(2006) 02 DEL CK 0174

In the Delhi High Court

Case No : IAs No. 821, 1106 of 2006 and CS (OS) No. 153 of 2006

Godrej Sara Lee Ltd. APPELLANT

Vs

Reckitt Benckiser (I) Ltd. RESPONDENT

Date of Decision : 15-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4

Citation : (2006) 128 DLT 81 : (2006) 32 PTC 307

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Arun Jaitley and Manmoahn Singh, for the Appellant; C.M. Lall, for the Respondent

Judgement

A.K. Sikri, J.—is No. 821/2006 is an application filed by the plaintiff under Order XXXIX Rule 1 & 2 of the CPC (CPC) seeking ad interim injunction. On 25th January, 2006 ex-parte ad interim injunction was granted to the plaintiff. On service of this injunction order upon the defendant, the defendant immediately filed is No. 1106/2006 under Order XXXIX Rule 4 CPC for vacation of the injunction order dated 25th January, 2006. It is, in these circumstances, both the applications were heard together and are being disposed of by this common order.

2. The question in these proceedings essentially is as to whether the advertisement of the defendant of its product under the trade name `Mortein'' which is an insecticide is disparaging and denigrates the product of the plaintiff and on this ground whether the plaintiff can restraint the defendant from exhibiting such an advertisement on electronic media.

3. The plaintiff company is engaged in the manufacturing and/or marketing variety of goods including coils, mats, liquid vaporizers (apparatus and refills), aerosols, oils sprays etc and destroying substances and preparations for insecticides. These products are produced and marketed under well known trademarks viz GOODNIGHT, JUMBO, HIT etc. I am concerned, in these

proceedings, with the plaintiff''s product traded under the trade name HIT. This product is produced by the plaintiff under two versions-one for killing cockroaches which is packed in a red colour can and other for killing mosquitoes which comes in a can with predominantly black colour. The defendant''s product Mortein, on the other hand, as launched by it is meant for destroying both cockroaches and mosquitoes. Thus whereas for tackling cockroaches and mosquitoes, two different products of the plaintiff are required, the defendant''s one version is sufficient for both types of insects. In the impugned advertisement, the defendant has highlighted this feature and added advantage of its product. However, the grievance of the plaintiff is that while boasting about this advantage, the defendant has attempted to denigrate the product of the plaintiff which is impermissible. The story board of the advertisement goes in the following sequence- Open with an army of roaches and mosquitoes marching

-The commander of the insect army is briefing the forces on the attack. The target is the family in the background.

-The army of roaches and mosquitoes charge towards the family.

-A MVO streams in as the lady of the house is contemplating the problem. The Black and Red Aerosol Cans are in front of her.

-Both the cans come together to morph into a Mortein Aerosol Can.

-The lady confidently picks up the new Mortein Aerosol Can.

- The commander of the insect army quickly senses the danger and alerts other insects.

-The lady beings her attack by spraying Mortein on the floor.

-The powerful effects of Mortein shown in the form of glowing arrowheads chase the roaches to their end.

-She then aims her Mortein at the swarm of mosquitoes above.

-The arrowheads chase the mosquitoes and finish them in no time.

-The last victim is the commander. An arrow penetrates him.

-Pack shot super: Shaktishali Suraksha.

4. Case of the plaintiff is that it is the market leader as it enjoys substantial share of the market in these products. Its insecticides for cockroaches and mosquitoes are well known, because of its volume of sale as well as advertisement, to the public at large. Therefore, people are aware that the two variants of the product marketed by the plaintiff are in red and black cans. Therefore, while showing the predicament of the lady in the advertisement that two cans of red and black colour to tackle the onslaught of mosquitoes and cockroaches from two sides the intention is to depict that the problem cannot be tackled with the products of the plaintiff. Thereafter, solution is suggested by

morphing the two products into one from where the defendant''s product emerges. Therefore, according to the plaintiff, it is not a case where the defendant is trying to puff up its product alone but the intention is to exhibit the products of the plaintiff in a poor light.

