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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Pronounced on: 27.03.2019

+ CS(COMM) 1109/2018

HINDUSTAN UNILEVER LIMITED Plaintiff

Through Mr.Chander M.Lall, Sr.Adv. with
Mr.Arunabh Deb, Ms.Nancy Roy, Mr.Arijit
Mazumdar, Mr.Shambo Nandy, Mr.Akshay
Chandna and Ms. Akanksha Kaushik, Advs.

versus

EMAMI LIMITED Defendant

Through Mr.Abhimanyu Bhandari, Ms.Roohina
Dua and Mr.Cheitanya Madan, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No. 12201/2018

1. This application is filed under Order 39 Rules 1 & 2 CPC seeking an injunction to restrain the defendant from issuing or telecasting the impugned television commercial or part of the impugned television commercial or in any manner disparaging the goodwill and reputation of the plaintiff's product "Fair & Lovely" in any advertisement and in any media whatsoever including electronic media. Other connected reliefs are also sought.

2. The accompanying suit is filed by the plaintiff for permanent injunction, damages, infringement of the trade mark, disparagement and unfair trade practices. It is pleaded in the accompanying plaint that the

plaintiff is aggrieved by the disparagement of the plaintiff's product "Fair & Lovely" by the defendant and infringement of its registered trade mark "Fair & Lovely" by the defendant through the impugned television commercial which is being aired on multiple TV channels on or from September 2018.

3. The case of the plaintiff is that it is India's foremost fast moving consumer goods company engaged in home and personal care products and food and beverages. It was established in 1933. It is pleaded that more than 50 years back, on the basis of market surveys and consumer insight, the plaintiff realized the need for developing a cream which not only takes care of the skin but also delivers skin lightening/fairness benefits. The plaintiff developed a technology to deliver skin lightening or in other words fairness benefits which technology was patented in various countries. The said patent technology was developed using the component "niacin". Further, Unilever developed a technology using "amide" and "niacin" i.e. "niacinamide" which is capable of delivering skin lightening benefits. The plaintiff had also applied for a patent for the same which was granted. Over the years, "niacinamide" became the most trusted active ingredients to be used in the personal care products as over the years the patents granted to the plaintiff group expired. Competition in the market led to development of formulations for personal care products to deliver skin lightening/fairness benefits. It is pleaded that majority of the products available in this category have "niacinamide" as an active ingredient. It is also pleaded that this ingredient "niacinamide" works in a similar manner on various skins including men's and women's skin with variable degree of efficiency. Hence, it is pleaded that it is common for male consumer to use fairness products available in the market without insisting for the products designed

specifically for men. Hence, it is further pleaded that a large number of male consumers are using fairness products designed for men's as well as for women's skin.

4. It is further pleaded that the plaintiff's well known and widely used range of skin care products are fairness face creams sold under the brand "Fair & Lovely" which was introduced in the year 1975. The said product was introduced with the active ingredient "niacinamide". The plaintiff also applied for and secured registration of the trade mark/brand/label containing and bearing the said trade mark "Fair & Lovely". Details of the registration of the trade mark "Fair & Lovely" have been given in the plaint, which are mostly in class 3.

5. It is further stated that for the trade dress/packaging the plaintiff has used the colour combination of Pink and White for its "Fair & Lovely" brand for fairness cream. Further the plaintiff has also been using a device in which two faces of a model are portrayed. One face is intended to portray the complexion prior to usage of the plaintiff's product and the other after usage of the plaintiff's product. It is pleaded that this manner of representation on the plaintiff's packaging is an important source identifier of the plaintiff's product which is referred to as dual face device which is used on the label/packaging across all range of "Fair & Lovely" branded products.

6. It is further pleaded that some times in June 2005, the defendant came out with a range of products by the name of "Fair And Handsome". However, as these were considered by the plaintiff to be deceptively and confusingly similar to the plaintiffs "Fair & Lovely", the plaintiff has opposed a number of trade mark applications of the defendant.

