

(2012) 07 BOM CK 0104

In the Bombay High Court

Case No : Notice of Motion (LDG) No. 1914 of 2012 in Suit No. 1515 of 2012

Godrej Consumer Products Limited

APPELLANT

Vs

Initiative Media Advertising and Another

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

Constitution of India, 1950 — Article 19(1)(a)

Citation : (2012) 114 BOMLR 2652 : (2012) 52 PTC 260

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, with Aspi Chinoy, with Nishad Nadkarni, Aashutosh Sampat, Shailendra Bhandare and Meghana Chandorkar instructed by Legasis Partners, for the Appellant; Rohan Cama with Rajesh Dubey and Raj Laxmi instructed by . M.S. Bodhanwalla and Co. for Defendant No. 1 and I.M. Chagla with Venkatesh Dhond with H.W. Kane instructed by . Rahul M. Kadam for Defendant No. 2, for the Respondent

Judgement

B.R. Gavai, J.—The plaintiffs have filed present suit for injuncting the defendants from telecasting or broadcasting or communicating to the public or publishing in any manner the impugned advertisements or any part thereof or any other advertisement of a similar nature. The plaintiffs have also filed notice of motion for temporary order of injunction in the aforesaid terms during the pendency of the suit. The plaintiffs have also moved for ad-interim orders. The plaintiff is a public limited company incorporated under the provisions of the Companies Act 1966 and carries on business of manufacturing and selling of consumer products including mosquito repellents. The plaintiffs claim to be a market leaders in the field of mosquito repellent in India. The defendant No.2 is also a public limited company incorporated under the Companies Act and carries on business of selling mosquito repellents and is competitor of the plaintiffs in the field of mosquito repellents. The plaintiffs are manufacturing mosquito repellents in various types such as mats, refills, coils and liquid vaporizers under the trademark "Good Knight". According to the plaintiffs, the mosquito repellents

with a trademark Goodnight are sold since 1984. It is the case of the plaintiffs that the mosquito repellents of the plaintiffs, in particular, Good Knight liquid vaporizer mosquito repellent bears distinctive label which is predominantly red in colour with a thin silver lining, being an essential predominant feature of its packaging/ trade dress. It is the case of the plaintiffs that the plaintiffs came to know recently that the defendants have launched three commercials on television which are disparaging the mosquito repellent liquid vaporizer of the plaintiffs. It is the contention of the plaintiffs that the said advertisement campaign conveys message to the public that the plaintiff's product is inferior and of substandard quality and defendant No.2's product is of best quality. In this background, the suit along with notice of motion as aforesaid has been filed.

2. I have heard Shri Tulzapurkar, learned senior counsel for the plaintiffs and Shri Chagla, learned senior counsel for the defendants on the question of grant of ad-interim relief.

3. Shri Tulzapurkar, learned senior counsel submits that perusal of the advertisements would clearly reveal that the advertisements in question, which shows that initially a machine with liquid vaporizer being ineffective and useless, is totally aimed with disparaging the product of the plaintiffs. It is submitted that the bottle containing liquid in the advertisement is the one shown having a label which is deceptively similar to the label used by the plaintiffs. Learned Counsel submits that though the defendants are entitled to make any claim so as to puff up their product; they cannot, in the advertisement, disparage the product of the rival. Learned Counsel further submits that the plaintiffs is a market leader in the field of mosquito repellents and only in order to eat up the plaintiffs' share in the market the impugned advertisements are telecast so as to show that the plaintiff's product is bad and ineffective and the defendants' product is a good product. In reply to the contention of the defendants that there are various other labels having red colour in predominance is concerned, Learned Counsel submits that out of three labels on which the defendants are relying, one is their own label. The other label shows the product to be manufactured by Balsara. It is further submitted that Balsara has been taken over by Dabur and, as such, the defendants are showing the product which was in the market in the year 2007 and therefore misrepresenting the Court. In so far as third one is concerned, it is submitted that the label of Mortein is a combination of red and yellow whereas the advertisement shows the combination of red and silver. It is, therefore, submitted that it is clear that the intention of the defendants is to disparage the product of the plaintiffs. The Learned Counsel relies on the judgment of the Delhi High Court in the case of Glaxosmithkline Consumer Healthcare Ltd. v. Heinz India (P) Ltd., MIPR 2010 (3) 0314 Del.; Reckitt Benckiser (India) Ltd. v. Hindustan Lever Limited, 2008 (38) PTC 139; Dabur India Limited v. Colgate Palmolive India Ltd., AIR 2005 Del. 102 and of Madras High Court in the case of Annamalayar Agencies v. VVS & Sons Pvt.Ltd. & Ors., 2008 (38) PTC 37 (Mad.) and of Calcutta High Court in the case of Reckitt & Colman of India Ltd. v. M.P. Ramchandran, 1999 PTC (19) 741.

