* **HIGH COURT OF DELHI: NEW DELHI**

\+ **FAO (OS) No. 625 of 2009**

Judgment reserved on: December 18, 2009

% Judgment delivered on: February 2, 2010

Dabur India Ltd.
8/3, Asaf Ali Road
New Delhi -110002. …Appellant

Through: Mr. Sudhir Chandra, Sr. Adv. with Mr. Hemant Singh & Ms. Mamta R. Jha and Mr. Sumit Rajput, Advocates.

Versus

1. M/s Colortek Meghalaya Pvt. Ltd.
   15th Mile, G.S. Road, Byrnihat
   District Ri-bhoi
   Meghalaya 793101.

2. M/s Godrej Sara – Lee
   Pirjoshanagar
   Eastern Express Highway
   Vikhroli (E)
   Mumbai 400079. …Respondents

Through: Mr. Ashok Desai, Sr. Adv. with Mr. Rajiv Tyagi, Advocate.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Appellant manufactures and markets, among other things, a mosquito repellant cream under its brand name Odomos and Odomos Naturals. The Respondents also manufacture a mosquito repellant cream, but under the brand name Good Knight Naturals.

2. The Respondents telecast their advertisement/commercial of Good Knight Naturals mosquito repellant cream and according to the Appellant, the advertisement/commercial disparages its product.

3. The question that arises before us is this: Does the commercial telecast by the Respondents disparage the product of the Appellant and if so, whether the Appellant is entitled to an injunction against the telecast. In our opinion, the answer to the first question is in the negative. Consequently, the second question does not arise. To this extent, we confirm the view taken by a learned Single Judge in the impugned order.

4. The commercial in question is in Hindi but for convenience, the story board is reproduced below in Hindi (as it appears) and its translation in English.

STORY BOARD

Video	Audio(Hindi)	Audio (English Translation)
	दो-दो पार्टियां हो रही है	Two parties are going on.
	एक बच्चों की, एक मच्छरों की	One for the kids and the one for mosquitoes.
	अब कहने को मॉस्किटो रीपेलेन्ट क्रीम है, पर लगाओ तो मुसीबत... न लगाओ तो मुसीबत। लगाओ तो रैशेस, एलर्जी का डर... ऊपर से चिप-चिपी	Just to say there are Mosquito Repellant Creams. But if you apply them it's a problem and if you don't, even then it is a problem. If you apply you get rashes, there is a risk of allergy and on top of that its sticky
	और न लगाओ तो मच्छरों की ऐश... तो करें क्या... वही तो बताने आई हूँ... गुड नाइट नैचुरल्स	and if you don't then its a fun time for mosquitoes. So what do we do? That is what I have come here to tell you. Good night naturals.
	तुलसी...	Made of Tulsi...

STORY BOARD

Video	Audio (Hindi)	Audio (English Translation)
	लैवेन्डर....	Lavender...
	और मिल्क प्रोटीन से बनी...	And Milk Protein...
	गुड नाइट नैचुरल्स मॉस्किटो रीपेलेन्ट क्रीम...	Good Knight Naturals Mosquito Repellent Cream...
	मच्छरों की हार...	Mosquitoes lose...
	... स्किन से प्यार।	...love with your skin

5. The submission of the Appellant is that its product Odomos is an extremely popular mosquito repellant cream and it enjoys over 80% of the market share all over the country and in some parts of the country it enjoys a 100% market share. The sales of the Appellant's product run into crores of rupees and the advertisement and promotion expenses also run into crores of rupees.

6. It is averred that the commercial of the Respondents' product was telecast on a news channel on 8th October, 2009. We are told that it has appeared on several occasions thereafter. According to the Appellant, the commercial disparages its product and, therefore, the Respondent should be injuncted from further telecasting it. It is submitted that even though there is no direct or overt reference to the Appellant's product, since the Appellant's product enjoys a huge market share, the commercial is obviously targeting it. Serious objection was taken to the suggestion in the commercial that the Appellant's product causes rashes, allergy and is sticky.

7. On these broad facts and submissions, the Appellant preferred CS (OS) No. 2029/2009 along with an application for injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure being IA No.13875/2009.

8. A learned Single Judge heard the injunction application and by the impugned order dated 4th December, 2009 expressed the view

that the commercial does not fall within the tort of "malicious falsehood" and that it was not directed against the Appellant. The learned Single Judge, therefore, rejected the application for injunction and that is how the Appellant is now before us.

