

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

% **Date of decision: 22nd April, 2020**

+ **CS(COMM) 629/2016**

RECKITT BENCKISER (INDIA) LTD. Plaintiff

Through: Mr. Chander M. Lall, Sr. Adv. with Ms.
Nancy Roy, Adv.

Versus

HINDUSTAN UNILEVER LTD Defendant

Through: Mr. Akhil Sibal, Sr. Adv. with Ms.
Pratyusha Priyadarshini, Adv.

AND

+ **CS(OS) 237/2018 & IA No.4428/2018 (u/O XXXIX R-1&2 CPC)**

RECKITT BENCKISER (INDIA) PRIVATE LIMITED ... Plaintiff

Through: Mr. Chander M. Lall, Sr. Adv. with Ms.
Nancy Roy, Adv.

Versus

HINDUSTAN UNILEVER LIMITED Defendant

Through: Mr. Akhil Sibal, Sr. Adv. with Ms.
Pratyusha Priyadarshini, Adv

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. CS(OS) No.237/2018 came up before this Bench on 7th March, 2019, for hearing arguments on the application for interim relief and for framing of issues. Finding, that the suit filed by the plaintiff against the defendant was for permanent injunction to restrain the defendant from airing an advertisement launched by the defendant of its product Lifebouy Soap on 2nd April, 2018, on the ground of the same being

disparaging of the product Dettol Antiseptic Liquid of the plaintiff and for ancillary reliefs and further finding that the plaintiff, till then was without any interim relief, it was on 7th March, 2019 enquired from the counsels whether the impugned advertisement was still being telecast/published by the defendant and the hearing adjourned to 22nd July, 2019. On 22nd July, 2019 the senior counsel for the plaintiff informed that the impugned advertisement was last aired in December, 2018 and had not been aired thereafter by the defendant. The senior counsel for the defendant, on 22nd July, 2019 stated that though the advertisement had not been aired but the defendant should be at liberty to air it at any time. He further stated that he had no instructions, when the advertisement was last aired but agreed that as of that date it was not being aired. Hearing was adjourned to 3rd September, 2019. On 3rd September, 2019 the counsels were heard on the application for interim relief and again some suggestions were made for amicable settlement and the hearing adjourned to 4th September, 2019. On 4th September, 2019 no settlement could be arrived at and the hearing adjourned to 20th January, 2020.

2. During the hearing on 20th January, 2020 reference was made by the counsels to an earlier suit being CS(OS) No.1834/2013, since re-numbered as CS(COMM) No.629/2016, by the same plaintiff against the same defendant, also for permanent injunction to restrain the defendant from airing an advertisement aired for the first time on 3rd June, 2012 and recording of evidence in which suit was underway. To determine, whether the decision in CS(COMM) No.629/2016 would apply to

CS(OS) No.237/2018 as well, CS(COMM) No.629/2016 was also directed to be listed before this Bench along with CS(OS) No.237/2018 and the hearing adjourned to 7th February, 2020.

3. On 7th February, 2020 the counsels were heard on the application of the plaintiff in CS(OS) No.237/2018 for interim relief as well as on the possibility of consolidating the two suits for trial, may be by amending the issues in CS(COMM) No.629/2016 and the remaining hearing adjourned to 10th February, 2020, and thereafter to 12th February, 2020, when orders on the application in CS(OS)237/2018 for interim relief and on the possibility of consolidating the suits for trial reserved.

4. CS(COMM) No.629/2016 was filed by the plaintiff in or about June, 2012 (as per amended plaint on 21st August, 2015) *inter alia* pleading that (i) adding Dettol Antiseptic Liquid to daily bathing water helps kill germs and increases protection against infection and illness and this attribute is heavily advertised by the plaintiff to promote its Dettol Antiseptic Liquid; (ii) the defendant had introduced television advertisement for its Lifebouy Soap, with malicious intention, to increase the market share of its Lifebouy Soap by adopting false assertions and by tarnishing the goodwill and reputation of the plaintiff's product Dettol Antiseptic Liquid; (iii) the impugned advertisement mocks and denigrates the plaintiff's product as being completely ineffective in warding infections and illness; (iv) thereafter it proceeds to compare the defendant's cosmetic toilet soap with the plaintiff's antiseptic liquid as being a '100% better germ protector'; (v) the impugned advertisement wrongly shows the defendant's ordinary toilet