4. As against this, Shri Chagla, learned senior counsel appearing for the defendants submits that apprehension of the plaintiffs that the advertisements in question tries to disparage the product of the plaintiffs is totally ill-founded. It is submitted that the part of the advertisement, which according to the plaintiffs disparage their product, is seen hardly for a second. He submits that it is improbable that any ordinary person would identify the said bottle shown in the beginning of the advertisement to be that of the plaintiffs' product. Learned Counsel submits that the advertisement is required to be seen as a whole. Even the first part to which the plaintiffs objects, does not show the machine in which the liquid vaporizer is put to be identical with that of the plaintiffs. The Learned Counsel submits that reliance placed by the plaintiffs on the judgments of the Delhi High Court, Madras High Court and of Calcutta High Court are the judgment of the learned single Judge. He submits that the correct legal position is laid down by the Division Bench of the Delhi High Court in the case of Dabur India Ltd. v. Colortek Meghalaya Pvt.Ltd. & Anr., 2010 (44) PTC (Del.) . Seeking assistance from the said judgment, he submits that an advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution. Learned Counsel further submits that by seeking injunction the plaintiffs are attempting to create monopoly in their favour which is not permissible in law. Mr.Chagla further submits that perusal of the advertisements of the other competitors in the field including that of the plaintiffs and another popular brand "all out" would also reveal that in the said advertisements also, the products of other manufacturers are compared so as to show that their product to be better one. He, therefore, submits that it is not permissible for the plaintiffs to say that the defendants are not entitled to telecast the advertisements which are impugned in the present proceedings. Learned Counsel further relies on the order of the division Bench of the Delhi High Court in the case of Hindustan Unilever Ltd. and Ors. v. SC Johnson & Sons and Anr. [FA(OS) No.90/2010 decided on 22nd April 2010]. Learned Counsel further relies on the judgment in the case of Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd., 2006 (32) PTC 307 (Del.) in support of the proposition that the plaintiffs are guilty of laches and are not entitled for interim relief. It is also contended by Shri Chagla that present motion so also suit are liable to be thrown away on the short ground of suppression of facts. It is submitted that the plaintiffs have suppressed that they also have label which is predominantly having white colour and, as such, on the ground of suppression of facts, the plaintiffs' case is liable to be rejected. In support of this proposition reliance is placed on the judgment of the Apex Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and judgment of the Division Bench of this Court in Appeal No.322/1991 (Maganlal Kuberda Kapadia v. Themis Chemicals Ltd.) decided on 22nd April 1991.

