than a combination of RBO with Safflower Oil, the advertisement even if held to be not disparaging are definitely in violation of the Food Act and are liable to be enjoined on this ground;

- (i). no material has been placed by the defendant on record to show that Oryzanol reduces cancer as claimed in the advertisements of the plaintiff;
- (j). attention is invited to the Codex GUIDELINES FOR USE OF NUTRITION AND HEALTH CLAIMS (CSC/GL 23-1997) prescribing that health claims must be based on current relevant scientific substantiation and the level of proof must be sufficient to substantiate the type of claimed effect and the relationship to health as recognized by generally accepted scientific review of the data and scientific substantiation. It is thus argued that qua health products puffing up even is not permitted.
- (k). Reliance is placed on:-

➤ ***Dabur India Limited Vs. Colgate Palmolive India Ltd.***
2004 (29) PTC 401 (Del) – to contend that generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable;

- ***Karamchand Appliances Pvt. Ltd. Vs. Sh. Adhikari Brothers*** 2005 (31) PTC 1 (Del) – laying down that where a rival tradesman carries on an advertisement campaign disparaging or defaming the product of another tradesman, the latter is entitled to the relief of prohibitory injunction;
- ***Pepsi Co. Inc. Vs. Hindustan Coca Cola Ltd.*** 2003 (27) PTC 305 (Del)(DB) – laying down that though comparative advertising is permitted but only so long as it does not discredit or denigrate the Trademark or trade name or disparages the product of the competitor;
- ***Dabur India Ltd. Vs. Vs. Colortek Meghalaya Pvt. Ltd.*** (2010) 44 PTC 254 Delhi (DB) holding that in view of the law laid down by the Supreme Court in ***Tata Press Ltd. Vs. MTNL*** (1995) 5 SCC 139 false, misleading, unfair or deceptive advertising is not protected commercial speech and the earlier judgments holding 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 are no longer good law. It was further held that while hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if does so, the advertiser must

have some reasonable factual basis for the assertion made and it is not possible 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.

(l). It is argued that the health provisions were not noticed in the aforesaid judgments.

5. Per contra, the senior counsel for the defendant has argued:-

- (i). that a distinction has to be carved out between denigrating the goods of competitor and exhorting the virtues of one's own goods;
- (ii). that this Court is at this stage to take only a *prima facie* opinion and not to render any final finding on the correctness or otherwise of the claims in the advertisement of the defendant;
- (iii). that the plaintiff is not entitled to any interim relief having concealed from this Court that it had first approached the Advertising Council of India and its complaint was still pending and which Council held that the claim of the defendant of being the healthiest oil in the world was an absolute claim not adequately substantiated and thus misleading by implication and has upheld the complaint of the plaintiff to the said extent but not upheld the complaint of the plaintiff to the effect that the product of the defendant was recommended by doctors all over the world as the same was not found mentioned in the

advertisement of the defendant;

- (iv). it is argued that the plaintiff cautiously chose the remedy of Advertising Council of India and could not have subsequently instituted this suit suppressing the said aspect. Reliance in this regard is placed on *Reckit Benckiser (India) Limited Vs. Naga Limited* 2003 III AD (DELHI) 641;
- (v). that the plaintiff in para 18 of CS(OS) No.246/2013 has not portrayed the advertisement of the defendant correctly;
- (vi). that there is no wrong representation in the claim that RBO is the healthiest;
- (vii). that there is sufficient disclaimer prominently visible in the advertisement;
- (viii). that the reliance by the plaintiff on the report, of a blend being healthier, is misconceived in as much as the said reliance is on the ratio of 70:30 while the ratio in the products of the plaintiff is 80:20 or 60:40;
- (ix). that the advertisement of the defendant only exhorts the virtues of RBO;
- (x). attention is drawn to other RBOs namely 'Ricela', 'Nutrela' and 'California Rice Oil Company' and downloads from their websites are handed over to show that they also are claiming RBO to be the healthiest and it is argued that the plaintiff has

dragged only the defendant and not the said three other manufacturers and marketers of RBO;

- (xi). it is argued that the plaintiff has approached this Court with a specific case of the advertisement disparaging the product of the plaintiff and cannot now be permitted to base its case on generic disparagement as has been sought to be argued;
- (xii). it is contended that the container of the other product shown in the television advertisement of the defendant is not distinctive of the plaintiff and in this regard photographs of other products with similar containers are shown;
- (xiii). attention is invited to *Hindustan Unilever Limited Vs. Cavincare Private Limited* 2010(44)PTC270(Del) laying down that every disparagement is not actionable and for disparagement to be actionable it should such as to bring it within the tort of malicious falsehood and the plaintiff as a result of the same should be shown to have suffered a special damage;
- (xiv). reliance is placed on *Dabur India Ltd. Vs. Wipro Limited* 2006 (32) PTC 677 (Del) laying down that it is permissible for an advertiser to proclaim that its product is the best even though that necessarily implies that all other similar products are inferior;
- (xv). reliance is placed on the Report of the Sixteenth Session of the