5. Case of the defendant, on the other hand, is that the defendant has right to project its product as better than products available in the market. In the process, even if a false statement is made for puffing up, even that is permissible. In the present case, however, the defendant has not stooped low or misled the public. What is projected is the truth and statement conveying the truth, which would not even amount to puffing up its product, is permissible in law. The sequence in which the case is built up by the defendant is the following:

(a) It is the presumption of the plaintiff that the two cans shown in black and white in the impugned advertisement are that of the plaintiff. Name of the product of the plaintiff is not shown therein. Merely two colours are shown and the plaintiff''s product cannot be identified with those colours.

(b) Even otherwise, the plaintiff cannot have any monopoly over the colours alone. Such a case is neither established under the trade mark law nor under Designs/Copyright Act. Therefore, the plaintiff cannot allege that its products are, in any manner, disparaged by showing the two cans in black and red colour.

(c) Even if it is presumed that the two cans shown in the advertisement are identified with the plaintiff''s product, the advertisement is not disparaging in nature. The defendant has only projected the superiority of its product by highlighting that its solution can kill both mosquitoes and cockroaches and the consumer is not required to buy two separate items for dispatching two different insects. This is only a statement of fact which is a true statement. Therefore, by having an advertisement of this nature, the defendant is not enhancing its product by puffing up it, though even puffing up is allowed, and in no case the defendant is denigrating the product of the plaintiff by revealing what is truth.

6. Apart from the aforesaid defense on merits, case of the defendant is that the ex-parte injunction is liable to be vacated also on the ground that the plaintiff has not approached the court with clean hands and by concealing material facts and defrauding the court it has obtained the ex-parte injunction. In this behalf, the submission of the defendant is that the defendant started showing this advertisement on various TV channels in February, 2005. Documents in support of this plea are produced on record. From these documents, it is highlighted that the advertisement has been appearing in number of channels repeatedly almost every day, throughout this period. It is not conceivable that the plaintiff would not or could not have noticed that the the defendant was showing its advertisement on the electronic media for almost a year. However, in spite of this the plaintiff has made a false averment in the plaint that it came to know of the impugned advertisement only in September, 2005 about the impugned advertisement. It is vehemently argued that the plaintiff which claims itself to be

the market leader, would not remain aloof and ignorant about this advertisement and, Therefore, it can clearly be inferred that it has intentionally made an untrue statement in the plaint.

7. It is also submitted that once an obvious inference is drawn that it was known to the plaintiff that the advertisement is on air since February, 2005, the plaintiff clearly acquiesced into the same by not objecting to it for all this period and, Therefore, the plaintiff would not be entitled to injunction on this ground as well.

8. It is also submitted that even if it is presumed that the plaintiff came across the infringing advertisement in September, 2005, it was duty bound to find out as to since when such an advertisement was being shown on TV as the information of this kind is easily available from specialised ad agencies like TV AD INDX which is media monitoring firm and specialises in recording new TV commercials as soon as they are first broadcast on TV channels. Documents in support of this plea are also filed. It is, Therefore, submitted that because of this concealment, even the suit itself is liable to be dismissed. In support, he relied upon the judgment of this court in the case of Satish Khosla Vs. M/s Eli Lilly Ranbaxy Ltd. and another, .

9. Development of law on the Comparative Advertisement in this country, is a recent phenomenon though abundance of judgments of the courts in England and United States of America are available. Comparative advertising is advertisement where a party advertises his goods or services by comparing them with goods and services of another party. This is generally done by either projecting that the advertiser''s product is of same or superior quality to that of the compared product or by denigrating the quality of the compared product. There is an underlying assumption that the comparative advertising benefits the consumer as the consumer comes to know of the two products and their comparative features/merits. New or unknown brands benefit most from comparative advertising because of the potential for transfer of the intangible values associated with the compared brand with or to the new brand. Comparative advertising has become more widespread, particularly in fiercely competitive markets.