5. I will first deal with the contention of the defendant that the plaintiff is not entitled to equitable relief on the ground of suppression of material facts. No doubt, the law on the point is very clear that if a party seeking equitable relief

approaches this Court by suppressing some vital material which would have bearing on the issue as to whether relief could be granted in its favour or not, then such party would not be entitled to any relief from this Court. The principles that who seeks equity must do equity and a party coming to the Court must come with clean hands are well settled. In that view of the matter, though various judgments are cited in support of the said proposition, I do not find it necessary to go into that aspect of the matter. The only question is as to whether the alleged suppression is first of all suppression or not and even if it be, whether such suppression is of such a nature which would have bearing upon the question of grant of relief in favour of the plaintiff or not. The defendants allege that though the advertisements of the defendants are published in various other languages including Hindi, Kannada and Telugu, it has been averred by the plaintiffs that they have noticed the advertisements only in Malayalam channel. The second contention is that though the plaintiffs have stated that they are producing the product which is having red label with silver lining, they have suppressed that they also have a product which has white colour in predominance.

6. In so far as first contention is concerned, the plaintiffs have averred that they have come to know about the advertisements after somebody has seen the same on the Malayalam channel. It is not necessary that the plaintiffs or their representatives might have viewed other channels or, in any case, the other channels at the time when the said advertisements were telecast on those channels. In any case, nothing would turn on the same in so far as grant of relief in the present matter is concerned. In so far as second contention is concerned, the plaintiffs have themselves placed on record their product which is having label of white colour in predominance. The manufacturer may have various products having different labels, however, can that be a ground for not pressing his case in so far as one label is concerned. In any case, there is no suppression about the same as alleged by the defendants. In that view of the matter, the contentions raised in that behalf are without any substance and are, thus, rejected.

7. From the perusal of the judgment on which plaintiffs so also defendants rely, the following appears to be a settled position of law which has been arrived at after taking note of some English judgments:

(I) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.

(II) He can also say that his goods are better than his competitors", even though such statement is untrue.

(III) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors" he can even compare the advantages of his goods over the goods of others.

(IV) He, however, cannot, while saying that his goods are better than his

competitors", say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible.

(V) If there is no defamation to the goods or to the manufacture 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.

8. For appreciating the rival submissions it will also be necessary to reproduce the story board of three advertisements which is as under:

Story Board of Advertisement No.1.

Video

Audio

Film opens on a man holding a racket. Standing in a room. The man is seen switching on his liquid vaporizer machine.

While the man sits to rest, mosquitoes start disturbing him so he shooing them with his racket.

VO:

What you are upto, getting ready to play in Wimbledon?...

The mosquitoes continue to trouble him so he stands up on his chair and tries killing them by waving his racket furiously.

VO:

... Listen Sir, Miss Padukone will be really impressed.

He gets really fed up of the mosquitoes, and continues shooing them with racket.

VO:

Oh master! What are you doing, shadow boxing?...

The man almost gives up on the mosquitoes and sits On the chair. But the mosquitoes don't leave him alone. He has to waive racket all across to shoo them.

VO:

... Or is it a kind of Living Room Olympics?

Madhavan says:

Maddy:

If this much hard work was put up at the proper place, you would have an Olympics Medal!

To chase away the mosquitoes, just one drop is enough...

A computer graphic image of the Maxo refill is shown, which zooms into the screen and then zooms out and fits itself into a machine. The refill's action is shown through purple laser rays. Maxo refill appears with the super "fits all machines".

Maddy (in the VO)

... of MAXO. A single drop is sufficient. The action is instant. Besides, it fits any machine.

Computer generated effects are used to show various types of machines fitting the Maxo refill while the man is exercising

VO:

Maxo on.

Mosquitoes gone.

A slide with the name of the company "Jyothy laboratory limited" appears.

Story Board of Advertisement No.2.

Video

Audio

Film opens on a man. Standing in a room. The man is seen switching on his liquid vaporizer machine.

While the man sits to read his newspaper, mosquitoes start disturbing him so he rolls his paper and starts shooing them.

VO:

Are you learning fencing?...

The mosquitoes continue to trouble him so he gets up from his chair and tries killing them.

VO:

... Or single handed batting practice?

Finding no respite, the man stands on the sofa chair following the mosquito, trying to kill it.

VO:

Helicopter shot was invented long back, my friend!

The man then tries to sleep, but can't because of mosquitoes. He is then seen fighting with mosquitoes (literally).