soap to have superior germ fighting capabilities than the plaintiff's antiseptic liquid; (vi) virtually identical advertisement as the impugned advertisement was issued by the defendant's group company in South Africa and the Advertising Standards Authority of South Africa had directed the defendant's group companies to withdraw the claims made by it therein, as the defendant's cosmetic soap did not and could not have any germ killing capabilities, as falsely represented in the impugned advertisement; on the contrary the plaintiff's antiseptic liquid Dettol has 99.99% germ killing capacity; (vii) the impugned advertisement is designed to give an impression that a cosmetic soap is more efficacious than an antiseptic liquid and an antiseptic liquid being completely ineffective to ward away germs; (viii) Lifebouy Soap is a listed cosmetic under the Drugs and Cosmetics Act and Rules; hence comparing a cosmetic soap to an antiseptic liquid and showing that the cosmetic soap has better germ killing/removing capability, itself is a false and misleading claim and disparages the entire category of antiseptic liquids of which the plaintiff is the market leader; (ix) the advertisement impugned herein (i.e. in CS(COMM) No.629/2016) was not the first attempt by the defendant to denigrate or defame the plaintiff's Dettol brand; and, (x) in a yet earlier suit filed by the same plaintiff against the same defendant, being CS(OS) No.1359/2007 this Court after full trial had held against the defendant and interim relief claimed by the defendant in RFA(OS) No.50/2008 preferred thereagainst had been declined.

5. CS(COMM) No.629/2016 came up before this Court first on 6th June, 2012 when the defendant being on caveat appeared and though the same was entertained but no *ad interim* order sought granted. FAO(OS) No.296/2012 preferred by the plaintiff against non-grant of *ad interim/interim* orders in CS(COMM) No.629/2016 was disposed of vide order dated 11th July, 2012 by issuing a direction for expeditious hearing of the application for interim relief. Ultimately vide judgment dated 13th May, 2013, the application of the plaintiff for interim relief was disposed of by directing the defendant to telecast the advertisement impugned in CS(COMM) No.629/2016 only after deleting certain attributes thereof and vide subsequent order dated 13th August, 2013 the following issues framed in CS(COMM) No.629/2016:-

“(i) *Whether the impugned advertisement is disparaging to the plaintiff? OPP.*

(ii) *If the answer to the above issue is in the affirmative then whether the main advertisement is protected as principal speech under the Constitution of India? OPD.*

(iii) *Relief.*

and the parties relegated to evidence.

6. FAO(OS) No.343/2013 and FAO(OS) No.353/2013 preferred by the defendant against the judgment dated 13th May, 2013 were withdrawn on 5th May, 2014 with liberty to raise all grounds available under the law before the Single Judge.

7. CS(OS) No.237/2018 was filed by the plaintiff *inter alia* pleading that (i) the defendant on 31st March, 2018 introduced a six second

advertisement of its Lifebouy Soap on digital media disparaging the plaintiff's Dettol Antiseptic Liquid; on 2nd April, 2018 the defendant disclosed extended version of the said advertisement of 29 second duration on one of the television channels; (ii) the defendant in the past also, on two occasions had made similar unfair comparisons of the plaintiff's Dettol Antiseptic Liquid with its Lifebouy Soap and this Court (in CS(COMM) No.629/2016) and the High Court of Calcutta had passed orders against the defendant; (iii) the plaintiff has different products under its brand name Dettol including Dettol Antiseptic Liquid, Dettol Bar Soap, Dettol Liquid Hand Wash, Dettol Shower Gel, Dettol Hand Sanitizer and Dettol Antibiotic Wipes; (iv) Dettol Antiseptic Liquid is not intended to be a substitute for bar soap, shower gel or liquid hand wash; it is a supplement to these products, to be additionally used for germ killing capabilities; (v) not only does the advertisement of Lifebouy Soap impugned in CS(OS) No.237/2018 makes false and misleading claims and is intended to dissuade consumers from using antiseptic liquid especially the plaintiff's Dettol Antiseptic Liquid as a supplement to bath soap while bathing but also unfairly compares the antiseptic liquid, a drug under the provisions of Drugs and Cosmetics Act, to a cosmetic; and, (vi) the advertisement impugned in CS(OS) No.237/2018 is also violative of the code of ethics for advertising in India laid down by the Advertising Standards Council of India.

8. CS(OS) No.237/2018 came up before this Court first on 5th April, 2018 when the defendant, being on caveat, appeared. Vide *ad interim* order dated 6th April, 2018, while issuing summons/notice of the

suit/application for interim relief, it was ordered that the defendant may telecast the advertise only after specified deletions therefrom. The defendant preferred FAO(OS)(COMM) No.62/2018 against the said order and vide order dated 11th April, 2018 therein, the *ad interim* order dated 6th April, 2018 was set aside and the matter remanded to the Single Judge to hear afresh the application for interim relief, after completion of pleadings. Resultantly there is no interim order till date in CS(OS) No.237/2018, though as aforesaid the advertisement impugned therein was aired last in December, 2018 and is not being telecast since then. However notwithstanding the same, the defendant desires this Court to pronounce on the application for interim relief.