Codex Committee on Fats and Oils recording that the delegation from India comprising of Dr. M.K. Kundu, Department of Sugar & Edible Oils, Ministry of Food & Consumer Affairs, Government of India had proposed inclusion of the development of provisions for RBO and its specific nutritional qualities in the Standards for Named Vegetable Oils;

(xvi). attention is drawn to the representation made by the plaintiff on its website to the effect that studies have shown that a right combination of Safflower Oil and RBO is more effective in reducing cholesterol than each of the oils singly and to the effect that Oryzanol present in RBO is known for its cholesterol lowering ability and on the basis thereof it is argued that the advertisement of the defendant to which objection is taken are not different;

(xvii) it is contended that the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 is not applicable to food articles;

(xviii) reliance is placed on the RICE BRAN AND ITS MAIN COMPONENTS: POTENTIAL ROLE IN THE MANAGEMENT OF CORONARY RISK FACTORS by A.F.G. Cicero and G. Derosa on the RBO and it is contended that the defendant in its evidence will prove the truthness of the qualities of its product represented in the advertisement.

6. The senior counsel for the plaintiff in rejoinder has argued that the plaintiff is not complaining about the quality of the defendant's product and the issue for consideration is whether 100% RBO is superior to blended oils. It is further argued that reference to the earlier judgments is of no avail in view of the Division Bench judgment in *Dabur – Colortek* supra. It is contended that the defendant has been unable to demonstrate any factual basis for the claim in its advertisement and since the products of the plaintiff comprises of RBO having Oryzanol, the defendant is not entitled to proclaim its product only as having benefits of Oryzanol. It is contended that the write-ups relied upon by the defendant are industry sponsored articles and not based on scientific studies. It is contended that Codex deals with International Standardization and is not concerned with health claims. It is argued that the claim of the defendant in the advertisements of the pure RBO being better than blended oil has been falsified from the defendant's own documents. In response to the argument of concealment it is stated that the present suit was filed within one day of approaching the Advertising Council of India and the plaintiff cannot be said to have elected its remedy or by approaching the Advertising Council of India having given up the right of approaching this Court.

7. I have on the anvil of settled principles, carefully viewed the electronic and the print media advertisements to gauge whether any *prima facie* case of disparagement of the product of the plaintiff is made out.

8. The electronic/television advertisement proclaims:-

(A). RBO as the healthiest oil in the world;

- (B). RBO is healthier than other cooking oils shown in the advertisement;
- (C). 100% RBO is better than other cooking oils though also having RBO but which are not 100% RBO;
- (D). 100% RBO is good for heart, cholesterol, immunity, skin and hormones;
- (E). the entire world is using 100% RBO.

9. The print media advertisement proclaims:

- A. Oryzanol is a heart healthy micro-nutrient with proven cholesterol lowering effect and also known to help lower bad cholesterol.
- B. Though other cooking oils also say the same about Oryzanol but are not rich in Oryzanol content.
- C. A comparison of the Oryzanol content per 100 grams of three cooking oils i.e. (i) Saffola Gold of the plaintiff; (ii) Sundrop Heart; and,(iii) Fortune Rice Bran Health of the defendant along with their prices per litre and in which the product of the plaintiff is shown to be having 400 mg of Oryzanol at the cost of Rs 140/litre; Sundrop Health to be having 500 mg of Oryzanol at Rs 165/litre; and, the product of the defendant to be having 1000 mg at Rs 115/litre.

- D. That the daily requirement of the body for Oryzanol is 300 mg.
- E. An average Indian consumes 33 grams of edible oil per day and to meet the daily requirement of 300 mg Oryzanol, the oil must contain 910 mg of Oryzanol per 100 grams.
- F. That is why the defendant's product has been designed with 1000mg of Oryzanol per 100 grams of edible oil to meet the requirement of the body at normal levels of oil consumption.
- G. Though Oryzanol is present in many health oils but not in enough quantity.

10. Having analyzed the impugned advertisements, now the settled principles on the anvil whereof the claim for disparagement is to be decided shall be examined.

11. The New International Websters' Comprehensive Dictionary defines disparagement to mean, "to speak of slightly, undervalue, to bring discredit or dishonor upon, the act of deprecating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth".

12. The courts, while dealing with such issues, have frequently referred to ***De Beers Abrasive v. International General Electric Co.*** 1975 (2) All ER 599 and which was cited by the senior counsel for the defendant also during hearing and which sums up the law relating to false advertising causing injury to a 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 goods....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.”