VO:

Will you practice KALARIPPAYTTU (a form of Martial art) throughout the night? Or defeat Jackichan ?

Madhavan says:

Maddy:

News paper is for reading, not to fight a war against mosquitoes. To chase away the mosquitoes, just one drop is enough?.

A computer graphic image of the maxo refill is shown, which zooms into the screen and then zooms out and fits itself into a machine. The refill's action is shown through purple laser rays. Maxo refill appears with the super 'fits all machines'.

Maddy (in the VO)

... of MAXO. A single drop is sufficient. The action is instant. Besides, it fits any machine.

Computer generated effects are used to show various types of machines fitting the Maxo refill while the man is happily reading his newspaper.

VO:

Maxo on.

Mosquitoes gone.

Story Board of Advertisement No.3.

Video

Audio

Film opens on a man. Standing in a room. The man is seen switching on his liquid vaporizer machine.

Cut to a shot where a boy is seen playing while this man is trying to kill the mosquitoes with his hand.

The camera zooms out to show the entire room. While the man is trying to kill mosquitoes with his hand furiously.

MVO

'Are you performing a folk dance? Or warming up your hands?'

The man, while trying to kill the mosquitoes, sits down to kill mosquitoes near the boy playing.

MVO

?Are you getting ready to be a cheerleader??

While the man continues to try killing mosquitoes near the boy, he accidentally topples the structure made by the boy while the MVO says...

MVO

?Or lifting your hands and playing hifi? Or is it a new method of self defence ?

Madhavan says:

Maddy:

To chase away the mosquitoes, just one drop is enough... of MAXO..

Madhavan continues...

Maddy:

To chase away the mosquitoes, just one drop is enough... of MAXO..

A computer graphic image of the maxo refill is shown, which zooms into the screen and then zooms out and fits itself into a machine. The refill?s action is shown through purple laser rays. Maxo refill appears with the super ?fits all machines?.

Maddy (in the VO) A single drop is sufficient. The action is instant. Besides, it fits any machine.

Computer generated effects are used to show various types of machines fitting the Maxo refill while the man and the boy are happily playing.

VO:

Maxo on.

Mosquitoes gone.

A slide with the name of the company ?Jyothy laboratory limited? appears.

9. In the case of Dabur India Limited v. Colgate Palmolive India Ltd. (cited supra), the sum and substance of TV advertisement complained of was that a Cinestar was seen stopping the purchasers of Lal Dant Manjan powder. He further informs them of the ill effects of such Lal Dant Manjan by rubbing it on the purchaser's spectacles which leaves marks which are termed by Cinestar as being akin to sandpapering. He also endorses the Colgate's (defendant therein) tooth power as being 16 times less abrasive and non damaging to the spectacles. He is heard telling the purchaser that it is easy to change spectacles but not the teeth. In the said case also, the product name of the plaintiff therein was not named. However, it was contended that red container/bottle used in the advertisement was identical with that one used by the plaintiff therein. In the said case the defendant had also expressed its willingness to drop the red container/bottle which, according to the plaintiffs identifies its product. In the

said case, in spite of that learned single Judge of Delhi High Court took a view that no one can disparage a class or genre of a product, within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified, and as such granted injunction as prayed for. It will be relevant to refer to the following observations of the learned single Judge which read thus:

21. The advertisement campaign on the visual media has an immediate impact on the viewers and possible purchaser's mind particularly when a well known cinestar is endorsing it. The plaintiff has thus made out a prima facie case of comparative strength particularly when the defendant does not deny that its campaign points out the deleterious effect of Lal Dant Manjan powder. The balance of convenience is also in the favor of the plaintiff as the effect of the advertisement aired cannot be repaired readily and easily. The averred right of the defendant to inform the purchasing public of the ill effects of the Lal Dant Manjan powder based on its commissioned study cannot tilt the balance of convenience in the favor of the defendant particularly when the plaintiff also seeks to rely upon studies commissioned by it to back up the merits of its product. Consequently, the non grant of an interim injunction would cause irreparable injury to the plaintiff not compensable in damages.