9. What emerges from the aforesaid narrative is that CS(OS) No.237/2018 is the third suit of the same nature by the plaintiff against the defendant before this Court, besides the proceedings in the Calcutta courts and before the Authorities of South Africa. It is obvious that the parties, using their financial prowess, are playing the game of litigation; the defendant, inspite of not airing the advertisement impugned in CS(OS) No.237/2018 now for the last about one and a half year and with no intention to air the same in near future, is not wanting to make a statement to, till the disposal of the suit not air the impugned advertisement or to before intending to air the same again, give reasonable notice to the plaintiff. Not only so, the defendant also objects to decision of CS(OS) No.237/2018 in accordance with the findings (after trial which is stated to be nearing completion) in CS(COMM) No.629/2016 even though the issues framed in CS(COMM)

No.629/2016 are found to be omnibus, though of course with reference to the advertisement impugned therein.

10. The need to detail the defence in the written statement of the defendant to CS(OS)237/2018 is not felt since only the application for interim relief therein is for consideration and further since the defence relevant for adjudication of the application for interim relief would be evident from the contentions hereinbelow recorded of the senior counsel for the defendant.

11. The senior counsel for the plaintiff contended:-

- (i) the Lifebouy Soap of the defendant, being a cosmetic, has no germ killing ability; on the contrary the Dettol Antiseptic Liquid of the plaintiff has 99.99% germ killing ability;
- (ii) attention was invited to the judgment dated 23rd September, 2013 of the High Court of Calcutta in the suit filed by the plaintiff against the defendant with respect to the then advertisement of the defendant with respect to its Lifebouy Soap, holding:-
 - (a) that the advertisement of the defendant did not show the product Dettol Antiseptic Liquid of the plaintiff in the proper perspective;
 - (b) the use of the defendant's product Lifebouy is predominantly for cleansing; on the contrary the plaintiff's product Dettol Antiseptic Liquid is

predominantly for germ eradication and is not declared to be used as a cleanser;

- (c) the defendant however claimed in the advertisement that its product Lifebouy Soap has germ removing capacity;
 - (d) the plaintiff's product Dettol Antiseptic Liquid is recommended for use as a supplement to bathing soap;
 - (e) showing the plaintiff's product Dettol Antiseptic Liquid in an inappropriate dilution and context and then declaring that it has no germ protection capacity whereas the defendant's product Lifebouy Soap has nearly 100% germ removal capacity was disparaging of the plaintiff's product;
 - (f) therefore the then advertisement of the defendant was unfair, prejudicial to the plaintiff and not with honest intention and lowered the reputation of the plaintiff's trade mark, offending Section 30 of the Trade Marks Act, 1999; and,
 - (g) restraining the defendant from showing the advertisement or any version or adoption thereof in any media till the disposal of the suit.
- (iii) drew attention to the judgment dated 14th March, 2014 of the Division Bench of the High Court of Calcutta

dismissing the appeal preferred by the defendant and further holding that Dettol Antiseptic Liquid of the plaintiff and Lifebouy Soap of the defendant were unlike products and comparison thereof was unfair;

- (iv) drew attention to the judgment dated 13th May, 2013 supra on the application for interim relief in CS(COMM) No.629/2016 and contended that what has been held therein with reference to the advertisement impugned therein applies to the advertisement impugned in the present suit as well;
- (v) the defendant in its written statement admits that the plaintiff's Dettol Antiseptic Liquid is not intended to be a substitute for bar soap, shower gel or liquid hand wash and is only a supplement to the same;
- (vi) the defence of the defendant in CS(OS) No.237/2018 is the same which has not been accepted in the earlier judgments of the High Court of Calcutta and in the judgments of this Court;
- (vii) reliance was placed on *Hindustan Unilever Limited Vs. Reckitt Benckiser (India) Limited* (2014) 207 DLT 713 (DB) being RFA(OS) No.50/2008 supra between the parties, and it was contended that the defendant therein had taken a plea that unlike products i.e. an antiseptic soap and a cosmetic soap could not be compared; it was argued that the

defendant is now itself doing the same and cannot be permitted to do so.

(viii) reliance was placed on *Dabur India Limited Vs. Colortek Meghalaya Private Limited* (2010) 167 DLT 278 (DB) to contend that untruthful advertisements are not permissible; and,

(ix) reference was also made to Section 4 of the Drugs and Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and to the Drugs and Cosmetics Act, 1940, to contend that there is a prohibition against misleading advertisements relating to drugs, as Dettol Antiseptic Liquid is.