7. It is further pleaded that though “Fair & Lovely” was initially used as a fairness cream which was gender neutral, though it was largely promoted as a fairness cream for women. However, almost 30% of the consumers are men who use the same product. To specifically target the men’s segment of the population, around 2006, the plaintiff launched its product “Fair & Lovely Men”. Subsequently, this was re-named as “Men’s Fair & Lovely”. The plaintiff changed the colour combination of this product to black and blue which are considered more male colours than pink. The said packaging has also dual face device. The plaintiff’s “Fair & Lovely Men”/ “Men’s Fair & Lovely” competes with the defendant’s product “Fair And Handsome”.

8. It is further pleaded that in the past the defendant had introduced an advertisement on television wherein a fairness cream was shown in a tube with the same colour combination being pink and white as used by the defendant and referred to the same as “*ladkiwali fairness cream*” and depicted the cream as ineffective for men’s skin while its product “Fair And Handsome” was shown as an effective fairness cream on men’s skin, though it is well known that the main active ingredient in both the fairness cream is “niacinamide”. In 2017, the defendant launched a television advertisement wherein a pink and white coloured tube with distinct characteristics of the plaintiff’s product “Fair & Lovely” were depicted. It is pleaded that the advertisement denigrated the plaintiff’s fairness cream by the voice saying “.....*Mardo ki sakt twacha per pink fairness cream beaasar! Fair & Handsome; Naam to suna hi hoga....*” It is pleaded that the defendant had referred to the plaintiff’s product as “Pink Fairness Cream”. It is pleaded that “Fair & Lovely” is a market leader in the category with market share of more than 60% in fairness creams and more than 80% in mass fairness creams

9. The plaintiff had filed a complaint with the Fast Track Complaints Panel (FTCP) of the Advertising Standards Council of India against the said commercial who has, it is stated, upheld the complaint of the plaintiff to the extent that it had challenged the statement "*Mardo ki sakt twacha per pink fairness cream beaasar!...*" this was later changed by the defendant to the line "*Mardo ki sakt twacha per pink fairness cream nai bani.*". The defendant is however recently ceased to be a member of the Advertising Standards Council of India.

10. The impugned television commercial which is subject matter of this suit was noticed by the plaintiff around 05.09.2018. It is pleaded that the impugned television commercial refers to the plaintiff's product and disparages the same. It is pleaded that the said commercial is claiming that the product of the plaintiff's brand "Fair & Lovely" is rubbish and inefficacious and restricted to only women while the product of the defendant "Fair And Handsome" is much more effective and useful. Hence, it is pleaded that this is an attempt to demean, diminish and injure the business of the plaintiff while at the same time, seek to expand the business of the defendant. It is pleaded that to an ordinary consumer, the tube used by the character is easily identifiable as plaintiffs "Fair & Lovely" cream. Though the impugned advertisement does not show it clearly but it is broadly an impression that has been created.

11. The plaint narrates the contents of the television commercial as follows:-

".....

II. In the above background, the advertisement begins in the setting of this dressing room. A man wearing a pink somewhat effeminate jacket over a white round neck T-Shirt is shown

sheepishly entering this woman's dressing area described above. The man looks to his right and to his left as if to verify and confirm that nobody has seen him enter this woman's dressing area. The manner in which he enters makes it apparent that it is not his dressing area but the dressing area of somebody else. He enters almost in a thief-like manner. This initial portion of the advertisement is designed to portray the embarrassment that men feel in using the "Fair & Lovely" product of the Plaintiff. In the humble submission of the Plaintiff, this itself is highly disparaging to the Plaintiff. It may not be out of place to mention here that according to the Plaintiffs market research, one third of men, in fact, use women's fairness products. This is also an admitted fact by the Defendant, who has made such pleadings in previous proceedings between the parties. Relevant screenshots are attached herein below:





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- a. The man while feeling his chin and face as shown in the screenshots above is shown asking the mirror "*mardo me sabse lovely kaun?*" (who is the loveliest out of all men!)

XXX

V. The next screenshot shows the protagonist of the advertisement, a bearded man enacted by a Bollywood star by the name of Vidyut Jammwal, holding the very same tube which appears in the first few seconds of the advertisement. This protagonist is then shown throwing and rejecting the Plaintiffs product in a dismissive manner. Relevant screenshots are shown below:





At the time of rejection of the Plaintiffs product, the protagonist is heard saying "Ab to Ladkiyon ki cream chhodo Mr. Lovely".

