

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

RESERVED ON : 13.05.2010

DECIDED ON: 12.11.2010

+ **I.A. No.15233/2008 (O-39, R-1&2 CPC) in CS (OS) 2577/2008**

GLAXOSMITHKLINE CONSUMER HEALTHCARE LTD Plaintiff

Through: Mr. Chander M. Lall with Mr. Subhash Bhutoria, Advocates.

Versus

HEINZ INDIA (P) LTD Defendant

Through: Mrs. Anuradha Salhotra with Mr. Rahul Chaudhry, Mrs. Bhavna Gandhi and Mr. Sumit Wadhwa, Advocates.

I.A. Nos.15647/2008 (O-39, R-1&2 CPC) in CS (OS) 2646/2008

HORLICKS LTD. & ANR. Plaintiffs

Through: Mr. Chander M. Lall with Mr. Subhash Bhutoria, Advocates.

versus

HEINZ INDIA (P) LTD. E+ Defendant

Through: Mrs. Anuradha Salhotra with Mr. Rahul Chaudhry, Mrs. Bhavna Gandhi and Mr. Sumit Wadhwa, Advocates.

I.A. No.(un-numbered) (O-39, R-1&2 CPC) in CS(OS) 547/2010

HEINZ INDIA (P) LIMITED Plaintiff

Through: Mrs. Anuradha Salhotra with Mr. Rahul Chaudhry, Mrs. Bhavna Gandhi and Mr. Sumit Wadhwa, Advocates.

versus

GLAXO SMITHKLINE CONSUMER HEALTHCARE Defendant

Through: Mr. Chander M. Lall with Mr. Subhash Bhutoria, Advocates.

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT**

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

MR. JUSTICE S.RAVINDRA BHAT

1. This common order will dispose of the various rival applications, for temporary injunctions preferred by the parties. The plaintiffs, M/s Glaxo Smithkline Consumer Health Care Ltd., (the sole plaintiff in the first suit and second plaintiff in CS (OS) 2646/2008) and Horlicks Limited United Kingdom (which is the first plaintiff in CS (OS) 2646/2008) are hereafter collectively referred to as “Horlicks”. The defendant in these suits and who is also the plaintiff in CS (OS) 547/2010 (originally instituted before the Bombay High Court and transferred to the file of this Court by orders of the Supreme Court) is hereafter referred to, for convenience, as “Heinz”.

2. Horlicks states that in August, 2004, it had instituted a civil suit in the Calcutta High Court seeking permanent injunction against Heinz alleging that it had issued a disparaging advertisement in respect of its product “Horlicks”, as against Heinz’s product Complian. It is stated that a temporary injunction was issued against Heinz with a direction to show the impugned advertisement without disparaging content. This, it is alleged, led to publication of another advertisement, which in turn resulted in initiation of contempt proceedings. Horlicks apparently filed another suit before the Madras High Court impugning an advertisement by Heinz in which its product Complian depicted a growing cup, taller than the other two cups with rival products, which were stagnant. The Madras High Court, it is alleged, allowed Heinz to use the comparative cups without any letter, along with the Complian cup provided the colour of the two cups were the same.

3. Heinz instituted a Civil Suit in Bombay High Court alleging disparagement against Horlicks. It impugned a moving advertisement, which comprised of a 30 Second footage with

audio and video lines. This advertisement placed the two rival products, i.e. Horlicks and Heinz's Complan alongside each other in baskets held by two mothers; the advertisement also indicated the maximum retail price of the two products. It was alleged that the impugned moving advertisement made disparaging remarks against Complan in regard to nutrients in health value as compared with Horlicks' product.

4. The points of distinction between the present three suits and the suits filed in the Madras and Calcutta High Court were that there was no specific reference to Horlicks. The Bombay suit, filed before the High Court, on 12.11.2008 sought for various reliefs including permanent injunction. The Bombay suit had impugned a moving advertisement dated 21.10.2008. Heinz's attempt to secure *ad interim* relief was unsuccessful. A statement was made on behalf of Horlicks that even while retaining the comparative costs of the two rival products, mention would be made of the flavor as well as the price of the product and that the products would refer to only one flavor. Dissatisfied with the Single Judge's Order, Heinz appealed to the Division Bench, which declined to grant the injunction and permitted withdrawal of the appeal by its order dated 2.12.2008. The Division Bench in its order stated that the *prima facie* view taken by the learned Single Judge cannot be taken into consideration for the purpose of finally disposing of motion for temporary injunction; even while not interfering with the orders of the single Judge, the parties were left with the liberty to argue their respective contentions in the pending motions for temporary injunction.