12. One of the contentions of the senior counsel for the plaintiff being, that the advertisement impugned in CS(OS) No.237/2018 is also violative of the orders/judgments in earlier suits being CS(COMM) No.629/2016 of this Court and the suit before the Calcutta High Court relating to the same products, it was enquired from the senior counsel for the plaintiff, how, for violation of an order/judgment already existing in favour of the plaintiff, yet another suit was maintainable and whether not the appropriate remedy available to the plaintiff was of execution or under Order XXXIX Rule 2A of the Code of Civil Procedure, 1908 (CPC). The senior counsel for the plaintiff contended that the said remedies were not available and/or were not availed of since the advertisement impugned in CS(OS) No.237/2018 was different from the advertisement impugned in the earlier proceedings, of orders wherein

violation, in spirit, was argued. It was contended that the defendant was otherwise in violation, having made only minor/inconsequential/ineffective changes in the advertisement. At this stage, the senior counsel for the defendant contended that the advertisement impugned in CS(OS) No.237/2018 was compliant with the conditions stipulated in the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016 .

13. It was also contended by the senior counsel for the plaintiff that while the Dettol Antiseptic Liquid was subject to price control, Lifebouy Soap, being a cosmetic was not subject to price control. Attention was also drawn to the memorandum of FAO(OS)(COMM) No.62/2018 preferred by the defendant against the judgment on the application for interim relief in CS(COMM) No.629/2016 to contend that what is being argued now by the defendant before this Court was the case of the defendant in appeal which was not pursued.

14. Per contra the senior counsel for the defendant contended (i) that the arguments of the plaintiff now were the same as were made during the hearing of the application for interim relief in CS(COMM) No.629/2016 and which were not accepted and interim relief sought in terms whereof not granted in the judgment dated 13th May, 2013; (ii) that the said judgment was not confined to advertisement impugned in CS(COMM) No.629/2016 but was of general application qua the two products; vide said judgment the advertisement impugned in CS(COMM) No.629/2016 was not restrained and only certain changes directed to be made therein and the advertisement impugned in CS(OS)

No.237/2018 is compliant of those directions; (iii) attention in this respect was also drawn to the observations in the earlier order dated 11th April, 2018 supra of the Division Bench against the earlier order dated 6th April, 2018 granting *ad interim* relief to the plaintiff; (iv) though the plaintiff earlier also had sought restraint against comparison, contending the two products to be dissimilar but no such restraint was granted; (v) in the earlier judgment of this Court, only the identification of the plaintiff's product in the advertisement of the defendant was restrained and the advertisement of the defendant impugned in CS(OS) No.237/2018 does not identify the comparative products as of the plaintiff; (vi) the plaintiff did not prefer any appeal against the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016; (vii) the advertisement impugned in CS(OS) No.237/2018 is what was permitted in the said judgment; (viii) that the advertisement of the defendant impugned in CS(OS) No237/2018 targets those consumers who are using antiseptic liquid only in their bath water and are not using soap and promotes soap as opposed to antiseptic liquid; (ix) the advertisement of the defendant impugned in CS(OS) No.237/2018 is to encourage consumers to use soap and does not denigrate the product of the plaintiff; (x) the plaintiff cannot be permitted to re-argue; (xi) the advertisement impugned in CS(OS) No.237/2018 does not claim that the plaintiff's product Dettol Antiseptic Liquid does not have germ killing ability; it rather says that the same will remove the germs only from the bathing water; (xii) the judgment of the High Court of Calcutta is on different facts and does not bind this Court; (xiii) the judgment of the

High Court of Calcutta, to the extent holding that the advertisement of the defendant comparing two unlike products is bad, is in the teeth of the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016 permitting such advertisement; (xiv) reliance is placed on *Dabur India Limited* supra to contend that the plaintiff's claim of having in the 81.9% market share of the antiseptic liquid market cannot mean the reference in the impugned advertisement to antiseptic liquid to be a reference to the plaintiff; (xv) reliance is placed on *Procter & Gamble Home Products Vs. Hindustan Unilever Ltd.* 2017 SCC OnLine Del 7072, *Dabur India Limited Vs. Wipro Limited* 2006 SCC OnLine Del 391, *Marico Limited Vs. Adani Wilmar* 2013 SCC OnLine Del 1513, *Havells India Ltd Vs. Amritanshu Khaitan* 2015 SCC OnLine Del 8115, *Puro Wellness Pvt. Ltd. Vs. Tata Chemicals Ltd.* 2019 SCC OnLine Del 10766 and *Dabur India Limited Vs. Emami Ltd.* 2019 SCC OnLine Del 7809 to contend that the advertisement being commercial speech is protected and is to be restricted only if the same is false, misleading, unfair or disparaging; (xvi) truthful comparisons are permissible; and, (xvii) the defendant in the subject advertisement has nowhere shown that a sick child becomes well after taking a bath with the defendant's soap and has not shown antiseptic liquid in a bad light.