VI. Upon hearing this, the effeminate man is portrayed as being extremely embarrassed. The embarrassment is also portrayed by showing the same man holding his chin in a rather effeminate manner. Relevant screenshots are shown below:





VII. The protagonist is then shown exiting the room by stating "Handsome bano *asli*. In the submission of the Plaintiff, by stating "Handsome bano *asli*" and rejection of a product which looks virtually identical to the Plaintiffs product, what is portrayed in the impugned advertisement is that it is the Defendant's product which is ASL1, i.e. real and not the Plaintiffs product.

VIII. The above portion of the advertisement covers almost 9 seconds and is squarely designed to denigrate and disparage the Plaintiff's product.

12. Based on the above averments it is pleaded that the impugned television commercial clearly generically denigrates the entire range of fairness creams including that of the plaintiff's, targeted for women. It also tarnishes "Fair & Lovely" brand of the plaintiff which continues to be the undisputed market leader having a market share in excess of 60%. The impugned television commercial, it is pleaded, further falsely claims that the defendant's product works on the tough skin of men in a manner the plaintiffs products under the brand "Fair & Lovely" does not, which is a false claim. This is especially so as the ingredients in both the creams are the same. It is pleaded that not only the impugned television commercial makes false and misleading claims, it mischievously depicts that the plaintiff's

brand is associated only with women while the defendant's product is exclusively for men. Hence, the present suit.

13. The defendant filed its written statement. It has been pleaded that the defendant has obtained the trade mark 'Naturally Fair' which was registered on 03.07.2009. The said product 'Naturally Fair' has been available in the market prior to 2004. The existing packaging of the cream is available in the market since September 2017. It has been pleaded that the averments made by the plaintiff in the plaint are contrary to the contents of the website of the plaintiff where the expert of the plaintiff while answering to the question raised by one of the consumers categorically states that "*men's skin is different from women's skin-it is thicker than women's skin and men have larger pores with more oil glands.....*" Then it is pleaded that this is the own admission of the plaintiff regarding the different requirement of the skin of men and women. It is pleaded that all that has been portrayed in advertisement is the truth and the truth does not amount to disparagement. The whole intent of the TV commercial is to differentiate and inform male consumers that the fairness cream used by female consumer is not effective on the skin of male consumer as the texture of the skin of male consumer is completely different from that of female consumers. There is not a whisper regarding the product of the plaintiff, let alone, comparison or denigration as alleged. The TV commercial merely depicts how fairness creams made for women is not effective on men due to different texture and hence, men should choose "Fair and Handsome". The story line of the impugned TV Commercial is reproduced in the written statement. Relevant portion of which reads as follows:

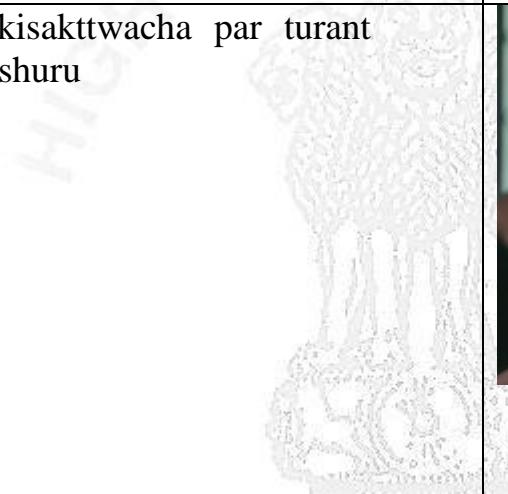
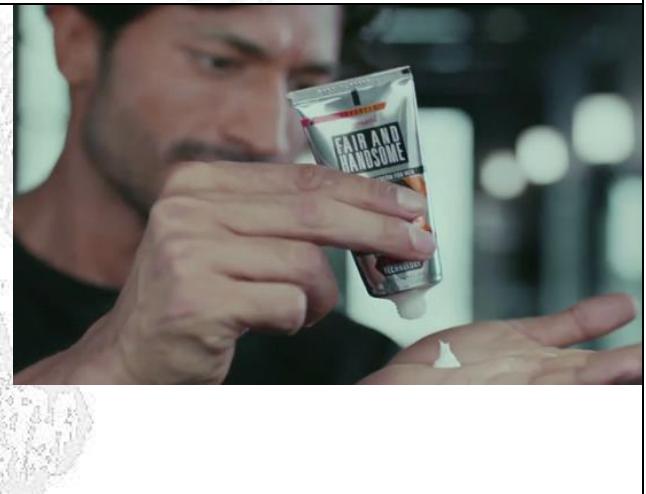
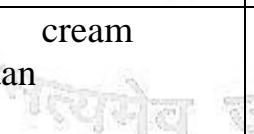
“6. In this regard, it is submitted that the whole intent of the impugned TVC is differentiate and inform the male consumers that fairness creams used by female consumers is not effective on the skin of male consumers as the texture of the skin of male consumers is completely different from that of female consumers. And in order to get desired results, male consumers should opt for “Fair and Handsome” which is the product of the defendant.