5. Horlicks, in the first suit, recounts the history of *inter se* litigation between the parties. In this suit (hereafter called as "first Delhi suit"), Horlicks complains of an advertisement issued by Heinz on 15.12.2008. It claims to have filed a suit in which an amendment was sought. The Court permitted Horlicks to withdraw the suit and file a fresh one, which was done. Consequently, the first suit was filed. The impugned advertisement was issued in the Television media on 11.12.2008 by Heinz. It shall be hereafter referred to as the "first Complan advertisement". The contents of the advertisement may now be briefly described. Kavita, (the "Horlicks mother") is out shopping when she is approached by another young mother, known to her (the "Complan mother"). The latter asks Kavita why she has started compromising on her child's health; to which, Kavita gets confused and seeks an explanation. The Complan mother explains by telling that she (Kavita) was buying a product made of cheap ingredients and that she

is compromising with her child's growth. Kavita then responds by asking whether she was compromising. The Complan mother then holds a bespectacled and fat child, (i.e. Kavita's child) and asks Kavita whether she knew that with Complan how fast her child could grow. Kavita dejectedly responds in the negative. At this stage, the Complan other mother picks up a Complan packet and states that it would help children grow twice as tall. The Complan mother elaborates this and highlights the product stating that it (Complan) has 23 vital nutrients and more protein, particularly quality milk protein and underlines that as the reason why Complan is better than any other health drink. Even as Kavita looks on the Complan mother emphasizes that intelligent mothers know that one cannot buy gold with the price of brass. At this, Kavita tells the Complan mother that she was made to understand wrongly and had been misled and from that day there would be no compromises. A visual shows her pushing away the Horlicks bottle, which she had earlier picked up and substitute it with a packet of Complan. The next shot highlights Complan's quality and attributes.

6. Heinz's second advertisement opens with the same cast, i.e. Kavita, the Horlicks mother and the Complan mother in a departmental store. The Complan mother's son picks up a Complan pack; at this Kavita queries the former as to how her son is so tall and healthy. The Complan mother replies that she gives the boy a health drink with better quality protein. Kavita then queries her as to what is meant by better quality protein. The Complan mother then explains "*Yes: Complan*". Kavita seeks an elaboration. At this stage, there is a female "voice over" which highlights that Complan has 23 vital nutrients, 18% protein and that too with better quality 100% milk protein. The camera then focuses on the Complan mother who says that these ingredients are essential for a child's growth. The Complan mother goes on to ask Kavita:

"have you ever read the label of cheap Horlicks?"

Kavita replies in negative. The Complan mother then states that it (with reference to Horlicks) contains "cheap products and ingredients" which means less proteins and less nourishment and then comments that if one wants one's child to grow tall and healthy there ought not to be any compromise. The last frame of this, second advertisement ends with a female voice over with the image of Complan flashing; the female voice urges

"drink Complan and see the difference".

7. Horlicks contends that its health food drink is essentially designed according to the international guidelines, i.e. United States Dietary Reference Intake and Codex providing for 100% daily requirement of iron, folic acid and several vitamins. It is stated that the Heinz advertisement deliberately suppresses that these nutrients are important in contributing to a child's growth; it is further disputed that children drinking Complan are getting higher rate of growth than those of drinking Horlicks. It is stated by representing that Complan is much better than any other health drink, Heinz's advertisement is giving a false impression that products other than Complan are compromising on the child's health and growth. Serious objection is taken to the insinuation that refers to use of the word 'compromise' in the context of the overall impact of the two advertisements upon the consumers. It is also argued that the explicit reference to gold and brass in first advertisement and even more direct reference to Horlicks containing "cheap" ingredients leading to compromise, amount to disparaging references and a slanderous attempt by Heinz to increase its market share through misleading advertisements. Horlicks takes objection to the use of the word 'Cheap', which it submits is in a derogatory manner and not a *bona fide* description of the product's attributes.

8. Horlicks' second suit seeks permanent injunction on almost identical terms, as in its first suit. Here, however, what is impugned are two comparative advertisements issued by Heinz in the print media. The first advertisement was issued on 02.12.2008 in Delhi Edition of Times of India; the same reads as follows: -

“(PHOTOGRAPH OF COMPLAN MOTHER WITH CHILD)”

Choosing a health drink for your growing child.