15. I have considered the rival contentions.

16. The High Court of Calcutta in judgment dated 23rd September, 2013 inter alia held as under:-

“ADVERTISEMENT NO. – III

This advertisement does not show the product of the plaintiff in the proper perspective. The use of the defendant's product is predominantly for cleansing. The plaintiff's product Dettol Antiseptic liquid is predominantly for germ eradication. It is not declared to be used as a cleanser. The defendant, however, claims that it's product has germ removing capacity. Moreover, the plaintiff's product is recommended for use as a supplement to bathing soap, gel etc. Showing the plaintiff's product in an inappropriate dilution and context and then, declaring that it has no germ protection capacity whereas the defendant's product 'Lifebuoy Soap' had nearly 100% germ removal capacity, was in my opinion disparaging the defendant's product. That too, showing the context "while bathing" in small font.

Therefore, the advertisement was unfair, prejudicial to Reckitt not with honest intention and aired at lowering the reputation of the defendant's trade mark, offending Section 30 of the Trade Marks Act, 1999.

In those circumstances I pass an order of injunction restraining the defendant from showing the above advertisement or any version or adaptation thereof in any media till the disposal of the suit. The application G.A. 942 of 2013 connected with C.S. 92 of 2013 is allowed."

17. The Division Bench of High Court Calcutta in judgment dated 14th March, 2014 *inter alia* held as under:-

“The third advertisement was published in the print media in such a fashion that a sentence was divided into two halves. Even if we take both parts together we would find, Lifebuoy would claim better germ protection than Dettol antiseptic liquid while bathing. However, when we see the Lifebuoy soap, it was claimed, Lifebuoy gives better germ protection than ordinary soap. Dettol and lifebuoy would have two different area having two different effect. Lifebuoy is a cosmetic whereas Dettol is an antiseptic liquid, Lifebuoy is used during bath that one would get the effect by rubbing it on the skin. Dettol might claim that one would get good protection in case they use diluted Dettol while bathing. We are not concerned with the advertisement of Dettol making such claim. When it would come before us we would definitely consider the same. These are two unlike products, the way it was compared was certainly an unfair attempt. Learned Judge restrained the advertisement, we do not find any scope to interfere.”

18. I thus enquired from the senior counsel for the defendant, whether not the High Court of Calcutta vide judgments aforesaid and which have attained finality, even though on applications for interim relief in a suit which was stated to be still pending, has restrained the defendant from

comparing its Lifebouy Soap to the plaintiff's Dettol Antiseptic Liquid and if so, how could the defendant, in the advertisement impugned in CS(OS) No.237/2018, compare the two.

19. I may in this context observe that I have in *Procter & Gamble Home Products Private Limited* supra *inter alia* held that (i) the only fetter on comparative advertising is that it does not unfairly denigrate, attack or discredit other's product; however while assessing so, the law of defamation would apply; (ii) the fundamental right of advertiser under Article 19(1)(a) has to be balanced with the constitutional right of the competitor under Article 21 of the Constitution of India to the reputation of its goods and the test of proportionality has to be applied; (iii) the right to protect own reputation is not to be misunderstood as right to be not spoken against or right to be not criticized; (iv) reliefs for disparaging advertising have to be restricted to gross cases; (v) the impact of the impugned advertisement on the consumer has to be seen; and, (vi) the courts are not equipped to return a finding on comparative merits of two competing products and if are to get into the said domain, would necessarily have to return a judicial determination, which of the two competing products is better. However the question of applying what was held therein, while adjudicating the application for interim relief in CS(OS) No.237/2018 does not arise since there have been earlier litigation between the parties herein and the orders/judgments wherein bind the parties and the test to be applied herein would have to be whether the advertisement impugned in CS(OS) No.237/2018 violates the reasoning in any of the judgments/orders in the earlier litigation.

20. The senior counsel for the defendant contended that though the High Court of Calcutta in the judgments aforesaid held the two products to be different and comparison thereof to be unfair but this Court in the judgment dated 13th May, 2013 in the application for interim relief in CS(COMM) No.629/2016 did not hold so and rather permitted comparative advertising of the two products and only required the defendant to make certain changes/deletion in the advertisement impugned therein. It was argued that this Court thus cannot on the basis of the judgments of the High Court of Calcutta restrain comparison in the advertisement impugned in CS(OS) No.237/2018.