10. The extent of permissibility of such comparative advertising has been the subject matter of few cases in the High Courts of this country for some time in the past. First decision is the judgment of the Calcutta High Court in the case delivered on 19th February, 1996 in Reckitt & Colman of India Ltd. v. M.P.Ramchandran and Anr. but reported almost three years as 1999 19 PTC 741. Within few months thereafter, this court gave decision in May, 1996 in the case of the Reckitt & Colman of India Ltd. v. Kiwi T.T.K.Ltd. reported as 1996 16 PTC 393. In the latter judgment, this court relied upon the judgment of the Calcutta High Court. Thereafter, cases have been coming up in this court with almost regular pace. Notably among them which were cited before me are the following:

(1) CM No. 2430/96 in FAO(OS) No. 261/96 decided on 23.7.1996.

(2) Reckitt & Colman of India Ltd. v. M.P.Ramchandran and Anr. 1999 19 PTC 741.

(3) Pepsi Co.Inc. and Ors. v. Hindustan Coca cola Ltd. and Anr. 2003 (27) PTC 305 (Delhi).

(4) Dabur India Limited v. Emami Limited 2004 (29) PTC 1.

(5) Karamchand Appliances Pvt. Ltd. v. Shri Adhikari Brothers and Ors. 2005 (2) R.A.J.570

11. Last mentioned judgment has taken note of and discussed all previous judgments as well as judgments of foreign jurisdictions.

12. Let me take note of principles enunciated in these judgments.

13. I may state at the outset that the cardinal principle is that the advertiser has right to boast of its technological superiority in comparison with product of the competitor. He can declare that his goods are better than that of his competitor. However, while doing so, he cannot disparage the goods of the competitor. Therefore, if the advertising is an insinuating campaign against the competitor''s product such a negative campaigning is not permissible. The advertiser, Therefore, may highlight the positive features of his product and can even claim that his product is better than his competitors. Such a statement may be untrue. But while doing so, he is not permitted to project that his competitor''s goods are bad. Accepting this cardinal principle, the Calcutta High Court in the case of Reckitt & Colman of India Ltd. v. M.P.Ramchandran and Anr. (supra) after taking note of some English judgments, culled out the following propositions of law:

(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.

14. Statement of law in the aforesaid principles is accepted in all the judgments of this court. In the judgment of this court in the case of Reckitt & Colman of India ltd. v. Kiwi T.T.K.Ltd. (supra), the aforesaid principles were specifically

restated with approval and the discussion summed up is as under:

The settled law on the subject appears to be that a manufacture is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturers is not entitled to say that his competitor''s goods are bad so as to puff and promote his goods. It, however, appears that if an action lies for defamation an injunction may be granted. It is in this background that I have to see whether there is any disparagement or defamation to the goods of the plaintiff in the advertisement in question.

15. The Division Bench of this court in the case of Pepsi Co.(supra), explained these very principles more elaborately. The Division Bench noted that frivolity has become a serious business these days. Television commercials which are meant to portray a stylization of the good life after crafted with great care, using all the skills that the arts and psychology have produced. The vast majority of the viewer of the commercial advertisement on electronic media are influenced by the visual advertisements as these have a far reaching influence on the psyche of the people, Therefore, discrediting the product of a competitor through commercial would amount to disparagement as has been held by the High Courts and the Supreme Court of India as well as the Law laid down by Courts in U.K. & U.S.A. Quoting from Kerly''s Law of Trade Marks and Trade Names by David Kitchin and Anr, dealing with the effect of misleading advertisement and the provisions relating to Treaty of the Member States of European Economic Community, the court noted that in those jurisdictions comparative advertising is permitted if the following conditions are met:

(a) It is not misleading according to Articles 2(2), 3 and 7 (1).

(b) it compares goods or services meeting the same needs or intended for the same purpose.

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser''s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

16. What is disparagement and what would constitute a disparaging message is explained in paras 12 and 13 of the judgment in the following manner:

What is disparagement. The New International Webseter''s Comprehensive Dictionary defines disparage/disparagement to mean. "to speak of slightingly, under value, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation." The Concise Oxford Dictionary defines disparage as under, to bring discredit on, slightingly of and depreciate.