7. Admittedly, there is not even a mention of the product of the plaintiff, let alone any comparison or denigration as alleged or at all. The Defendant simply depicts in the TVC that how fairness creams made for women is not effective on men, due to the different textures and thus men should chose fair and handsome. The storyline of the Impugned TVC is reproduced herein below:

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SCRIPT	
Ladke ne ladkio ki fairness cream lagayi aur pucha, Mardo mein sab se lovely koun?	 

<p>Ab toh laadkiyo ki cream chhorो Mr. Lovely Haah! Handsome bano aasli</p>	
<p>Jiyo Tough, Dikho Handsome</p>	
<p>Advanced Fair And Handsome Fairness Cream with Faircell Technology™</p>	

	
<p>Mardokisakttwacha par turant action shuru</p> 	
<p>Jiskeliyeladkiyoki cream nehibaniAur de gorapaan</p> 	 <p>WOMEN'S CREAM</p> <p>F H</p> <p>रघनालम्बक वित्रण निष</p>

Handsome
HandsomeHeyyy_...
Handsome



Fair And Handsome India's
No.1 Fairness Cream for Men



Jiyo tough, Dikho Handsome



8. submitted that the impugned TVC clearly depicts that the Defendant only uses the term “lovely” and refers to the man in pink jacket as “Mr. Lovely”. It further refers to the said product in TVC as “ladkiyon waali cream”. The TVC nowhere uses/names the product of the Plaintiff i.e. “Fair & Lovely”. Admittedly the Plaintiff does not have the exclusive use of the term “lovely” as per its own disclaimer at @ pg.22 (vol.1, part 4). Hence there cannot be a bar on the Defendant to use the word “lovely”. Further it is stated that the Plaintiff has no exclusivity over the word “lovely” or its usage in any manner not only because of the fact that it is a common dictionary word but also because of the fact that Plaintiff has disclaimed the word “lovely” while registering its label. In fact there are many other brands in the market which use the term “lovely” as it is a descriptive term in the cosmetic industry.

14. It is pleaded in the written statement that white and pink bottle depicted in the commercial cannot be stated to be a copy of the distinctive feature of the plaintiff's product. The same combination is used by several other brands such as Loreal, Cavin Care, Revlon and Himalaya It is pleaded that in common parlance, the colour pink is used for depicting femininity and there cannot be exclusivity of the colour pink.

15. I may note that on 14.09.2018 when the matter came up for hearing, learned counsel appearing for the defendant had made some concessions as follows:-

“IA No.12201/2018

1. The learned senior counsel appearing for the plaintiff has shown to me the impugned television commercial (*in short 'TVC'*) stating that the same is disparaging the products of the plaintiff. He points out that the first nine seconds of the advertisement appear to disparage the products of the plaintiff.
2. After hearing some arguments, the learned counsel

appearing for the defendant has volunteered that in the said advertisement in the first nine seconds he will remove the word 'Lovely' which is said by one of the actors.

3. It was also put to the learned counsel for the defendant that the tube packaging that is depicted appears to depict the packaging of the plaintiff. This has been denied by the learned counsel for the defendant who has said that the depiction is of the defendant's own cream 'Naturally Fair'. A sample of the product which according to the defendant is manufactured by the defendant was shown in court to stress that the cream packaging that is depicted in the commercial advertisement is that of the defendant.

4. However, learned senior counsel for the plaintiff asserted that this packaging which is shown in the court is not available in the market and appears to have been manufactured for the purpose of impugned commercial advertisement.