21. To consider the aforesaid contention, it is deemed apposite to set out below the relevant part of the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016:

“4.

iv. Plaintiff is the manufacturer of the famous antiseptic liquid DETTOL for over 70 years. ‘Dettol’ antiseptic liquid has an unparalleled medical history of capturing over 85 % of the market in India in this segment.

v. The active ingredient of ‘Dettol’ liquid is chloroxymenol (PCMX). The other ingredient includes isopropyl alcohol, pine oil, castor oil soap, caramel, water basically used for first aid purpose. The exclusive attribute of the said trademark is – its amber gold colour and the fact that it becomes milky when diluted in water. Also, the packaging of DETTOL is distinct, having a sword on the pack that acts as a mnemonic for fighting against germs and infection.

XXXXXXX

- x. *The peculiar features that have been copied are:
 - a. *visual of a liquid that is being poured is of the same colour as that of the plaintiff's product.*
 - b. *The liquid is poured from a bottle which is virtually identical to that of the plaintiff's antiseptic liquid bottle.*
 - c. *The liquid when poured into water becomes milky exactly like the plaintiff's product.*
 - d. *Thereafter, the advertisement claims plaintiff's product to be completely ineffective in warding off germs whereas shows that lifebuoy gives "100% germ protection."**
 - xi. *Virtually identical advertisement was issued by the Defendant's group in South Africa and by a detailed order passed by the Advertising Standards Authority of South Africa, the respondent therein (defendant herein) was directed to withdraw the claims made by it.*
 - xii. *The language used by the father of the sick child in the advertisement emphasising on "nahane ke paani mein 'do dhakkan' antiseptic liquid" clearly indicates towards Dettol.*
 - xiii. *No other liquid except 'Dettol' create a cloud formation when diluted in water.*
 - xiv. *The disclaimer flashing below the screen in the television commercial is also very vague and blurred.*
63. *Adverting to the facts of the present case, having gone through the commercial not only in its text (as reproduced above) but also having watched it on a*

DVD, the question here is whether the advertisement disparages or denigrates the antiseptic liquid of the plaintiff and also whether it only seeks to project the superiority of the defendant's LIFEBUOY soap over an ordinary antiseptic liquid? The advertisement begins with the scene showing a sick child lying with a few toys around in the display and the doctor entering the house and commenting that he has been invited yet again. Thereafter, the doctor inquires about the hygiene habits of the child and the doctor asks: “kya ye nahata hai roz”, to which the mother of the child replies: “haan nahane ke paani mein do dhakkan antiseptic liquid be daltehai” and the doctor mocking and ridiculing in reply says: “aap bhee nahane mein sirf do dhakkan, use balti toh bimari nai padegi, paani ke kitanu shayad nikal jayen, lekin body ke, yeh yahan se yahan , fir zukaam, khansi, flu” . In the meanwhile, the commercial runs to demonstrate a lady pouring brown liquid with a tilted bottle in the bucket of water. The mother of the child then proceeds to ask the doctor: “to nahane mein isse better? And the doctor replies: “100% germ protection, Advanced Lifebuoy” and then appears two different shields of protection, green signifying Dettol and Red signifying Lifebuoy wherein , the green side is left with a few germs and the red shows “kill of all”. Once again lifebuoy is shown to have excellent germ killing capability whilst an antiseptic liquid is completely ineffective. The voice-over also indicates the same. It is obvious that the advertisement displays the said so called "antiseptic liquid" in bad light and as something harmful. Thereafter, the advertisement proceeds with the introduction of the defendant's LIFEBUOY soap

and the manner in which it spreads a protective red wall thereby removing and dissipating the germs.

65. With aforesaid discussion, it is ostensibly clear that the advertisement disparages the plaintiff's antiseptic liquid and it is not an advertisement which seeks merely or only to promote the superiority of the defendant's „LIFEBUOY“ soap over an ordinary antiseptic liquid. When the commercial is displayed before the public at large, the basic principle that is followed is that the public tries to find the connectivity and the impact that advertisement probably creates on them. If 'X' would raise the standards of its product by claiming the rivals products „Y“ to be bad and not effective displaying similar/ comparative attributes of the two, the same would be bad in law. If it were a case of mere promotion of superiority of the defendant's product, alone, the plaintiff would not have had a case as that would have only betokened a permissible "better" or "best" statement. The advertisement comprises of two parts; one which denigrates and disparages the product of the plaintiff and the other which promotes the purported superiority of defendant's LIFEBUOY soap. There is thus a hint of some malice involved in the commercial in respect of the defendant's product - indeed, it would be appropriate to delete certain relevant attributes of the defendant's advertisement which clearly hits on the plaintiff's product and portrays the same in bad light. Without a doubt comparative advertising is beneficial as it increases consumer awareness and therefore, it is permissible but not by pulling down the reputation of your competitor by showing its product in debauched light. Moreover, advertising is a