10. The Delhi High Court again in Reckitt Benckiser (India) Ltd. v. Hindustan Lever Limited (supra) had an occasion to consider the advertisement of defendant therein telecast on television for promotion of its soap "LIFEBOY". According to the plaintiff therein, it was allegedly disparaging the plaintiff's soap sold under the trade mark "DETTOL". Again in the said case, the name of the plaintiff's product "Dettol" was not named in the said advertisement. The learned Judge observed thus:

22. The question which needs resolution is: whether the orange soap shown in the advertisement could be said to have a reference to the DETTOL Original soap of the plaintiff. Ext. PW1/11 are some photographs extracted from the video clip of the said advertisement.

Photograph

Photograph

They clearly indicate the orange colour of the soap bar, the contours on the soap, the overall shape of the soap. Ext. PW1/8 is a sample of the DETTOL soap in the green coloured packaging. The new shape of the DETTOL Original toilet soap with the curved edges and the curvature in the middle is clearly displayed on the product packaging, which is further indicative of the importance given to the shape by the plaintiff in its marketing of the product. The packaging (Ext. PW1/8) also establishes the fact that although white is also used, green is the pre-dominant colour. Although, the brand name, logo or the sword device does not appear in the orange bar of soap shown in the advertisement (Ext. PW1/2), there can be no misgiving that the bar of soap which has been shown in the said

advertisement is of a colour similar to that of the plaintiff's DETTOL soap. The contours, curvature as well as the overall shape of the orange bar of soap in the advertisement itself, are virtually the same as that of the contours, curvature and overall shape of the plaintiff's DETTOL Original soap. Moreover, the clear impression given in the advertisement is that the said orange bar of soap has been taken out from a green wrapper/ packaging. It must also be noted that the design of the plaintiff's soap has been registered by the plaintiff as indicated by Ext. PW1/DX-1. While it is true that there may be other orange coloured soaps and other soaps sold in the predominantly green packaging and other soaps which have an oval shape, it is also true that it is only the plaintiff's soap which has a combination of all the three elements, i.e., orange colour, curved oval shape and pre-dominantly green packaging. Apart from this, it is only the plaintiff's soap which has contours in the manner indicated in the bar of soap in the said advertisement. No evidence has been produced by the defendant to show that there is any ordinary antiseptic soap with the same combination of the aforesaid elements of colour, shape, design and packaging. I have absolutely no doubt that the orange bar of soap shown in the advertisement refers to the plaintiff's DETTOL Original soap.

It will also be relevant to refer to the observations of the learned single Judge, which read thus:

26. In the case of disparagement, the one who disparages another's product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor's product. The comparisons, Therefore, in cases of passing off and in cases of disparagement are different. Consequently, the comparison must be from the perspective of an average person with imperfect recollection but, that person must be picked from the category of users of the product allegedly sought to be disparaged or slandered.

11. Again in the case of Glaxosmithkline Consumer Healthcare Ltd. v. Heinz India (P) Ltd. (supra), the Delhi High Court had an occasion to consider the advertisement of the defendant therein promoting its product "Complan" on the ground that plaintiff's product "Horlicks" was sought to be disparaged. However, since in the said case the product which was sought to be disparaged was directly named, the said judgment would not be of much assistance so far as present case is concerned.