9. At the outset, we may state that there is a reference made by the learned Single Judge to the use of Citronella in the product of the parties and there was some debate before us whether "oil of Citronella" is harmful to the human skin or not. In our opinion, there is absolutely no need to get into this controversy because the commercial does not even remotely suggest anything about the use or otherwise of "oil of Citronella". If we jump into this controversy, we would really be diverting our focus from the main issue in this case.

10. In ***Tata Press Ltd. v. MTNL & Ors., (1995) 5 SCC 139*** (paragraph 25) the Supreme Court held that "commercial speech" is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. However, what is "commercial speech" was not defined or explained. In fact, it does not appear to be possible to clearly define or explain "commercial speech" and, in any event, for the purposes of this case it is not necessary for us to do so. The reason for this is that the Supreme Court has said in ***Tata Press Ltd.*** (paragraph 23 of the Report) that advertising as a "commercial speech" has two facets thereby postulating that an advertisement is a species of commercial speech. The Supreme Court further said as follows:-

> "23. ….Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech"….."

11. Earlier, the Supreme Court referred to ***Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., (1975) 421 US 748*** and observed in paragraph 15 that it is almost settled law in the United States that though "commercial speech" is entitled to the First Amendment protection, the Government was completely free to recall "commercial speech" which is false, misleading, unfair, deceptive and which proposes illegal transactions.

12. In ***Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1***, the Supreme Court observed in paragraph 36 of the Report that a distinction would always have to be made and latitude given for an advertisement to gain a purchaser or two. This latitude cannot and does not mean any permission for misrepresentation but only a description of permissible assertion. In this context, reliance was placed by the Supreme Court on ***Anson's Law of Contract (27th Edn.)*** which says that commendatory expressions are not dealt with as serious representations of fact. The view remains the same in the ***28th Edition*** (page 239). "A similar latitude is allowed to a person who wants to gain

a purchaser, though it must be admitted that the borderline of permissible assertion is not always easily discernible."

13. The Supreme Court recognized and applied in ***Colgate Palmolive (India) Ltd.*** the rule of civil law, "*simplex commendatio non obligat*" – simple commendation can only be regarded as a mere invitation to a customer without any obligation as regards the quality of goods. It was observed that every seller would naturally try and affirm that his wares are good enough to be purchased (if not better than those of a rival).

14. On the basis of the law laid down by the Supreme Court, the guiding principles for us should be the following:-

(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 representations of fact but only as glorifying one's product.

To this extent, in our opinion, the protection of Article 19(1)(a) of the Constitution is available. However, if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection.

15. There is one other decision that we think would give some guidance and that is ***Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd.***

& Another, 2003 (27) PTC 305 (Del.) (DB). In this decision, a Division Bench of this Court held that while boasting about one's product is permissible, disparaging a rival product is not. The fourth guiding principle for us, therefore, is: (iv) While glorifying its product, an advertiser may not denigrate or disparage a rival product. Similarly, in ***Halsbury's Laws of England (Fourth Edition Reissue, Volume 28)*** it is stated in paragraph 278 that "[It] is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product." This view was followed, amongst others, in ***Dabur India Ltd. v. Wipro Limited, Bangalore, 2006 (32) PTC 677 (Del)***. "[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 plaintiff's product is inferior to that of the defendant."

16. 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.

17. In our opinion, it is also important to keep in mind the medium of the advertisement. An advertisement in the electronic media would have a far greater impact than an advertisement in the print media. In ***D.N. Prasad v. Principal Secretary, 2005 Cri LJ 1901*** the Andhra Pradesh High Court observed that a telecast reaches persons of all categories, irrespective of age, literacy and their capacity to understand or withstand. The Court noted that the impact of a telecast on the society is phenomenal. Similarly, it was observed in ***Pepsi Co.*** that a vast majority of viewers of commercial advertisements on the electronic media are influenced by visual advertisements "as these have a far reaching influence on the psyche of the people …" Therefore, an advertiser has to virtually walk on a tight rope while telecasting a commercial and repeatedly ask himself the questions: Can the commercial be understood to mean a denigration of the rival product or not? What impact would the commercial have on the mind of a viewer? No clear-cut answer can be given to these questions and it is for this reason that this Court has taken a view that each case has to be decided

on its own facts. (See ***Reckitt Benckiser (India) Ltd. v. Cavinkare Pvt. Ltd., ILR (2007) II Delhi 368***, paragraph 17). Consequently, this Court has been called upon to decide the same issue time and time again resulting in the same and very large number of decisions being cited.