5. At this stage, learned counsel for the defendant states that to try and settle the matter, the defendant would be willing to change the depiction of the cream packaging in the commercial advertisement. He submits that in para 53 of the plaint, the plaintiff has reproduced a cream manufactured by the defendant. He submits that the depiction of the cream packaging in the advertisement would be changed as depicted in para 53 of the plaint. He however states that the trade mark which will be shown on the tube depicted in the commercial advertisement would remain 'Lovely'. He submits that the registered trade mark of the plaintiff is 'Fair & Lovely'. The trade mark registration certificate clearly states that the registration of the trade mark shall give no right to the plaintiff to exclusive use of the word 'Fair'.

6. The defendant shall remain bound by the submissions made in court today.

7. Learned senior counsel for the plaintiff has stressed that the colour combination on the tube packaging that is being depicted in the Commercial Advertisement should be completely changed. He also submits that the Commercial Advertisement wrongly states that the cream of the plaintiff cannot be used by men whereas large number of men are using the cream of the

plaintiff 'Fair & Lovely'.

8. In my opinion, the balance contentions of the plaintiff should be adjudicated only after receipt of a reply from the defendant.

9. Notice. The learned counsel for the defendant accepts notice and seeks time to file a reply. Reply be filed within one week from today. Rejoinder, be filed within one week thereafter.

10. List on 09.10.2018.

11. A copy of this order be given *dasti* under the signatures of the court master."

16. On 17.09.2018 a typographical error in the order dated 14.9.2018 was corrected as follows:-

"IA No.12668/2018

1. This application is filed pointing out a typographical error in the order of this court dated 14.09.2018. It is submitted that in paragraph 5 of the order dated 14.9.2018 there is a typographical mistake and the word LOVELY should actually be read as FAIR.

2. Learned counsel for the defendant also submits that this is a typographical mistake. Paragraph 5 of the order dated 14.9.2018 shall read as follows:-

"5. At this stage, learned counsel for the defendant states that to try and settle the matter, the defendant would be willing to change the depiction of the cream packaging in the commercial advertisement. He submits that in para 53 of the plaint, the plaintiff has reproduced a cream manufactured by the defendant. He submits that the depiction of the cream packaging in the advertisement would be changed as depicted in para 53 of the plaint. He however states that the trade mark which will be shown on the tube depicted in the commercial advertisement would remain 'FAIR'. He submits that the registered trade mark of the plaintiff is 'FAIR & LOVELY. The trade mark registration certificate clearly states that the registration of

the trade mark shall give no right to the plaintiff to exclusive use of the word ‘FAIR’.

3. Application stands disposed of.
4. A copy of the order be give *dasti* under signatures of the Court Master.”

17. Now, two aspects which remain for adjudication as noted in the order dated 14.09.2018 are the pleas of learned senior counsel for the plaintiff that the colour combination of the tube packaging that is being depicted in the commercial advertisement should be completely changed. There is also a grievance that the advertisement wrongly states that the cream of the plaintiff cannot be used by men whereas large number of men are using the cream of the plaintiff “Fair & Lovely”.

18. I have learned counsel for the parties.

19. Learned senior counsel for the plaintiff has pleaded that the defendant was free to praise his men’s cream as that would merely amount to puffing. However, the statement being made that the cream of the plaintiff “Fair & Lovely” is not effective on men or should not be used by men tantamounts to ‘generic disparagement’. 30% consumers of the plaintiff’s cream “Fair & Lovely” are men and hence, it is targeted against them. It has also been pleaded that the defendant has only 1% share in the women’s cream segment. It is pleaded that “niacinamide” is the only ingredient for fairness used both in the men’s cream and women’s cream. He has also relied upon the orders of the Advertising Standards Council of India dated 22.05.2017 where the plea of the plaintiff regarding the earlier TV commercial which had mentioned “*Mardo ki sakt twacha per pink fairness cream beaasar!*” had been recorded. The said act was held to be in contravention of the code

and the complaint was upheld. It is further also pleaded that the manner of representation of the tube in the commercial advertisement needs to be changed as the present one would mislead the public to believe that it relates to the plaintiff's product "Fair & Lovely".