In the electronic media the disparaging message is conveyed to the viewer by repeatedly showing the commercial everyday thereby ensuring that the viewers get clear message as the said commercial leaves an indelible impression in their mind. To decide the question of disparagement we have to keep the following factors in mind namely; (1) Intent of commercial (ii) Manner of the commercial (iii) Story line of the commercial and the message sought to be conveyed by the commercial. Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to shown one''s product better or best without derogating other''s product then that is not actionable.

17. The highlight of Dabur India Limited (supra) is that even when a particular product of the competitor is not disparaged but some generic product is denigrated, even that would be disparaging. That was a case where infringing advertisement depicted that Chayawanprash is not be taken in the summer months and instead Amritprash is the substitute for it. It was a verbal assertion in the advertisement by the actor without pointing out at the product of the plaintiff specifically, namely, Dabur Chayawanprash. It was argued that Dabur had market share of 63% of the total market of Chayawanprash throughout India and the impugned advertisement branding Chayawanprash as a product which is not suitable in summer amounted to disparaging its product. The court accepted this contention and held that `even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of Chayawanprash in its generic sense, still it may amount to disparagement. It was found that there was insinuation against user of Chayawanprash during the summer months in the advertisement in question and it gave rise to the cause of action to Dabur Chayawanprash for the reason that it is also a Chayawanprash as against which disparagement is made.

18. I may note at this stage that in Dabur India Limited v. Colgate Palmolive India Ltd. reported as 2004 29 401PTC 401 Delhi, the defendant had tried to argue to the contrary by relying upon English judgment in Eastwood v. Holmes

where the court held that action cannot be maintained even if the infringing article was libellous as it was a libel on the plaintiff but reflected on a class of persons dealing in such objects. However, the court preferred to accept the view taken in Dabur India Limited v. Emami Limited (supra) and disagreed with the view of Willes, J. in the aforesaid English judgment, inter alia, on the ground that the said case dealt with libel and not a commercial advertisement.

19. In Kamarchand Appliances (supra), the court explained the reason in further detail as to why disparaging advertisement was not permissible. It was pointed out that even under the law of torts, no one can by his act of omission or commission cause to another an injury to his or her reputation or goodwill nor can a rival in trade or industry slander or defame the goods or products of another trader of manufacturer. Law would consider any slanderous campaign or comment to be an actionable injury which the Courts would step in to prevent in appropriate cases.

20. The narration of law contained in the aforesaid judgments highlighted by the learned senior counsel for the plaintiff was not disputed by the learned counsel for the defendant. However, there is a sharp division as to whether in the instant case the advertisement of the defendant amounts to disparaging the product of the plaintiff. It is this aspect which needs to be considered.

21. What is that the advertisement of the defendant wants to project? It shows the presence of both mosquitoes and cockroaches in the house by depicting an attack from both the sides, one by mosquitoes and other by cockroaches. Then it seeks to emphasise that use of two different products at the same time to kill two different insects may be inconvenient. The message which is sought to be projected is that in any household or in a kitchen both the insects are normally found. When the lady of the house is confronted with `do tarfa hamla'', the message is prevalence of both kinds of insects at same time and same place. At that time holding two cans, one to kill mosquitoes and other to kill cockroaches may be cumbersome. The commercial then comes up with the answer by introducing the product of the defendant whereby both the cans come together to morph into Mortein aerosols can. Again, the message is that here is one single product which is insecticide for both types of insects. Telling the consumer that you can use one single product to kill two different species insects, by no stretch of imagination would amount to disparaging the product of the plaintiff or for that matter, of those manufacture two different products for destroying two different insects. It is a statement of fact which is in the visual.

22. Though learned counsel for the defendant did not agree that merely by showing red and black colour of the two cans, the defendant in any manner identified the same with the plaintiff ''s product, even if it were so, the defendant is only comparing its product with that of the plaintiff. It has not disparaged the product of the plaintiff. It has not shown the product of the plaintiff in poor light. It has not stated that one product of the plaintiff meant for putting away cockroaches and other meant putting away mosquitoes are in any manner

ineffective in doing their respective job. What is highlighted is that the defendant is providing a better and more convenient solution by giving two-in-one product.