Do you know the difference between what is good and what is cheap?

Children are fussy eaters. As a caring mother you would want to give your child the best in his/her growing years. You need to be well informed so that you do not unknowingly compromise by choosing a cheaper health drink. Ensure your child gets the complete planned nourishment to help maximize his or her growth potential.

Proteins are essential building blocks of your child's growth. The quantity and quality of protein makes a significant difference to the way your child grows. It has been prove that milk protein is a complete protein. Milk Protein is far superior to incomplete proteins from other common and cheaper sources like barley and wheat.*

Please read the labels of health drinks carefully before you decide what is best for your growing child.

	<i>IMAGE OF COMPLAN BOX</i>	<i>IMAGE OF HORLICKS BOX</i>
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	<i>Complan for growth</i>	<i>The family nourisher</i>
<i>Main Ingredients</i>	<i>Milk</i>	<i>Malted Barley/Sugar and Wheat Flour</i>
<i>Quantity of protein</i>	<i>18%</i>	<i>11%</i>
<i>Source of protein</i>	<i>100% milk</i>	<i>Mostly cheaper sources</i>
<i>Number of nutrients</i>	<i>23</i>	<i>19</i>

(Based on the information on packs; may not be applicable to new Horlicks Life Strength & Stamina which is not recommended for children).

*So, with Complan, you can be sure you are not compromising when it comes to your growing child. Make a well informed choice and see your child grow “twice as fast”***

Complan is available in Chocolate, Natural, Kesar Badam, Strawberry, Caramel & Mango variants.

** National Institute of Nutrition, 1995*

*** Research conducted on children in 7-12 years age group over a period of one year.*

COMPLAN BOX

*Complan
Extra Growing Power”*

9. The second advertisement of 06.12.2008 issued in the Delhi Edition of Times of India reads as follows: -

“(PHOTOGRAPH OF COMPLAN MOTHER WITH CHILD)

What is more important to you while choosing a health drink?

Cheaper price or your child’s complete growth?

Children are fussy eaters. As a caring mother you would want to give your child the best in his/her growing years. You need to be well informed so that you do not unknowingly compromise by choosing a cheaper health drink. Ensure your child gets the complete planned nourishment to help maximize his or her growth potential.

Proteins are essential building blocks of your child’s growth. The quantity and quality of protein makes a significant difference to the way your child grows. It has been prove that milk protein is a complete protein. Milk Protein in Complan is far superior to incomplete proteins from other common sources like barley and wheat found in cheaper health drinks.*

Please read the labels of health drinks carefully before you decide what is best for your growing child.

	<i>“COMPLAN BOX” Complan for growth</i>	<i>HORLICKS BOX The family nourisher</i>
<i>Main Ingredients</i>	<i>Milk</i>	<i>Malted Barley/Sugar and</i>

		<i>Wheat Flour</i>
<i>Quantity of protein</i>	<i>18%</i>	<i>11%</i>
<i>Source of protein</i>	<i>Complete (100% milk)</i>	<i>Incomplete (mostly cheaper sources)</i>
<i>Number of nutrients</i>	<i>23</i>	<i>19</i>

(Based on the information on packs; may not be applicable to new Horlicks Life Strength & Stamina which is not recommended for children).

*Choose only Complan so that you do not compromise on your child's growth, and see him/her grow "twice as fast"****

Complan is available in Chocolate, Natural, Kesar Badam, Strawberry, Caramel & Mango variants.

** National Institute of Nutrition, 1995*

COMPLAN BOX

*** Research conducted on children in 7-12 years age group over a period of one year.*

*Complan
Extra Growing Power"*

Heinz's Case

10. Heinz's defence is identical in both the Delhi suits. Its position, in support of its temporary injunction claim - in the transferred Bombay suit - is also identical with such defence. It states that the advertisements issued by it were in self-defence, and in response to Horlicks' advertisement of 13th October, 2008, by which Complan was disparaged. It urged that Horlicks in that advertisement, unfairly attempted to wean away its customers. The relevant part of Heinz's allegations, in its pleadings, may be usefully seen, for this purpose, from the following extract of its written statement, in the first Delhi Suit: -

"The advertisement is a clear attempt by the Plaintiff to target the consumers of the goods sold under the COMPLAN brand and get them to change their brand loyalty by disparaging and denigrating the Defendant's product as can be seen from the following among various claims made by the Plaintiff in its impugned advertisement:

Slide 6 of the Advertisement: Song of COMPLAN Mother: My drink makes me taller! In reply on the Slide 7 & 8 the HORLICKS boy counts on his fingers and says: HORLICKS makes me Taller; Stronger; Sharper!