20. He has also relied upon the judgment of the Division Bench of this Court in ***Hindustan Unilever Ltd. vs. Reckitt Benckiser India Ltd., (2014) 207 DLT 713*** to support his contentions.

21. Learned counsel for the defendant has pleaded that he has very fairly before this court modified the depiction of the cream in the impugned advertisement as noted by this court in its order dated 14.09.2018. The cream that has been depicted is a cream of the defendant and not of the plaintiff. He relies upon various judgments of this court including the judgment in the case of ***Mother Dairy Foods and Processing Ltd. vs. Zee Telefilms Ltd., ILR (2005) I Delhi 87 and Dabur India Ltd. vs. Wipro Ltd., Bangalore, (2006) 129 DLT 26*** to support his case. He further states that the composition of men's cream of the defendant is different from that of the plaintiff's.

22. The legal position regarding the issue of disparaging advertisements or commercials was dealt with by a Division Bench of this court in the case of ***Dabur India Ltd. vs. M/s. Colortek Meghalaya Pvt., Ltd ILR (2010) 4 Del 489***. The court in that case was dealing with a mosquito repellent cream Odomos. The respondent had a mosquito repellent cream under the brand Good Knight Natural. The respondent telecast their advertisement which according to the appellant was disparaging the product of the appellant. The court held as follows:-

“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.

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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.

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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 repellent cream causes rashes or allergy or is sticky. All that it is suggested is that if a mosquito repellent cream is applied on the skin (which could be any

mosquito repellent 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 repellent cream or all mosquito repellent creams cause rashes and allergy. In fact, the Respondents are also trying to promote a mosquito repellent cream and it can hardly be conceived that all mosquito repellent 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."

23. Similarly, the Division Bench of this court in the case of ***Hindustan Unilever Ltd. vs. Reckitt Benckiser India Ltd.(supra)*** held as follows:-

"34. The law recognizes that tradesmen and manufacturers may commend their goods and state that they are better than those of rival traders. Yet this is with an important caution that the publisher or advertiser should not make any false representation as to the quality or character of the rival or competitor's goods or products. If no such false representation (as to the character or quality of the rival's goods) is made, the advertisement of a

tradesman howsoever commendatory or exaggerated cannot result in an actionable claim. Exaggerated claims sans such false representations are known as "puffing". This license - to puff - was recognized in *Bubbuck v. Wilkinson*, 1899 (1) OB 86 where the Lindlay MR observed that mere statement that the defendant's goods are better than the plaintiff would not be actionable. This reasoning was upheld in *Allen v. Flood*, 1898 AC 1. Lindlay MR held that mere puffing would not be actionable because it would "open a very wide door to litigation and might expose every man who said its goods were better than another's to the risk of action". This was echoed in *White v. Mellin*, 1895 AC 154 (widely cited by Indian Courts):

"Indeed the Courts of Law would be turned into machinery for advertising rival productions by obtaining judicial determination which of the two was the better".

The determinative considerations were described in *Cellacite & British Uralite v. Robertson* [The Times, July 23rd, 1957 (CA)] in the following, if one may so term - legal "catch phrase": "the general proposition is: Comparison - Yes but Disparagement – No". In *De Beers Abrasive v. International General Electric Co.*, 1975 (2) All ER 599, the Court elaborated this as follows:

"In order to draw the line one must apply this test, namely, whether a reasonable man would take the claim being made as a serious claim."

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44. There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement disparages or defames the viewpoint to be considered is that of the general public (the refinements of whether such "right thinking" or "reasonable" persons belong to a "respectable" section of the public, apart). Thus, whenever an argument that a sectarian approach (i.e. applying the standpoint of members of a section of the public) is to be adopted, Courts have tended to reject it time and again. In *Tolly v. Fry*, 1931 AC 333, the House of Lords had to decide if the depiction of the plaintiff, an amateur golfer -

without his consent - in an advertisement defamed or caused injury to his amateur status (which was during the times regarded as valuable for a golfer). The advertisement contained a limerick and also the plaintiff's picture. It was argued unsuccessfully by the plaintiff that the governing test was whether the knowing public (i.e. those aware about the nature of the game, and the valuable status of an amateur, at that time) would regard the depiction and the statement as defamatory. The House of Lords, which had to decide whether the judgment which left the matter to the judge, instead of the jury, was a correct one, held that the guiding principle was one of perception of the general public and not the golf knowing citizens. This was emphasized in the judgment:

"The question here does not depend upon a state of facts known only to some special class of the community, but to the inference which would be drawn by the ordinary man or woman from the facts of the publication."