12. The Madras High Court, in Annamalayar Agencies v. VVS & Sons Pvt.Ltd. & Ors. (supra) had an occasion to consider an advertisement wherein the plaintiff's product "Parachute Coconut Oil" was bottled in blue bottle, whereas defendant's product "VVD Gold Coconut Oil" was bottled in a green bottle. The advertisement No.1 impugned in the said case shows two coconuts, one in green colour and another in blue colour and an actress wearing green dress appears on the scene and asks a question "which is natural?", and then she herself picks up a green

coconut and says that it is natural. In advertisement No.2, an actress wearing green dress picks up one of the green colour plastic bottles of VVD arranged in a shelf and says this is 100% pure and natural and this is what I want. Then the next shot shows an actress wearing green dress in the foreground and the lady wearing blue saree in the background. The lady wearing blue saree has a blue colour bottle in her left hand and a VVD bottle in her right hand. She looks at the blue bottle which is in her left hand and shakes her head disapprovingly and puts the bottle down. Then she looks at the VVD bottle in the right hand and lifts the bottle up and says VVD Gold, this is what I want. The learned Judge, observed thus:

33. Insofar as advertisements 2 and 3 are concerned, they definitely refer to a plain unnamed blue bottle and drives home a message that the blue bottle does not contain 100% pure and natural coconut oil whereas the 1st Defendant's product alone contain 100% pure and natural coconut oil. It is one thing to say that the 1st Defendant's product alone is 100% pure which is not actionable and it is another thing to say that the Plaintiffs product is not 100% pure which is actionable.

..... 37. The 3rd advertisement also goes to show that the general public not picking the blue bottles stacked in the shelf whereas the 1st Defendant's product are being grabbed with enthusiasm and swiftness. This definitely would send a wrong message to television viewers and the buyer of the coconut oil that the blue bottle products are inferior to that of green bottle products of the 1st Defendant, which is nothing but openly disparaging the product of the Plaintiff.

13. The Calcutta High Court in the case of Reckitt & Colman of India Ltd. v. M.P. Ramchandran (supra) had an occasion to consider the advertisement wherein the product of the plaintiff "Robin Blue" was sought to be disparaged by the defendant who was manufacturing the product whitener under the brand name "Ujala". In the said advertisement, the product whitener in the bottle of dispenser with the word "blue" printed on it was disparaged by showing disadvantages of the said product. It was the case of the defendant therein that the plaintiff's product was Robin Liquid Blue whereas the bottle of which dispenser was shown was an ordinary bottle of blue as such it was not disparaging the product of the defendant. The learned judgment observed thus:

Therefore, in a suit of this nature one has to look at whether the advertisement merely puffed the product of the advertiser or in the garb of doing the same directly or indirectly contended that the product of the other trader is inferior. There cannot be any dispute that in the concerned advertisements blue was stated to be of inferior quality. Although, for having depicted the container and the price in the advertisement together it is difficult to proceed on the basis that the defendant No.1 was not referring to Robin Blue, but assuming in the advertisement insinuations are not made against Robin Blue and the same were directed to all blues as has been stated in no uncertain terms in the affidavits,

can it be said that it was not made against Robin Blue? The answer is a definite "no", because Robin Blue is also a blue.

It was sought to be contended that insinuations against all are permissible, though the same may not be permissible against one particular individual. I do not accept the same for the simple reason that while saying all are bad it was being said all and everyone is bad and anyone fitting the description of everyone is affected thereby.

..... In the instant case the object of the advertisement was to convey to the customers of the blue including those of the plaintiff that if you use blue to whiten your washed clothes you will get washed clothes with blue patches. This could not be done.

14. In so far reliance placed by Learned Counsel for the defendant No.2 on the judgment of the Division Bench of the Delhi High Court in the case of Dabur India Ltd. v. Colortek Meghalaya Pvt.Ltd. & Anr (supra) is concerned, in the said case the Division Bench was considering an appeal against the order of learned single Judge refusing to grant injunction in favour of the plaintiff therein. It was the contention of the plaintiff that the defendants while promoting their product Good Knight Naturals mosquito repellent in the advertisement were disparaging the plaintiff's mosquito repellent under the brand name Odomos Naturals. The Division Bench observed thus:

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

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

and milk protein. While comparing its product with any other product, any advertiser would naturally highlight its positive points but this cannot be negatively construed to mean that there is a disparagement of a rival product. That being so, whether the Appellant's product is targeted or not becomes irrelevant.