This comparison clearly states that while COMPLAN only helps the child to grow taller, HORLICKS helps the child the grow taller, sharper, and stronger. The consumers get the impression that the COMPLAN drink does not have sufficient nutritional value and is thus inferior to HORLICKS.

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In Slide 9 the Song of HORLICKS mother says: Its Proven!

However the plaintiff has not mentioned any parameters of comparison or the subject matter of any study to substantiate the said claims or any explanation as to how it is proven or by whom it is proven that the drink HORLICKS makes a child Taller, Stronger and Sharper while the drink COMPLAN only makes the child Taller.

Slide 10 the HORLICKS mother: Ok! What is the price of yours?

Slide 11 the COMPLAN Mother: Umm.... Rs. 174/-

Slide 12 the Son of the HORLICKS Mother: HORLICKS is only Rs. 128/-

Slide 13 the son of the COMPLAN mother excitedly says: Mom, we are higher in this.

This above comparison in the slides from 10 to 13 in conjunction with the slides 7 & 9 clearly gives the impression that the COMPLAN drink is higher in price with lesser nutritional value in comparison to the HORLICKS drink. This attempt by the Plaintiff was specifically designed to disparage and denigrate the reputation of Defendants drink COMPLAN in the eyes of the consumers. The Plaintiff could not accept the growing popularity of the Defendants drink COMPLAN and therefore decided to defame the product by releasing the said advertisement. In the slide 13, the child specifically makes the mockery of the value/price of the COMPLAN drink. The Plaintiff is deliberately and with the malafide intentional trying to create the wrong impression amongst the consumers of COMPLAN that they are only paying more price and are giving lesser nutritional value to their child by choosing to buy COMPLAN over HORLICKS.

Slide 14: We cut to the COMPLAN mom thinking and a HORLICKS banner moving behind. In the end the last slide shows the COMPLAN mother is thinking and the HORLICKS banner is moving behind in her direction. Thus, making the COMPLAN mother to think about changing from COMPLAN to HORLICKS. This advertisement is targeted to influence the loyal COMPLAN customers to change their drink to HORLICKS. Thus the Plaintiff are disparaging and denigrating the reputation of the Defendants popular drink COMPLAN by making comparison which is false and without any base."

11. Heinz denies any disparagement in its advertisements, in the Delhi suits. Horlicks' claim at market leadership in the food (malted) drink market at 43.1% (of the market share, as opposed to Heinz's alleged share of 11%) is denied. It is alleged that Complian's brand image has always been that of a complete health drink, containing all necessary nutrients for a child's growth. It submits that all its advertisements are focused and featured on the effect of its product on growing children. It alludes to Complian's previous brand image up to 2003 as one catering to

the sick and aged, and how, based on a study, after 2005, the brand positioning has been as that which helps children grow. Heinz refers to orders of the Madras High Court, and Calcutta High Court, in the two Horlicks suits and argues that the advertisements there did not involve any price or cost comparison, unlike in the Bombay action. It is alleged that Horlicks has scant respect for the process of law and has repeatedly indulged in offending activities to unfairly gain additional market share, by misleading advertisements.

12. Heinz justifies its advertisements impugned by Horlicks in the Delhi suits, saying that they have to be seen in the overall context of Horlicks' advertisements, impugned in the Bombay suit, and not in isolation. It is submitted that Complan, as a matter of fact, contains milk based protein, and 23 nutrients. In contrast, Horlicks' ingredients are not milk based, and contain 19 nutrients. It is further stated that such ingredients are conducive to growth, and Heinz's advertisements, which merely spell out facts, such as:

- (1) Complan's 100% milk based protein composition;
- (2) Ingredients being more expensive as compared with those of Horlicks;
- (3) Horlicks being cheaper priced than Complan.

cannot be objected to, or held to be disparaging. On the other hand, submits Heinz, Horlicks' advertisements imply that Complan does not have as good effects as the Horlicks drink.