13. The Division Bench of this Court in ***Pepsi Co Inc.*** supra held that a tradesman by comparison cannot slander or defame the goods of the competitor nor call them bad or inferior. Thus 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*** supra and should not be of a slighting or ‘rubbishing’ nature.

14. The subsequent Division Bench in ***Dabur-Colortek*** echoed the same view as under:-

“In Pepsi Co. it was also held that certain factors have to be kept in mind while deciding the question of disparagement. These factors are: (i) Intent of the commercial, (ii) Manner of the commercial, and (iii) Story line of the commercial and the message sought to be conveyed. While we generally 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 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.”*

15. ***Mc Donalds Hamburgers Ltd. Vs. Burgerking (UK) Ltd.*** [1987] F.S.R. 112 followed in ***Glaxosmithkline Consumer Healthcare Ltd. Vs. Heinz India*** MANU/DE/3273/2010 held that advertisements are not to be read as if they were some testamentary provision in a Will or a clause in some agreement with every word being carefully considered and the words as whole being compared. ***Heinz India*** further held that in determining the meaning of the impugned advertisement, the Court has to take into account the fact that public expects a certain amount of hyperbole in advertising and the test to be applied is whether a reasonable man would take the claim being made as one made seriously and will have to take it with a large pinch of salt. In the facts of that case, the use of the term ‘cheap’ in relation to the competitors’ product was held to be disparaging. However a claim that the

Horlicks boy is taller, stronger and sharper as opposed to the Complan boy was held to be not disparaging. It was held that a trader was entitled to advertise that his product has a cost or price advantage over the rival's goods as long as it is accurately done (it may be mentioned that the plaintiff has not controverted the Oryzanol content and the price of the products as depicted in the impugned print advertisement). It was further yet held that showing the Horlicks boy to be stronger, taller and sharper in comparison to the Complan boy was at best an instance of puffing. It is worth highlighting that it has also not been the plea or argument of the plaintiff in the present case that the claims in the advertisement of the defendant, of the requirement by the human body of 300 mg of Oryzanol daily or of the average daily consumption in India of edible oil being 33 grams, are false.

16. The Division Bench in ***Dabur – Colortek*** after laying the following propositions relating to comparative advertising:-

*“Finally, we may mention that **Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.**, 1999 (19) PTC 741, was referred to for the following propositions relating to comparative advertising:*

- (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 competitors', 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.”*

held as under:-

*“These propositions have been accepted by learned Single Judges of this Court in several cases, but in view of the law laid down by the Supreme Court in **Tata Press** that false, misleading, unfair or deceptive advertising is not protected commercial speech, we are of the opinion that propositions (a) and (b) above and the first part of proposition (c) are not good law. While hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if does so, the advertiser must have some reasonable factual basis for the assertion made. It is not possible, therefore, for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival.”*

17. Now I will proceed to analyze the advertisements with the principles of law culled out hereinabove.

18. Though considerable time was spent by the plaintiff in arguing that the comparative product in the electronic/television advertisement is unmistakably of the plaintiff but once it is held that comparative advertising is permissible, the said argument has no relevance except to the extent that the customer in the said advertisement is shown as abandoning the

comparative product for the product of the defendant after being satisfied of the defendant's product being better. However in my opinion the same cannot be said to be denigrating the comparative product even it that be of the plaintiff, especially in the storyline of the advertisement and the message sought to be conveyed thereby.

19. The intent, storyline and the message sought to be conveyed by both the electronic/television as well as the print media advertisements is that RBO is the healthiest oil in the world, healthier than other cooking oils and better than cooking oils which are a blend of RBO and some other oil because 100% RBO has a higher quantity of Oryzanol which is good for heart, cholesterol immunity, skin and harmones. The plaintiff's own cooking oil also has RBO as a significant component and the plaintiff also in fact in its advertisements and website has been claiming similar if not the same benefits of Oryzanol. No challenge even otherwise, neither in the pleadings nor in the arguments is made to the benefits of Oryzanol or as aforesaid to the daily requirement of the human body of Oryzanol or to the Oryzanol content in the products of the plaintiff and of the defendant. In the electronic/television advertisement the product of the plaintiff is not even named and in the print media advertisement the product of the plaintiff though is named but only to represent its Oryzanol content and price and which is not stated to be wrong or false. I have not found any part of either of the impugned advertisements to be denigrating the product of the plaintiff. The only thing which the advertisements do is to inform the consumer that the Oryzanol content in the product of the plaintiff is less than that required by the human body and that the Oryzanol content in the

product of the defendant satisfies the daily requirement for Oryzanol of the human body. The advertisements thus amount to nothing but comparing the advantages of the defendant's goods over the goods of others. No part of the advertisements are found to be saying that the plaintiff's goods are bad.