21. Learned Counsel for the Appellant further submitted that the use of expressions such as an apprehension of getting rashes and allergy or an allegation that other creams cause stickiness amounts to disparagement of the Appellant's product. We cannot agree with the submission of Learned Counsel. There is no suggestion that any other mosquito 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.

(emphasis supplied)

It can, thus, clearly be seen that in the facts of the said case, the Division Bench of the Delhi High Court has come to the specific conclusion that the advertisement in question did not directly or indirectly, deliberately disparage the plaintiffs product, as such the said case would be of no assistance to the case of the defendants.

15. In so far as order of Delhi High Court in the case of Hindustan Unilever Ltd. v. SC Johnson & Sons (supra), the Court has clearly come to the conclusion that when cleaning action is actually shown in the advertisement, an orange bottle of the respondents or the similar orange bottle of some other manufacturer was not shown but, in fact, a completely different blue bottle was shown. In this background, the Division Bench found that there was nothing in the advertisement to suggest that the product of the respondents was in any manner disparaged or shown to be inferior to the product of the appellants. In the circumstances, the order of injunction granted by the learned single Judge was reversed.

16. It can, thus, clearly be seen that it is a settled position of law that a tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue. He can also say that his goods are better than his competitors, even though such statement is untrue. He can also say that his

product is best in the world or better than his competitors" and also can compare the advantages of his product over the products of the others. However, while doing so, he cannot say his competitors are bad and, if he does so, he really slanders the goods of his competitors and defames his competitors and their goods which is not permissible and only in such a case the Court would be competent to grant order of injunction restraining repetition of such defamation.

17. It is equally settled that to decide the question of disparagement, the following factors are to be kept in mind:

(i) Intent of commercial

(ii) Manner of the commercial

(iii) Storyline of the commercial and the message sought to be conveyed by the commercial.

Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable.

18. In this background, we have to consider the present matter. The first advertisement shows a man holding racket standing in the room and is seen switching on the liquid vaporizer machine. It shows that though the machine is put on the mosquitoes continue troubling him and so he starts shooing them with his racket. Thereafter standing on the chair he is shown trying to kill them by waving his racket furiously. Thereafter some oral utterances are made by the famous actor Madhavan and at last defendant's product zooms into the screen and then zooms out and fits itself into a machine and the actor says, "of MAXO. A single drop is sufficient. The action is instant. Besides, it fits any machine." Similarly, there are two other advertisements. Since the entire story line is reproduced hereinabove, I do not find it necessary to repeat again the sum and substance of the advertisements. At the request of the parties, I have personally seen all the three advertisements on the screen of P.C. In all the three advertisements, immediately as soon as film starts, a man is shown switching on the liquid vaporizer. The bottle containing the red liquid vaporizer is shown with a label which is of a dark red colour having a silver linings. I have personally compared the labels shown in the advertisements with that of the plaintiff's. I am aware of the fact that the comparison that has to be done should be from the view point of an ordinary person of average intelligence. Upon comparison of the labels used on the bottles in the advertisements and the label of the plaintiff's product, I find that the label used in the advertisements is capable of giving impression to the ordinary man of average intelligence that the bottle which is initially used in the machine is that of the plaintiff's product. The theme of the first advertisement is that after the machine is put on with the vaporizer having label alike the plaintiff's, the said product is ineffective and the mosquitoes continue to trouble the man standing in the room and he tries to flee them away

and kill them with a racket. Finally, the defendant's product is sought to be shown on the screen by saying, "...of MAXO. A single drop is sufficient. The action is instant. Besides, it fits any machine." In the second advertisement, after the liquid vaporizer machine is switched on, the man in the room tries to flee away the mosquitoes with newspaper, climbs up on the chair doing many acrobatics as he is not in a position to kill the mosquitoes and finally the defendant's product is sought to be glorified with same words. The third advertisement opens in the same manner, the man tries to kill the mosquitoes with his hands which has an effect of clapping the hands furiously, the claps go on increasing and, finally, the defendants product is sought to be glorified.