13. It is stated that Horlicks has, in its advertisement underscored the price differential and, therefore, should not complain of disparagement when the same effect is spelt out in the Complan advertisements. It is further argued that comparative advertisement with reference to price differential attributes and qualities of the products - which includes the number of ingredients as well as their effects (in the case of food stuff etc). - can legitimately be portrayed without being called "disparaging".

14. Horlicks relies upon this Court's judgment reported as *Pepsico Inc. v. Hindustan Coca Cola* 2003 (27) PTC 305 to say that while "puffing" or exaggeration by trader or seller of goods, of his products, is permissible, disparaging rival product would not be justified. Reliance is also placed upon *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.* (1999) 7 SCC 1 where the Supreme Court held that a distinction should be made and due latitude given for an

advertisement to promote one's clientage. This latitude, it is submitted, does not extend to license to misrepresent.

15. Elaborating on the argument, Horlicks submits that advertisements particularly those in the electronic media can be powerful and that the advertiser has to walk a tight rope while telecasting the commercial - and always be alive to whether what is being conveyed denigrates the rival product and the likely impact of such a message. Reliance is also placed in this context upon the judgment reported as *Reckitt Benckiser (India) Ltd. v. Cavincare Pvt. Ltd.*, ILR (2007) II Delhi 368 and another judgment of the Andhra Pradesh High Court in *D.N. Prasad v. Principal Secretary* 2005 Cri LJ 1901. It is argued that taken as a whole, the impugned advertisements in the two Delhi suits have crossed the boundary of what is permissible puffing and actually denigrate Horlicks' product. It is submitted that repeated use of the expression 'cheap' in order to convey that if the product is used, it would result in compromising on the growth needs of the child, taken together with the visual portrayal, conveys a negative image implying that Horlicks is clearly an inferior product and that if mothers have health concern for their children, they ought to buy Complan.

16. Heinz argues, on the other hand, that its advertisements portray the truth about its product, and those of Horlicks. It is argued that the right to reach out to one's clientele is part of the Constitutionally guaranteed right to free speech, under Article 19 (1)(a) of the Constitution of India. Reiterating its averments that the advertisements impugned in the Delhi suit are to be taken together with the context of the Bombay suit, and the advertisements issued by Horlicks, in the first place, it is argued that after having called Horlicks cheaper than Complan with a view to market the product, on the basis of perceived cost (or price) advantage, it cannot be now argued that a different manner of highlighting the same idea, (by Heinz) amounts to product denigration, or slander. It is submitted that as far as use of expressions other than "cheap" is concerned, Heinz cannot be faulted, since Horlick's Mumbai advertisement (the subject matter of the Bombay suit) trumpets that Horlicks boys grow taller, stronger and sharper, in comparison with Complan mother's statement that boys drinking Complan are "taller".

17. It is submitted that while there is no dispute that a trader or seller of goods can exaggerate and "puff" his products to increase his sales, and that so long as he does not make derogatory references to rival products, equally, advertisements have the right to portray facts, and highlight

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aspects which are true. So long as this thumb rule of truthful portrayal of a rival's product, is maintained, an action for alleged disparagement cannot lie. In this context, reliance is placed on the judgment of the Division Bench reported as *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. and Godrej Sara – Lee* (FAO 625/2009, decided on 2.02.2010), particularly the following observations:

“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....”

In support of the argument that it has made fair and permissible comment, Heinz relies on various reports and studies to *prima facie* establish that milk based protein foods are superior to others. It is argued that Complan is therefore, undeniably superior, and better at assisting growth in children. It is argued that Complan does contain 23 nutrients, as compared with Horlick's 19 nutrients. Horlick's ingredients are priced cheaper than those of Complan. Therefore, submits Heinz, the advertisements issued by it are not disparaging. Heinz complains that Horlick's advertisements, impugned in the Bombay suit, are clearly disparaging, as they are aimed at showing Complan as ineffective, and expensive.

18. The above narration reveals that the issue, in the three suits, is whether Horlick's complaint about disparagement of its products in the advertisements issued by Hienz (which are the subject matter of the two Delhi suits) cross the boundary of permissible commercial speech. Likewise, the Court has to consider whether Horlick's advertisement, impugned in the Bombay suit, disparages Heinz's product, Complan.