18. On balance, and by way of a conclusion, we feel that notwithstanding the impact that a telecast may have, since commercial speech is protected and an advertisement is commercial speech, an advertiser must be given enough room to play around in (the grey areas) in the advertisement brought out by it. A plaintiff (such as the Appellant before us) ought not to be hyper-sensitive as brought out in ***Dabur India***. This is because market forces, the economic climate, the nature and quality of a product would ultimately be the deciding factors for a consumer to make a choice. It is possible that aggressive or catchy advertising may cause a partial or temporary damage to the plaintiff, but ultimately the consumer would be the final adjudicator to decide what is best for him or her.

19. Having said this, we are of the opinion after having gone through the commercial not only in its text (as reproduced above) but also having watched it on a DVD that there is absolutely nothing to suggest that the product of the Appellant is targeted either overtly or covertly. There is also nothing to suggest that the commercial denigrates or disparages the Appellant's product either overtly or covertly. There is also no hint whatsoever of any malice involved in the

commercial in respect of the Appellant's product – indeed, there is no requirement of showing malice.

20. Learned counsel for the Appellant submitted before us that since his client has over 80% of the market share in the country and a 100% market share in some States, the obvious target of the commercial is the product of the Appellant. In our opinion, this argument cannot be accepted. The sub-text of this argument is an intention to create a monopoly in the market or to entrench a monopoly that the Appellant claims it already has. If this argument were to be accepted, then no other mosquito repellant cream manufacturer would be able to advertise its product, because in doing so, it would necessarily mean that the Appellant's product is being targeted. All that we are required to ascertain is whether the commercial denigrates the Appellant's product or not. There is nothing in the commercial to suggest a negative content or that there is a disparagement of the Appellant's product. The commercial merely gives the virtues of the product of the Respondents, namely, that it has certain ingredients which perhaps no other mosquito repellant cream has, such as tulsi, lavender and milk protein. While comparing its product with any other product, any advertiser would naturally highlight its positive points but this cannot be negatively construed to mean that there is a disparagement of a rival product. That being so, whether the Appellant's product is targeted or not becomes irrelevant.

21. Learned counsel for the Appellant further submitted that the use of expressions such as an apprehension of getting rashes and allergy or an allegation that other creams cause stickiness amounts to disparagement of the Appellant's product. We cannot agree with the submission of learned counsel. There is no suggestion that any other mosquito repellant cream causes rashes or allergy or is sticky. All that it is suggested is that if a mosquito repellant cream is applied on the skin (which could be any mosquito repellant cream) there may be an apprehension of rashes and allergy. Generally speaking, this may be possible depending on upon the quality of the cream, the sensitivity of the skin of the consumer and the frequency of use etc. – we cannot say one way or the other. The commercial does not suggest that any particular mosquito repellant cream or all mosquito repellant creams cause rashes and allergy. In fact, the Respondents are also trying to promote a mosquito repellant cream and it can hardly be conceived that all mosquito repellant creams (which would naturally include the Respondents' product) cause rashes or allergy. All that the Respondent's are suggesting is that since their product contains tulsi, lavender and milk protein such apprehensions are greatly reduced or that they should not reasonably exist.

22. With regard to stickiness, this is entirely a matter of opinion. What one person may perceive as stickiness, may not be considered as stickiness by another. No injunction can be granted in a case such as the present on an averment based on a perception. As mentioned above, a

plaintiff should not be hyper-sensitive. So far as this case is concerned, we are left with an impression that the Appellant is being hyper-sensitive. It does appear that the entry of another product in the market may challenge the monopoly or the near monopoly of the Appellant and this Court is being used to ward off that challenge through the injunctive process.

23. 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.

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.

24. Having considered all the facts of the case, we are of the opinion that there is no merit in this appeal. There is no occasion to interfere with the impugned order of the learned Single Judge.

25. The appeal is dismissed.

MADAN B. LOKUR, J

February 2, 2010 **MUKTA GUPTA, J**
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