19. As already discussed hereinabove, an intent of commercial; the manner of commercial; storyline of commercial; and the message sought to be conveyed would be material. If the intent of the commercial is only for the purpose of promotion of the goods of the manufacturer, the same would not be actionable but if the intention of the commercial is disparaging the product of the plaintiff, then an action would lie. From the storyline and the manner of the advertisements in question, it can clearly be seen that the message that is sought to be given in the advertisements, is that even after the machine with product containing label alike plaintiff's product is put on, it has no effect and the mosquitoes go on troubling which require the person in the room to indulge in acrobatics etc. It is to be noted that the advertisement campaign or visual media has an immediate impact on the viewers and possibly purchaser's mind, particularly, when a well known cinestar is endorsing it. It is further to be noted that the matter has to be looked from the view point of the ordinary person of average intelligence. Though the advertisements in question may show the product having a label alike that of plaintiff's product for a few seconds, the possibility of the same being registered in the mind of an average consumer and linking it with the ineffectiveness of the product cannot be ruled out.

20. In so far as contention of the defendants that there are other similar labels which are having red colour in predominance is concerned, I have examined the labels which are placed on record by the defendants. One of the labels is that of the defendants themselves and, in any case, it is a combination of red, white and black colours with a dark gray border. In so far as Odomos label is concerned, I have personally seen the bottle of which photograph is placed on record. The said bottle is manufactured in 2007. Apart from that the said label is combination of orange, red, white and blue colours. The third one i.e. Mortein is combination of red, black and yellow colours with yellow border. It cannot be a matter of coincidence that in the advertisement of the defendant, which shows the product in the bottle containing liquid vaporizer to be useless, is having a label of dark red colour with silver border. From the material placed on record, I find that it is only plaintiff's product which is having label of dark red colour with a silver border. In that view of the matter, I am of the considered view that by the impugned advertisements the defendants have attempted to disparage the product of the plaintiff.

21. In so far as the contention regarding other visual advertisements are concerned including the advertisement of the plaintiffs and of the another mosquito repellent in the market i.e. "All Out", I have personally seen the advertisements on the P.C. In none of the advertisements the labels are shown on the bottle of liquid vaporizer, which are sought to be compared with the product of the advertisers. The distinction between the advertisements which are subject matter of the suit and the other advertisements is that, the advertisement which is subject matter of the suit shows bottle which is having a label identical to that of the plaintiff's product, whereas the other advertisements though show a bottle of liquid vaporizer for comparison, it does not contain any label. In that view of the matter, the contention in that regard is also without any substance.

22. However, I am of the view that if the objectionable label is removed from the bottle shown in the advertisements, then such advertisements would be permissible in view of settled law that a manufacturer, without disparaging the product of his competitor, can make claim that his product is best in the world, even though such a claim may not be true. In that view of the matter, I find that the plaintiff has made out prima facie case for grant of injunction.

23. The test of balance of convenience and irreparable injury also tilts in favour of the plaintiff. If the injunction as sought is not granted, the attempt of the defendants to defame and disparage the product of the plaintiff would continue, whereas in view of the order that I am inclined to pass the defendants can very well continue to publish the very same advertisements with a slight change i.e. removal of label from the bottle of the liquid vaporizer which is used in the advertisements in question.

24. I am, therefore, inclined to grant adinterim relief in terms of prayer clause (a). However, it is clarified that the defendant No.2 would be free to use the impugned advertisement provided it removes the red lable with silver lining from the bottle of the liquid vaporizer as appearing in the advertisement. At this stage, the learned senior counsel request for stay of the order for a period of 5 weeks from today. Shri Tulzapurkar, learned Senior Counsel vehemently opposes the prayer. However, taking into consideration that the advertisement is being telecasted for almost a period of two months, I am inclined to grant stay to this order for a period of four weeks from today.