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

\+ CS(COMM) 340/2021 & IAs.8999-9005/2021

RECKITT BENCKISER INDIA PRIVATE LIMITED.... Plaintiff

Through Mr.C.M.Lall, Sr.Adv. with Ms.Nancy Roy, Mr.Jawahar Lal and Ms.Ananya Chug, Advs.

versus

HINDUSTAN UNILEVER LIMITED ..... Defendant

Through Mr.Sudhir Chandra, Mr Rajiv Nayar and Mr.Tushar Rao, Sr.Advs. with Mr.Ankur Sangal, Mr. Nishad Nadkani, Ms.Pragya Mishra, Mr.Saurabh Seth & Ms. Khushboo Jhunjhunwala, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

O R D E R

% 30.07.2021

This hearing is conducted through video conferencing.

IA No.8999/2021

1. This application is filed seeking the following reliefs:

"A. The Defendant, its directors, principals, proprietor, partners, officers, employees, agents, distributors, franchisees, representatives and assigns be restrained by an ex-parte ad interim and interim injunction from:

i. Telecasting/ broadcasting/ publishing or otherwise howsoever, communicating to the public any of the Impugned advertisements or any part thereof or any other advertisement of a similar nature in any language or in any manner causing the Impugned advertisement or any part thereof or any other advertisement of a similar nature to be telecast or broadcast or communicated to the public or published in any media including

digital/electronic or social media or in any other manner disparaging the goodwill and reputation of the Plaintiffs and their products sold under the trade mark HARPIC;

ii. Using the depiction of the Plaintiffs' product or any other product deceptively similar to that of the Plaintiffs' in its advertisement or in any other manner infringing the Plaintiff's registered trademarks and/or disparaging the goodwill and reputation of the Plaintiff and its product sold under the trade mark HARPIC.

....."

2. It is the case of the plaintiff that the plaintiff's product Harpic is a premiere product in the market on account of its cleaning and maintaining hygiene capabilities. It is claimed that it kills 99.99% germs, kills Sars-CoV-2 virus, removes toilet stains, kills odour causing germs and provides complete hygiene to the toilet bowl.

3. It is stated that the defendant has a toilet cleaning product sold under the brand name of 'DOMEX' which enjoys a market share of 5.3%. To illegally promote the sale of this 'DOMEX' branded product, it is stated that the defendant has compared it in its advertisement with the HARPIC branded toilet cleaner of the plaintiff, which product enjoys 77.2% market share. It is stated that while making comparisons, the defendant has not only disparaged and degenerated the plaintiff's HARPIC product but has also blatantly made false statements and half-truths. It is stated that this campaign has been launched on 23rd July, 2021. Campaign has been extensively used by flooding it on Youtube, leading newspapers and TV Channels and other media.

4. The impugned advertisements, which are subject matter of challenge before this court, are reproduced in this injunction application as follows:

(i) The first advertisement is as follows:

(ii) The second advertisement is as follows:

It is stated that in the above advertisement, the HARPIC bottle is clearly identifiable and termed as an ‘ordinary toilet cleaner’.

(iii) The third print advertisement is as follows:

It is stated that the above advertisement once again seeks to portray HARPIC as a cleaner of the toilet bowl which causes stench after use.

(iv) The fourth advertisement is as follows:

(v) The fifth advertisement is as follows:

5. I have heard learned senior counsel for the plaintiff and learned senior counsel for the defendant.

6. Learned senior counsel for the plaintiff has relied upon judgment of a Co-ordinate Bench of this court in the case of ***Reckitt Benckiser (India) Ltd. vs. Hindustan Unilever Ltd./MANU/DE/1219/2013***; judgment of another Co-ordinate Bench of this court in the case of ***Reckitt Benckiser (India) Ltd. vs. Hindustan Unilever Ltd./MANU/DE/0967/2008***; judgment of the Division Bench of this court in the case of ***Hindustan Unilever Ltd.*** v. ***Reckitt Benckiser (India) Ltd., 2014 SCC OnLine Del 490\|ILR (2014) II Del 1288***; and a judgment of this court in the case of ***Hindustan Unilever Ltd. v. Emami Limited, 2019 SCC OnLine Del 7809***.

7. It has been urged that all the five advertisements are not a case of puffing and are a case of disparagement of the product of the plaintiff. Regarding the second advertisement and the fourth advertisement, it is urged that the shape of bottle that is being depicted in the advertisements is an exact copy of the bottle of the plaintiff for which the plaintiff also has a registered trademark. Hence, it is prayed that an interim injunction as prayed be granted forthwith pending adjudication of the present application.

8. Learned senior counsel appearing for the defendant have relied upon the judgments of a Co-ordinate Bench of this court in the case of ***Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd., 2013 (55) PTC 499***; ***Colgate Palmolive Company & Another v. Hindustan Unilever Ltd. 2014 (206) DLT 329***; and a judgment of the Division Bench of this court in the case of ***Dabur India Ltd. v. M/s Colortek Meghalaya Pvt. Ltd. (2010) SCC OnLine Del 391/(2010) 167 DLT 278 (DB)***.