19. The law relating to false advertisements, causing injury to a rival trader's goods, was expounded in several decisions in the 19th Century. These were re-visited in *De Beers Abrasive v. International General Electric Co.* 1975 (2) All ER 599 where the Court summarized the correct position as follows:

“What precisely is the law on this point? It is a blinding glimpse of the obvious to say that there must be a dividing line between statements that are actionable and those which

are not; and the sole question of a dry point of law such as we are discussing here is; where does the line lie? On the one hand, it appears to me that the law is that any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival's goods. Thus in the well known case of the three adjoining tailors who put notices in their respective windows reading: 'The best tailor in the world', 'The best tailor in this town', and 'The best tailor in this street', none of the three committed an actionable offence."

*Where, however, the situation is not that the trader is puffing his own goods, but turns to denigrate those of his rival, then, in my opinion, the situation is not so clear cut. Obviously 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'. Accordingly, I do not think such a statement would be actionable. At the other end of the scale, if what is said is: 'My goods are better than X's, because X's are absolute rubbish', then it is established by dicta of Lord Shand in the House of Lords in *White v. Mellin* (1895) AC 154, which were accepted by counsel for the defendants as stating the law, the statement would be actionable.*

*Between these two kinds of statements there is obviously still an extremely wide field; and it appears to me that, in order to draw the line, one must apply this test, namely, 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 defendant has pointed to a specific allegation of some defect or demerit in the plaintiff's goods. This is, I think, the test favoured by the learned editors of the last few editions of *Salmond on Torts*"*

20. In *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.* 1999 19 PTC 741, the Calcutta High Court considered the concept of negative advertisement. The Court, after considering several English decisions including *White v. Mellin* 1895 AC 154; *Bubbuck v. Wilkinson* 1899 (1) OB 86; and *De Beers Abrasive (supra)* held that:

"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 his 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 others.

IV) 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.

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 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.”

In *Pepsi Co. Inc. and Ors.*(supra) a Division Bench of this Court held that comparative advertising, which discredits or denigrates the trade mark or trade name of a rival is impermissible. The Division Bench held that:

“What is disparagement. The New International Websters' Comprehensive Dictionary defines disparage/disparagement to mean, "to speak of slightingly, 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, and degradation. The Concise Oxford Dictionary defines disparage as under, to bring dis-credit on, slightingly of and depreciateTo decide the question of disparagement we have to keep the following factors in mind namely; (i) Intent of commercial (ii) Manner of the commercial (iii) Storyline of the commercial and the message sought to be conveyed by the commercial. Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable.

Summing up the law the Court said that:

“It is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior. It has been so held in the following cases:

(i) Hindustan Lever v. Colgate Palmolive (I) Ltd AIR 1998 SC 526 .

(ii) Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr. 1999 1 PTC 741.

(iii) Reckitt & Colman of India v. Kiwi TTK Ltd. 1996 16 PTC 393.”

The judgment reported as *McDonalds Hamburgers Ltd v. Burgerking (UK) Ltd* [1987] F.S.R. 112, warned 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 a whole being compared”.

21. The Court’s approach was indicated in *Dabur (supra)*, by the Division Bench, where a large number of previous rulings were considered. It was observed that the following factors are to be kept in mind:

“(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.”

22. In determining the meaning in the impugned advertisement, the Court has to take into account the fact that the public expects a certain amount of hyperbole in advertising. The test is whether a reasonable man would take the claim being made, as one made seriously. The more precise and specific the claim, the more likely it was that the public would take it seriously. The Court will have to do what an ordinary man would do – take it with a large pinch of salt. (See *De Beers Abrasive Products Ltd (supra)* and *Vodafone Group Plc v. Orange Personal Communications Services Ltd* [1997] F.S.R. 34).

23. Now, coming to the facts of this case. Heinz’s advertisements have the following distinctive features:

- (1) All of them specifically refer to Horlicks, and are comparative advertisements.
- (2) Heinz emphasizes that its Complan has 23 nutrients, as compared to 19 in Horlicks;
- (3) Complan contains 100 percent milk protein
- (4) Milk protein is more conducive to children’s growth;

(5) Use of other drinks would compromise on the child's growth (this element is, however absent from the newspaper advertisements which are the subject matter of the second Delhi suit).