20. The plaintiff has however succeeded in showing from the defendant's own documents that as far as the cholesterol lowering ability of Oryzanol is concerned, the said ability is best in a blend of Oryzanol and Safflower Oil in the ratio of 70:30 than in 100% RBO. Notwithstanding it being held that the advertisements of the defendant are not disparaging the product of the plaintiff, it will thus still have to be considered whether in the light thereof the claim of the defendant in its advertisement particularly the electronic/television one, of 100% RBO being better than other cooking oils though also having RBO, is untrue and the effect thereof.

21. As aforesaid though the settled position in law as noticed in *Dabur – Colortek* also was that a “tradesman can say that his goods are better than his competitors’ even though such statement is untrue” but the Division Bench in *Dabur – Colortek* on the basis of the judgment of the Supreme Court in *Tata Press* supra held the same to be no longer good law. Before applying this aspect to the present controversy, I may add that *Tata Press* is not found to be dealing with disparagement at all and was concerned with the question as to what extent commercial speech is permissible as a fundamental right and while laying down that commercial speech is a part of fundamental right as envisaged under Article 19(1)(a) of the Constitution of India and that there should be less impediments in commercial speech as the

economic system of the country is structured on the information which is provided by advertisements by way of dissemination of information, held that any commercial speech which is misleading, false or deceptive can be restrained by the State and such advertisement can be regulated and prohibited by the State and would be hit by Article 19(2) of the Constitution. Perhaps relying on the latter of the aforesaid observations the Division Bench in *Dabur–Colortek* held *Tata Press* to be overruling the settled position earlier prevalent that a tradesman is entitled to declare his goods to be the best in the world even though the declaration is untrue. It is also worth mentioning that though *Tata Press* is a judgment of the year 1995 but none of the subsequent judgments on disparaging are found (at least by me) to have interpreted it as has been interpreted by the Division Bench in *Dabur–Colortek* i.e. of overruling the settled principle of law relating to comparative advertising. However having said so, this Bench is bound by what the Division Bench has said in *Dabur–Colortek*.

22. However even applying *Dabur – Colortek*, I am not able to find an actionable case in favour of the plaintiff. This is for the reason that the intent, manner and storyline and message of the advertisement of the defendant is of its product containing a higher quantity of Oryzanol (and which follows from being 100% RBO) sufficient to meet the daily requirement of human body of Oryzanol, and which the other products do not, is better. The storyline and the message conveyed by the advertisements of the defendant is not about the comparative cholesterol lowering ability of Oryzanol and which is shown to be higher in the case of a blend of RBO with Safflower Oil in the ratio of 70:30 than 100% RBO; rather the

advertisement/website downloads of the plaintiff handed over during the course of arguments themselves inform the said fact to the customers. The Division Bench in *Dabur– Colortek* has also emphasized on the intent of the advertisement as understood from its storyline and message sought to be conveyed, being factors to be kept in mind while deciding the question of disparagement. Not only so, it was further held that while promoting its product the advertiser may while comparing it with a rival, make an unfavorable comparison but that might not necessarily affect the storyline and message of the advertised product or have that as its overall effect. It thus cannot be said that failure of the defendant to highlight or disclaim in its advertisement, about the cholesterol lowering ability of Oryzanol, is untruth of a nature which comes in the way of its proclamation in the advertisement of 100% RBO being better than a blend of RBO with some other oil. I am therefore on this score also unable to find a case of disparagement to have been made out.

23. It also has to be noted that even the Division Bench in *Dabur-Colortek* acknowledges that what the Courts need to consider in such cases is whether the impugned advertisement is ‘by and large truthful’ and that an advertiser must be given enough room to play around in the grey areas in the advertisement brought out by it and further that the plaintiff ought not to be hyper-sensitive. Viewed in this light, the Courts cannot adopt a hyper-technical view and penalize the defendant for not disclosing each and every detail regarding the cholesterol lowering abilities of Oryzanol so long as the intent, storyline and message sought to be conveyed by the advertisement is not entirely untrue.

24. The promotion of a robust market for trade and commerce requires that the Courts grant some latitude to the advertisers in designing and crafting their pitch to the consumers and the tendency to scrutinize such advertisements with a magnifying glass must be eschewed unless of course the claims made are found to be totally unsubstantiated and to have no basis in reason or logic.

25. Notice may also be taken of *Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.* (1999) 7 SCC 1, though with respect to misleading advertisements, but in the context of Unfair Trade Practice under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969. The MRTP Commission in that case had granted an interim injunction against the advertisement which was stated to be making misleading and false claims to gain unfair advantage in the market place. The Supreme Court however vacated the said interim injunction and held that the claims in that advertisement could be dislodged only after evidence has been recorded and not at the interim stage.

26. I am therefore unable to find the plaintiff to have made a *prima facie* case for grant of interim injunction. The applications are accordingly dismissed. However nothing contained herein shall come in the way of final adjudication of the suit.

RAJIV SAHAI ENDLAW, J

APRIL 18, 2013

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