9. It has strongly been urged that the bottle depicted in the second and

fourth advertisement is a generic bottle. It has been prayed that the defendant seeks to place on record the nature of the bottles used by a various toilet cleaners which would clearly show that all these bottles have been shaped akin to that as depicted by the defendant in the second and fourth advertisements.

10. I may look at the two judgments of the Division Bench of this court. In the case of ***Dabur India Ltd. v. M/s Colortek Meghalaya Pvt. Ltd.***(supra), the Division Bench held has follows:

> "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.
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> 10. In *Tata Press Ltd.* v. *MTNL*, (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:—
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> > "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"…."
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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.* v. *Hindustan Coca Cola Ltd.*, 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."

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23. Finally, we may mention that *Reckitt & Colman of India Ltd.* v. *M.P. Ramchandran*, 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."

11. Similarly, the Division Bench of this court in the case of ***Colgate Palmolive Company & Another v. Hindustan Uniliver Ltd.*** (supra), held as follows:

> "27. The law relating to disparaging advertisements is now well settled. While, it is open for a person to exaggerate the claims relating to his goods and indulge in puffery, it is not open for a person to denigrate or disparage the goods of another person. In case of comparative advertisement, a certain amount of disparagement is implicit. If a person compares its goods and claims that the same are better than that of its competitors, it is implicit that the goods of his competitor's are inferior in comparison. To this limited extent, puffery in the context of comparative advertisement does involve showing the competitor's goods in a bad light. However, as long as the advertisement is limited only to puffing, there can be no actionable claim against the same. In the case of *White* v. *Mellin*: (1895) A.C. 154, the House of Lords while rejecting the contention of disparagement observed as under:
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> > "The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better

cured the disease which it was alleged to cure - whether a particular article of food was in this respect or that better than another. Indeed, the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better."

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29. Thus, as long as claims made in an advertisement are considered only as puffery, no interference with the same by the courts would be warranted. This is for a simple reason that puffing involves expressing opinions and are not considered as statements of fact which can be taken seriously. As puffery is neither intended to make a representation as to facts nor is considered as such by the target audience. The advertisement involving puffery, thus, cannot be stated to be misrepresenting facts. It is common for advertisements to make extravagant and exaggerated claims in relation to goods and services. It is expected that an advertiser would embellish the goods and services that are advertised and such puffery is neither expected to be nor is taken seriously by any average person. This was also observed by the Chancery Division in De Beers Abrasive Products Ltd. (supra) as under: -

"In other words, in the kind of situation where one expects, as a matter of ordinary common experience, a person to use a certain amount of hyperbole in the description of goods, property or services, the courts will do what any ordinary reasonable man would do, namely, take it with a large pinch of salt.""

30. Having stated the above, it is equally well settled that a trader is not entitled to denigrate or defame the goods of his competitor's, while comparing his goods with that of the other traders. In comparative advertising, the comparing of one's goods with that of others and establishing the superiority of one's goods over that of others is permissible, however, while doing so, one is not allowed to make a statement that the goods of others are bad, inferior or undesirable as that would amount to defaming or denigrating the goods of other's, which is actionable. In the case of *Dabur India Ltd.* v. *Colortek Meghalaya Pvt. Ltd.* : 167 (2010) DLT 278 (DB), a Division

Bench of this Court reviewed the propositions on comparative advertisement as held by the Calcutta High Court in the case of *Reckitt & Colman of India Ltd.* v. *M.P. Ramchandran*, : 1999 (19) PTC 741 and held as under : -

> "23. Finally, we may mention that *Reckitt & Colman of India Ltd.* v. *M.P. Ramchandran*, 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.
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> (b) He can also say that his goods are better than his competitors', even though such statement is untrue.
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> (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.
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> (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.
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> (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.""

12. Clearly the question that arises is as to whether the said impugned advertisements disparage the product of the plaintiff or the advertisements falls within the exception spelt out by in the aforesaid judgments.

13. I cannot help noticing the third print advertisement, which is as follows:

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14. The above advertisement certifies the product of the defendant as superior to that of the plaintiff. It further tends to denigrate the product of the plaintiff. In my opinion, the said advertisement, *prima facie*, at this stage, based on the averments appears to disparage the product of the plaintiff. Balance of convenience would also be in favour of the plaintiff. I accordingly restrain the defendant from publishing the aforenoted advertisement in any forum till they remove all references to the product of the plaintiff 'HARPIC'.

15. As far as the other advertisements are concerned, in my opinion, for the purpose of determining as to whether the said advertisements are

disparaging or slandering the product of the plaintiff, a conclusion can be arrived at only after a better and detailed examination of the reply that may be filed by the defendant.

16. Accordingly, issue notice. Learned counsel for the defendant accepts notice. Reply be filed within 10 days. Rejoinder, if any, be filed within one week thereafter.

17. List for arguments on 17.08.2021.

18. Parties are also requested to desist from issuing press statements about the present order.

JAYANT NATH, J.

JULY 30, 2021/v