Similarly, in *Gillick v. Brook Advisory Centres* [2001] EWCA Civ 1263, the following approach was adopted:

"the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task."

24. Essentially after order of this court dated 14.09.2018 read with the typographical correction done on 17.09.2018, there are only two issues which survive for further consideration in this application. The plea of the learned senior counsel for the plaintiff is that firstly the colour combination on the tube packaging that is being depicted in the commercial advertisement should be completely changed as it tends to mislead the consumer to believe that it depicts the plaintiff's cream Fair & Lovely.

25. I may note, as already noted in the order of this court dated 14.09.2018, that in para 53 of the plaint, the plaintiff has reproduced a picture of depiction of the product of the defendant 'Naturally Fair'. The said colour combination used in the said product is pink and white. It does not have a dual face device. What is now being represented as stated by the defendant now in the new commercial advertisement after 14.09.2018 is the product of the defendant which is as follows:-



26. I may also look at the relevant screenshot of the commercial advertisement of the defendants' prior to the order of this court dated 14.09.2018 and after the order of this court dated 14.09.2018 which are as follows:-

“BEFORE 14.09.2018



AFTER 14.09.2018



27. A close look at the aforesaid relevant screenshot shows that the tube of cream that is depicted in the commercial advertisement, prior to the order of this court dated 14.09.2018, had a pink and white colour combination which may to some appear to be similar to the colour combination of the plaintiff and was also using dual face logo somewhat similar to that of the tube used by the plaintiff. Plaintiff may be justified in arguing that the tube depicted in

the impugned commercial appears to depict the product of the plaintiff. However, the present tube of cream which is being depicted after the order dated 14.09.2018 of this court has a hazy colour but mostly in white and does not have a dual face logo. It is not possible to accept the contention of the learned senior counsel for the plaintiff that the cream tube in the TV commercial seeks to represent the product of the plaintiff's Fair & Lovely. The product that is depicted now would not be perceived by the general public to be the product of the plaintiff. The tube that is now being depicted is materially different. The plaintiff cannot now complain about the same.

28. The second plea of the learned senior counsel for the plaintiff is that the commercial advertisement is disparaging the use of the plaintiff's cream "Fair & Lovely" by men. It is pleaded that 30% of the users of the product of the plaintiff's "Fair & Lovely" are men and hence, to that extent the product of the plaintiff is gender neutral. It has been stressed that the defendant is indulging in 'generic disparagement'. Hence, essentially the plea of the plaintiff is that this amounts to disparagement of all creams which are meant for ladies. It is also pleaded that the fact is that the composition of the creams for ladies and for gents is the same and hence, a male can also use the said cream of the plaintiff's.

29. The learned counsel for the defendant has rightly pointed out that a perusal of the website of the plaintiff would show that the entire tenor of the literature posted on the web by the plaintiff is that there is a positive effect of the said cream of the plaintiff "Fair & Lovely" on women. As an example reference may be had to one of the printouts placed on record by the defendant at page 21 of the list of documents which read as follows:-

Impacting Lives of Women

Fair & Lovely has reflected a Women's Dreams for the past 40 years. This is a brand, which has championed the deepest ambitions and desires of women. Throughout its history, Fair & Lovely has inspired women to go for their dreams, even if they were at odds with what society expected them to do. In the 80's, when society expected women to marry mostly via arranged marriages, Fair & Lovely gave them hope that women could marry by choice. In the 90s, when women desired not just marriage but also an equal partnership, Fair & Lovely inspired them to believe that this was possible. In the 2000s, when society believed that a woman's place was at home, Fair & Lovely encouraged her to choose her own career. And today, when despite much progress, women still don't get equal opportunities and society continues to impose barriers for women, Fair & Lovely will give women the confidence to overcome their own hesitations & fears to achieve their true potential.