23. The contention of the learned senior counsel for the plaintiff that showing lady with two cans red and black and looking confused and hapless as to how use these two cans simultaneously, is an innuendo whereby the plaintiff''s products are undermined. According to me, the matter is to be viewed in the following perspective. First, the plaintiff''s (i.e. competitors) products are shown in the form of two cans with confused lady. Then emerges the product of the defendant which is projected to be better. Is it disparaging the plaintiff''s product? No. It is only comparing two products.

24. If the defendant highlights its better feature while comparing its product with that the plaintiff in an advertisement given in newspaper. No possible objection can be raised thereto. This is precisely what is done in visual form. Without dubbing the product of the plaintiff as poor in quality or contents and without undermining those products the simple message which is sought to be conveyed is that the product of the defendant is better in the sense that it is more convenient to use the same for destroying two different kinds of insects at the same time. There is neither any negative reference to the plaintiff''s products nor it is defamatory or libellous. This kind of advertisement is permissible as it would fall in principle No. (iii) carved out in Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr. which, inter alia, lays down that for the purpose of showing that his goods are best in the world or his goods are better than competitors he can even compare the advantages of his goods over the goods of others.

25. What is disparagement. Black''s Law Dictionary defines `disparagement'' as well as `disparagement of goods'' in the following manner:

Disparagement:

Matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another''s property in land, chattels or intangible, things or upon their quality.

A falsehood that tends to denigrate the goods or services of another party is actionable in a common law suit for disparagement. The same conduct is also actionable under certain state statutes and can form the basis for an F.T.C. Complaint. There is no private federal cause of action for disparagement under the Lanham Act.

Disparagement of goods:

A statement about a competitor''s goods which is untrue or misleading and is made to influence or tends to influence the public not to buy.

26. There is nothing in the advertisement which is untrue or misleading. There is no attempt to say that the products of the plaintiff are of inferior quality and,

Therefore, public is influenced not to buy the same. In order to succeed in an action of disparagement both these aspects are to be satisfied. In this case, the defendant boasts that its singular product can kill two insects as against the plaintiff''s two products required for same purpose (even if it is presumed that the reference in the advertisement is to the plaintiff''s products). It is stated at the cost of repetition that the product of the plaintiff in its quality, contents or effectiveness is not undermined. A particular comparative advantage of convenience in using the defendant''s product over the plaintiff''s product is highlighted.

27. The court, while deciding such a dispute would take into account the perception of average individual who is reasonably well informed and observant. So long as the product of the adversary/competitor is not denigrated, it is left to the consumer to choose. In the instant case, the defendant has tried to take mileage from the unique feature of its product and to demonstrate that its product shall suffice as against two products of the plaintiff. Ultimately, the consumer may still like to buy the plaintiff''s products thinking that solution/ spray for killing one particular insect may be more effective than the product of the defendant meant for killing two insects. He may also think that it is not necessary that there may be mosquitoes and cockroaches at same place and same time. The choice is ultimately of the consumer.

28. In De Beers Abrasive Products Ltd. and Ors. v. International General Electric Co. of New York Ltd. and Anr. 1975 (2) ALL ER 599, (which is quoted with approval by the Calcutta High Court as well as this court), the court had given the example of disparagement in the following manner:

In that case a manufacturer of natural diamond abrasive sued a manufacturer of a competing abrasive made from synthetic diamonds on the ground that the latter has circulated a pamphlet containing a report of laboratory experiment of comparing the performance and qualities of those two products and wherein the goods of the plaintiff have been tainted. The Learned Judge at page 605 of the report held that the statement "My goods are better than X''s" is only a more dramatic presentation of what is implicit in the statement, "My goods are the best in the world" and such a statement would not be actionable but if the statement is "My goods are better than X''s, because X''s, are absolutely rubbish" the statement would be actionable.

29. There is no endeavor to rubbish the product of the plaintiff.

30. In White v. Melin reported as 1895 AC 154, the court had observed:

But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another''s goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor''s goods are better either generally or in this or that particular respect than his competitor''s are.

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Mr. Moulton sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rivals. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour''s very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour''s, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect.