medium through which an advertiser can establish his brand in the market, but at the same time there are certain set of laws that cannot be deserted. Denigrating or causing direct harm to one's product which has attained appreciation in its genre in terms of usage and application, would amount to slander, which would also cause great prejudice to the public interest, as the question is not of deciding which product is better, but also of public awareness. Because, misleading and disparaging advertisement would not only mellow down the faith of the public but would also result in misleading them.

68. Therefore, I am of the view that the defendant can telecast the advertisement only after deleting the following attributes as under:

- a. remove the 'toys' in the advertisement.*
- b. remove the phrase "two dhakkans" and the particular portion featuring the lady shown pouring liquid in the bucket by holding the bottle of the antiseptic liquid in her hand.*
- c. Remove the shot showing the cloud formation.*
- d. Since green is the colour majorly associated with 'Dettol', therefore also change the colour scheme showing the comparison between the two products in the television commercial and change the green colour to a different shade.*

69. I am, therefore, inclined to grant ad interim relief to the plaintiff and as against the defendant

thereby restraining the defendant from telecasting the impugned advertisement. However, the defendant will be well within its rights to telecast the same only after following the conditions as envisaged in paragraph 68 (a) to (d) of the said judgment. Defendant is also restrained from inserting or adding any such kind of piece/feature in the advertisement which would otherwise directly or indirectly result in disparaging the said product of the plaintiff till the final disposal of the case at hand.”

22. In my view, on a reading of the relevant part aforesaid of the judgment dated 13th May, 2013 does not show this Court to have held anything different from what has been held by the High Court of Calcutta in the judgments aforesaid, for it to be said that the view of this Court is irreconcilable to that of the High Court of Calcutta. It is also significant that while the appeal preferred by the defendant against the judgment of the High Court of Calcutta was dismissed on merits by the Division Bench of that Court, the appeal preferred by the defendant against the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016 of this Court, was withdrawn by the defendant.

23. I am also of the view that the principle of comity of courts [*India Household & Healthcare Limited Vs. LG Household & Healthcare Limited* (2007) 5 SCC 510 and *Sterling Agro Industries Limited Vs. Union of India* AIR 2011 Del 174 (FB)] requires this Court to, while adjudicating the controversy as has arisen, endeavour to show due respect to the judgments of the High Court of Calcutta especially when

relating to the same products and entailing similar issue as for adjudication herein. If this Court were to expressly permit the defendant to, notwithstanding the judgments of the High Court of Calcutta restraining comparative advertising, not grant any injunction in CS(OS) No.237/2018, thereby permitting the defendant to compare its product with that of the plaintiff and which two products have been held by the High Court of Calcutta to be dissimilar, the same would amount to this Court permitting the defendant to violate the order of the High Court of Calcutta. The judgments/orders of the High Court of Calcutta though may not bind this Court, bind the defendant.

24. I may in this context also notice that the judgment dated 14th March, 2014 of the Division Bench of the High Court of Calcutta is subsequent in point to the judgment dated 13th May, 2013 of this Court on the application for interim relief in CS(COMM) No.629/2016.

25. The senior counsel for the defendant in this context referred to the judgment dated 11th April, 2018 of the Division Bench of this Court in FAO(OS) (COMM) No.62/2013 preferred against the order dated 6th April, 2018 of *ad interim* injunction in CS(OS) No.237/2018 and wherein the judgments aforesaid of the High Court of Calcutta were noticed and inspite of the same the order dated 6th April, 2018 of *ad interim* injunction was set aside.

26. Undoubtedly so. However the Division Bench in the judgment dated 11th April, 2018 supra set aside the order dated 6th April, 2018 only on the ground that the same had been passed without completion of pleadings and while remanding the application for interim relief in

CS(OS) No.237/2018 for decision afresh, did so with liberty to the parties to raise all grounds available, as clarified in subsequent order dated 1st May, 2018 in Review Petition No.183/2018 preferred with respect to judgment dated 11th April, 2018. In view of the same no benefit can be taken by the defendant of the judgment dated 11th April, 2018.