Fair & Lovely wants to create a positive change in the society in its own small way – by helping women get the confidence to pursue their dreams and ambitions. Fair & Lovely will do this by not just inspiring women but also enabling them by giving opportunities like higher education, career and entrepreneurship via the Fair & Lovely Foundation.

[More on Fair & Lovely Foundation >>](#)

30. There are various other printouts of the site of the plaintiff which have been placed on record. It is manifest from a reading of this literature that it is the own case of the plaintiff that the cream "Fair & Lovely" has a positive impact on the women. It is also an admitted fact that the plaintiff is having a separate cream, namely, 'Men's Fair & Lovely' for men.

31. The TV commercial no doubt seems to make fun of a male using a ladies cream. Can it be said that this advertisement on account of the said dialogue stated is false or misleading or unfair or deceptive? Does it amount to generic disparagement. The answer is in the negative. In my view, the plaintiff is being over sensitive on the story line of the TV commercial. The defendant had enough room to play around for making the advertisement. In view of the literature that has been posted on its own website by the plaintiff, it also cannot be said that *prima facie* the statements made in the advertisement regarding using of women's cream by men is false.

That apart as already noted the cream that is depicted in the impugned TV serial, which is now being shown does not *prima facie* resemble that of the plaintiff's product 'Fair & Lovely'. In these facts and circumstances, the plaintiff now cannot complain about the TV commercial. The contentions of the plaintiff *prima facie* have no merits.

32. I may also look at the judgments relied upon by the learned counsel for the defendant. In *Dabur India Ltd. vs. Wipro Ltd., Bangalore*(supra), the court held as follows:-

"23. In comparative advertising, a consumer may look at a commercial from a particular point of view and come to a conclusion that one product is superior to the other, while another consumer may look at the same commercial from another point of view and come to a conclusion that one product is inferior to the other. Disparagement of a product should be defamatory or should border on defamation, a view that has consistently been endorsed by this Court. In other words, the degree of disparagement must be such that it would tantamount to, or almost tantamount to defamation. In the present case, the overall audio-visual impact does not leave an impression that the story line of the commercial and the message that is sought to be conveyed by it is that Dabur Honey is being denigrated, but rather that Wipro Sanjivani Honey is better.

33. Similarly, this court in *Mother Dairy Foods and Processing Ltd. vs. Zee Telefilms Ltd.*(supra) held as follows:-

"27. Reference may also be made to Bonnard and Another v. Perryman (1891-4) All E.R. Rep.965 wherein it has been held as under:-

"The Court has jurisdiction in an action of libel to grant an injunction at any stage of the case restraining the publication of the libel, but this jurisdiction should be exercised with great caution. Although the publication, if untrue, would clearly be libelous, an interlocutory injunction will not be granted where the defendant pleads justification unless the Court can be sure that his defense

cannot be sustained at the trial and that the plaintiff will receive more than nominal damages."

28. Lastly reference is invited to the Division Bench Decision of this Court in Khushwant Singh and Anr. v. Maneka Gandhi , where the Court vacated the injunction granted against the defendants from publishing, circulating or selling the autobiography pertaining to the respondent and her family. The Division Bench vacated the injunction upholding the observations of Lord Denning in Woodward V. Hutch Inc.:-

"The reason is because the interest of the public in knowing the truth outweighs the interest of a plaintiff in maintaining his reputation."

"There is a parallel to be drawn with libel cases. Just as in libel, the Courts do not grant an interlocutory injunction to restrain publication of the truth or of fair comment. So also with confidential information. If there is a legitimate ground for supposing that it is in the public interest for it to be disclosed, the Courts should not restrain it by an interlocutory injunction, but should leave the complainant to his remedy in damages."

34. I conclude that there is no merit in the contention of the learned senior counsel for the plaintiff. In my opinion, over all the commercial advertisement does not leave an impression that in any manner disparages the product of the plaintiff. It cannot *prima facie* be concluded that the said TV commercial seeks to slander the goods of the plaintiff.

35. The defendant shall continue to remain bound by the statement recorded on 14.09.2018 by the court read with the correction done on 17.09.2018 by the court.

36. The application is disposed of on the above terms.

CS(COMM) 1109/2018

List on 11.07.2019.

**(JAYANT NATH)
JUDGE**

MARCH 27, 2019/rb