31. Likewise, in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. 1899 (1) QB 86, the law was stated in the following words:

The truth is that the defendants'' circular when attentively read comes to no more than a statement that the defendants'' white zinc is equal to, and, indeed, somewhat better, than the plaintiffs''. Such a statement, even if untrue and the cause of loss to the plaintiffs, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not enough to convert what is prima facie a lawful into a prima facie unlawful statement. It is not unlawful to say that one''s own goods are better than other people''s; and Allen v. Flood (1) shows that malice in such a case is immaterial.

32. Present case is more akin to the situations contemplated in the observations contained in the aforesaid judgments.

33. In Reckitt & Colman of India v. M.P. Ramachandran and Anr.(supra) the plaintiff was a manufacturer of whitener sold under the brand name Robin Blue. The defendants were also manufacturing a whitener and selling their product under the brand name Ujala. The advertisement of the defendants depicted that the colour blue (which was of plaintiff''s product) was uneconomical and the average blue was the most expensive to whiten the clothes. Then it had been added `what is more, you have to use lots of blue per wash''. While making the said comment the container of the plaintiff had been shown upside down and it had further been shown that the liquid was gushing out. The court observed:

The object is obviously to show that the product of the petitioner priced at Rs.10/- gushes out as a quirt and not in drops while using and Therefore, it is an expensive way to whiten clothes. The container of the petitioner as produced by Mr. Chakrabotry was put by me up-side-down and I found that the liquid packed in the container comes out drop unless one squeezes the container, which is made of plastic. It has then been shown in the advertisement that blue is a product of obsolete technology and Therefore, it cannot dissolve completely in water and as such forms sediments at the bottom of the wash bucket. The said assertion it appears to me is not a presentation of a technological disadvantage of the product of the petitioner as was asserted by Mr. Chakraborty but an insinuation to the product itself. The same is clarified by the last assertion contained in advertisements to the effect that blue leaves dirty blue patches on clothes because it forms sediments. The insinuation, Therefore, is sediment of blue leaves blue patches on freshly washed clothes since blue cannot dissolve in water.

Thus it was the poor depiction of the plaintiff''s product which was aimed at in the impugned advertisement and was found to be disparaging.

34. In Dabur v. Emami (supra), in the commercial shown on TV projected Chayawanprash in a negative manner as the hero while holding bottle of Himani Sona-Chandi Chayawanprash (defendant''s product) in his hands declares that GARMION MEIN CHYAWANPRASH BHOOL JAO, HIMANI SONA CHANDI AMRITPRASH KHAO (English translation- Forget Chyawanprash in summers, eat Amritprash instead). This was again a clear case of negative campaigning of the product of the plaintiff i.e. Chayawanprash.

35. In the case of Reckitt & Colman of India ltd. v. Kiwi T.T.K.Ltd.(supra), again, the product of the plaintiff, namely, Cherry Polish was shown in a disparaging manner as the advertisement showed a bottle of KIWI (defendant''s product) which does not drip as against the bottle described as "OTHERS" which was held to be that of plaintiff''s because of red blob on the surface which represents CHERRY which dripped.

36. Likewise, in the case of Pepsi Co.(supra), the Division Bench found that the plaintiff''s product PEPSI was described as `Bachhon Wali Drink'' and was mocked at in the commercial with the message `that the kids who want to grow up should drink "Thums Up". It was disparaging because the following feature in flier: The commercial shows that the lead actor asks a kid which is his favorite drink. He mutters the word "PEPSI", which can be seen from his lip movement though the same is muted. The lead actor thereafter asks the boy to taste two drinks in two different bottles covered with lid and the question asked by the lead actor is that "Bacchon Ko Konsi pasand aayegi"? After taste the boy points out to one drink and says that that drink would be liked by the children because it is sweet. In his words he says, "Woh meethi hain, Bacchon ko meethi cheese pasand hai". He discredited the drink one which according to his has a sweet taste. He prefers the other drink which according to him tastes strong and that grown up people would prefer the same. At that point, the lead actor lifts the lid from both the bottles and the one which is said to be strong taste reveals to be "Thums up", and one which is sweet, word "PAPPI" is written on the bottle with a globe device and the colour that of the "PEPSI". Realizing that he had at the initial stage given his preference for "PEPSI" and subsequently finding it to be a drink for kids, the boy felt embarrassed. This embarrassment gesture he depicts by putting his hands on his head.