27. The defendant, in the advertisement impugned in CS(OS) No.237/2018 having compared its Lifebouy Soap to plaintiff's Dettol Antiseptic Liquid (as evident from use of the words "USSE STRONG), the plaintiff has a *prima facie* case. Even otherwise I find the advertisement impugned in CS(OS) No.237/2018 to be violative of the spirit of the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016; vide the said judgment, hint of malice was found in the then advertisement of the defendant showing defendant's Lifebouy Soap to be having excellent germ killing capability whilst showing an antiseptic liquid in bad light and as something harmful and completely ineffective. In the advertisement subject matter of CS(OS) No.237/2018 also, the female protagonist shown acting as a doctor is shown as dissuading the male protagonist from pouring antiseptic liquid in bath water and further shown to be claiming that adding antiseptic liquid in the bath water will leave germs on the body while Lifebouy Soap will remove all the germs. The advertisement does not claim that both, antiseptic liquid in bath water and soap should be used. The advertisement impugned in CS(OS) No.237/2018 also has the same hint of malice albeit in different form, as existed in advertisement

impugned in CS(COMM) No.629/2016 and has the same impact, which was restrained vide judgment dated 13th May, 2013 in CS(COMM) No.629/2016.

28. Needless to state that once the advertisement impugned in CS(OS) No.237/2018 is found to be *prima facie* disparaging of the product of the plaintiff and found to be in violation of the earlier orders/judgments binding on the defendant, the plaintiff will suffer irreparable loss and injury unless interim relief sought is granted.

29. The balance of convenience is found to be in favour of the plaintiff and against the defendant since the defendant for the last one and a half years is not even airing the advertisement.

30. It is not as if these advertisements are aired in a particular city only. The advertisements are aired on television channels having national coverage and even if not having national coverage, are aired on various other electronic platforms having viewership throughout the country. It is thus not as if the defendant, in Calcutta would be bound by the judgment of the Calcutta High Court and in Delhi would be entitled to act in contravention thereof.

31. I thus allow IA No.4428/2018 of the plaintiff under Order XXXIX Rules 1&2 of the CPC in CS(OS) No.237/2018 by restraining the defendant till the decision of the suit from airing the subject advertisements.

32. That brings me to the only other aspect of adjudication at this stage i.e. whether CS(OS) No.237/2018 is to be separately tried or the

finding therein is to be returned in accordance with the findings after trial in CS(COMM) No.629/2016.

33. In this context I highlight that the senior counsel for the defendant during the hearing has contended that the directions contained in the judgment dated 13th May, 2013 on the application for interim relief in CS(COMM) No.629/2016 are of general application and not confined to the advertisement subject matter thereof as well and has yet further contended that the advertisement impugned in CS(OS) No.237/2018 is compliant with the conditions in the said judgment. The senior counsel for the defendant having contended so, it follows that the findings on the issues aforesaid framed in CS(COMM) No.629/2016 on the basis of trial therein, would govern the outcome of CS(OS) No.237/2018 as well and there is no need for separate trial in CS(OS) No.237/2018.

34. However since no specific issues has been framed in CS(OS) No.237/2018 on the plea of the plaintiff, of the products of the plaintiff and the defendant being dissimilar the defendant is not entitled in advertisement of its product compare the same with the product of the plaintiff, it is deemed appropriate to frame the following additional issues as arising for consideration in both CS(COMM) No.629/2016 as well as CS(OS) No.237/2018:-

- (iv) Whether the product Dettol Antiseptic Liquid of the plaintiff is of a different genre and class then the product Lifebouy Soap of the defendant so as to be not fit for comparison with the product Lifebouy Soap of the defendant? OPP

- (v) Whether the comparison in the advertisement impugned in CS(COMM) No.629/2016 and in CS(OS) No.237/2018 of an antiseptic liquid with a bath soap, is unfair and amounts to disparagement of the product of the plaintiff? OPP

35. It is clarified that the issue framed in CS(OS) No.237/2018 qua reliefs of damages etc. other than those of injunction would include the reliefs owing to damages if any suffered by the defendant on account of advertisement impugned in CS(OS) No.237/2018 also.

36. It is further clarified that while granting costs if any of the suit in pursuance to the findings in the consolidated judgment in CS(COMM) No.629/2016 and CS(OS) No.237/2018, the costs till this stage in CS(OS) No.237/2018 would also be included.

37. It is yet yet further clarified that pursuant to the consolidation of the two suits, the plaintiff shall be entitled to file additional affidavit/s of examination in chief either of the same witnesses as already examined or of additional witnesses. CS(COMM) No.629/2016 and CS(OS) No.237/2018 having been so consolidated for the purposes of trial and further proceedings, to be hereafter listed together on each and every date of hearing.

38. List for further appropriate orders on 16th June, 2020.

RAJIV SAHAI ENDLAW, J.

APRIL 22, 2020

‘pp’