24. An application of the principles discussed previously in this judgment, would mean that the Court has to, as far as possible, consider the overall effect of the advertisements; a minute dissection of each term, or phrase is uncalled for, and the stand point from where the Court should judge the nature of the alleged disparagement should be not of the aggrieved trader, but the reasonable, or average consumer, who is conscious of trading rival's propensities to puff and exaggerate their products. At the same time, this reasonable or average consumer is likely to be influenced by factual assertions made in such advertisements. Specific assertions, or claims, in advertisements are more likely impact directly, as contrasted with vague and general claims. (See *Vodafone Group plc v. Orange Personal Communications Services Ltd* [1997] F.S.R34, to the effect that the public are used to the ways of advertisers who will stress the good points of a product and ignore others, and that the more precise the claim, the more likely the average consumer would take it seriously).

25. Heinz is no doubt right in contending that comparative price differential can be highlighted. However, while doing so, the advertisement should be fair, and non-judgmental. The advertiser has various choices, while portraying the price differential. If his products are lower in cost, obviously, that perceived advantage would be highlighted. However, when a rival chooses to highlight this aspect, with special emphasis on the quality of his product, care has to be exercised to ensure that no commercial, or advertisement injury, occurs to the rival's product. In this case, the use of the term "cheap" in relation to the product, is in the electronic media. The line between the a permissible expression, and the pejorative or what is likely to cast a slur on another's goods, is slight, and determined by the context in which terms and expressions are used. While "cheap" may be positive, in the context of a trader proclaiming that his wares are a bargain, or good value for money, (since in the case of many products, consumers are price sensitive) "cheap" used by a rival, in an advertisement might well connote not just inexpensive, but inferior. Here it would be useful to recollect the judgment of Lord Reid in *Lewis v. Daily Telegraph* [1963] 2 All E.R. 151, where it was observed that words have to be seen in their ordinary sense and context:

“..is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning..”

26. In this case, the word “cheap” has been used repeatedly, by Heinz in respect of Horlicks; the suggestion further is that it uses “cheap” ingredients, as opposed to Complan’s 100 % milk protein ingredients, which are not cheap. In one advertisement, the insinuation is that good quality (“gold”) cannot be had for the price of brass. The next word used repeatedly is “compromise” on the growth needs of the child. While lauding or commending Complan’s qualities, as best suited to a child’s growth needs, is permissible, any contrast with a rival product, such as Horlicks, with a further suggestion that use of such (rival) product would compromise on the child’s growth, with images of a tall and healthy boy, said to be using Complan, as compared with a less healthy or child, clearly amounts to denigration of the rival product – in this case, Horlicks. Heinz’s attempt to justify its position by saying that Horlicks had referred to its product as cheaper than the rival Complan, is technically correct, but unpersuasive, because the contexts of the rival advertisements are entirely different. Nor is the Court satisfied that the mere detail that it uses 23 nutrients, as opposed to 19 used by Horlicks, brings it within the permissible or fair threshold.

27. This Court is conscious of the powerful and lasting impact that audio visual images have on viewers. Unlike the printed word, which is processed analyzed, and assimilated uniquely by each individual, an advertisement in the electronic media, particularly, has a different impact. First, it has a wider spread; it is perceived aurally through different senses, such as sound, visual, and printed. The suggestive power of this medium is greater. Second, such advertisements use several different tools, like music, dialogue, colors, and other aids, to bring home the message. Advertisements through this medium can, and do operate at conscious and subconscious levels; their power of suggestion extends not just to the discerning, or educated viewer, but to an entire range of viewership, with diverse income earning capacities, educational attainments, tastes, and

so on. They influence even children. The impact of a catchy phrase, a well acted skit or story line, or even distinctive sounds or distinctive collocation of colors, can well define the brand or product's image, by imprinting it in the public memory forever. In these circumstances, it becomes even more imperative for an advertiser, who wishes to indulge in comparative advertisement, to tread the boundary carefully. In the present case, the Court is satisfied, *prima facie* that the references to Horlicks, on an overall consideration, in the impugned two advertisements issued by Heinz, amount to disparagement.