The court found that these advertisements were not only made in mocking manner but in fact denigrated the goods of the appellant when the lead actor said "Wrong choice baby" and that "Thums up" is a right choice. Saying of the lead actor " Kyo Dil Mange No More" in fact depicted the product of the appellant in poor and inferior form.

37. In Karamchand Appliances Pvt.Ltd (supra), the product of the plaintiff, namely, PLUGGY DEVICE which was deceptively similar to the defendant''s device was shown in poor light by giving the message in the advertisement that " Pluggy devices used as mosquitoes repellents are old, obsolete and outdated method of chasing the mosquitoes and deserve to be discarded".

38. In Dabur v. Colgate (supra), the impugned advertisement runs down all Lal Dant Manjan tooth powder as severely detrimental to dental health and in particular damaging the tooth enamel.

39. Thus in all the aforesaid cases the sales talks denigrated the product of the competitors and were, Therefore, injuncted. If without doing so the advertisement highlights the product of the advertiser as better than that of the competitor, grant of injunction would not be appropriate.

40. In this context, other argument of the learned counsel for the defendant also becomes relevant. The defendant has filed a letter dated 1st February, 2006 of Radio TV AS INDX certifying that the first telecast of the defendant''s advertisement was on 24th February, 2005. The defendant has also filed a chart which projects airing of commercial of its product in question on as many as 25 TV channels repeatedly since February, 2005. These channels include not only regional channels with all India coverage like MAX, SAHARA ONE SONY ENTERTAINMENT, STAR GOLD, STAR PLUS, ZEE CINEMA, ZEE TV etc. The number of times each month from February, 2005 this commercial was shown on the aforesaid channels is indicated in the following figures:

Month Feb-05 191 Mar-05 890 Apr-05 1105 May-05 641 Jun-05 7 Jul-05 785 Aug-05 985 Sep-05 1054 Oct-05 1130 Nov-05 1278 Dec-05 1337 Grand total 938

41. It cannot be imagined that the plaintiff did not come to know of it and the statement in the plaint about acquiring knowledge only in September, 2005 is obviously inaccurate in its pitch confronted with these facts, figures and document the only oral Explanation sought to be given was that in February, 2005 the advertisement was different as when the two cans were shown in earlier commercial. AVO was "Do can kyon" and, Therefore, action was not taken but the advertisement is offending as showing "Do tarfa hamla'' and, Therefore, action can be taken. There are two responses. First, it is hardly a distinguishing feature in so far as grievance of the plaintiff is concerned. Even in the advertisement then shown, the lady is looking at the two cans in red and black colour and is in confused and hapless state. This is precisely the grievance today. Then it could be the grievance even at that time as well but the plaintiff

eschewed that advertisement and did not take any action almost for one year. Secondly, this argument admits that the plaintiff had knowledge about the defendant''s commercial even in February, 2005. Even otherwise, it is highly improbable that the plaintiff did not come to know of this advertisement and spotted this advertisement only in September, 2005. The plaintiff did not even bother to find out since when the advertisement was shown on TV channels and conveniently made the statement in the plaint that it came to know about this advertisement only in September, 2005. I am, Therefore, of the view that the plaintiff is guilty of concealment of material facts as well.

42. As an upshot, not only injunction application of the plaintiff warrants to be dismissed, even the suit is liable to be dismissed. There is another reason for adopting this course of action. Entire matter is examined treating the averments of the plaintiff as correct (except the assertion about coming to know of the advertisement only in September, 2005). Therefore, there is no need of evidence to establish the facts. However, even on the basis of averments made in the plaint, the legal right in favor of the plaintiff is not established as the impugned advertisement of the defendant is not disparaging.

43. The suit and is No. 821/2006 filed by the plaintiff are accordingly dismissed and is No. 1106/2006 filed by the defendant is allowed with costs.