28. The second Delhi suit is concerned with two newspaper advertisements. They compare – or list out the so called qualities of the two rival products. What is interesting, however are the captions and the text which precede the comparison. The first advertisement proclaims “*Do you know the difference between what is good and what is cheap?*” It suggests to mothers to be

“well informed so that you do not unknowingly compromise by choosing a cheaper health drink.... It has been prove that milk protein is a complete protein. Milk Protein is far superior to incomplete proteins from other common and cheaper sources like barley and wheat”*

The second advertisement contains the heading “*Cheaper price or your child's complete growth?*” and goes on to suggest, to caring mothers that they are to be well informed so that they do not “*unknowingly compromise by choosing a cheaper health drink..... Milk Protein in Complian is far superior to incomplete proteins from other common sources like barley and wheat found in cheaper health drinks.*”

29. Both the advertisements, like the electronic versions, use “cheap” as connoting inferior, since the comparison is with Complian with “superior” ingredients. Again, like the electronic versions, the use of “compromise” (in the child's growth needs) with pointed reference to the inferior quality of barley or wheat based food drinks (i.e. in this case Horlicks) as opposed to milk protein based Complian, is pejorative, and derogatory. These parts of the advertisements clearly disparage Horlicks. As regards the comparison, or comparative table, the Court is of opinion that to the extent they rival products' ingredients are listed out (as Horlicks does not claim that these are misleading) there can be no objection. Heinz has referred, at the foot of each advertisement, to a report by the National Institute of Nutrition of 1995. Horlicks submits that this report has not seen the light of the day. The Court is of the opinion that since at this stage only the *prima facie* strength of the rival parties, based on the existing documents, is being

considered, the absence of such a report would not lead to an inference that a reference to it is false or misleading, or that such claims are misleading. At best it might amount to “puffing” which, in the circumstances, is legitimate.

30. Now, coming to Heinz’s claim for temporary injunction. Its objection to Horlicks’ advertisement, impugned in the Bombay suit, appears to be three fold, i.e. price comparison, leading to shift in consumer loyalty; second, the claim that the Horlicks boy is taller, stronger, and sharper, as opposed to the Complan boy’s claim of only one attribute, i.e. tall and third, that the overall impact of the advertisement is that Complan is not only more expensive, but less nutritional, and effective to a growing child’s needs.

31. This Court is of the opinion that a fair application of the tests indicated in the previous part of this judgment, would lead to the conclusion that Horlicks’ advertisement does not disparage. The price comparison is by a trader, who wishes to advertise that his product has a cost (or price) advantage, over the rival’s goods. It accurately describes the position. The difference in attributes of the consumer, is part of a natural dialogue, where the Complan boy proclaims with pride that using it (Complan) makes him stronger; the other boy, naturally responds saying that Horlicks makes him taller, stronger and sharper. This is at best an instance of puffing. As far as Heinz’s complaint about the impact of Horlicks’ advertisement that Complan is less nutritional is concerned, the Court notes that there is no comparison of ingredients, nor is the advertiser basing the claim on any expert opinion or report. It is just the claim of a boy, no more than that. In the circumstances, it is held that the Horlicks advertisement, impugned in the Bombay suit, does not disparage Complan.

32. Before concluding, it would be appropriate to deal with a submission made by Heinz, that all the advertisements, and their potential impact is to be seen in totality, and the Court should not see any one advertisement in isolation. While as a general statement, the argument may be attractive, and perhaps appropriate, such an approach cannot have universal application. This is because an advertiser’s acts in indulging in a “retaliatory” advertisement campaign, highlighting his goods’ attributes, - even comparing them with those of a rival- may be part of a larger context, (and triggered by such rival’s advertisement, or publicity campaigns, with a view to compete in the market place), the subjective context cannot color the Court’s primary task to

determine whether the advertisement complained of indeed disparages the rival's goods. At best the context can provide the Court with the clue about motivation – of the complained conduct.

33. In view of the above discussion, the temporary injunction application in the first Delhi suit is allowed; Heinz is restrained from publishing or telecasting the two impugned advertisements, or any other advertisements containing similar content, which tends to cast a slur on Horlicks, by implying that it is cheap or inferior, or that it compromises on essential qualities. Similarly, the *ad-interim* injunction application in the second Delhi suit, is allowed, partly; Heinz is restrained from publishing any reference to Horlicks being cheap, or inferior, or comprising of inferior ingredients, or compromising on children's growth needs. Heinz's *ad-interim* temporary injunction application, for the reasons discussed above, is dismissed. In the circumstances, Heinz is directed to bear the costs of the three injunction applications, quantified at ₹ 75,000/- each, to be paid to Horlicks, within four weeks.

CS(OS) Nos. 2577/2008, 2646/2008 & 547/2010

List the suits on 18th January, 2011.

12th November, 2010

(S.RAVINDRA B HAT)
JUDGE