

(2010) 10 CAL CK 0068

In the Calcutta High Court

Case No : G.A. No. 679 of 2010, APOT No. 132 of 2010 arising out of G.A. No. 614 of 2010 and C.S. No. 43 of 2010

Hindustan Unilever Limited

APPELLANT

Vs

Procter and Gamble Home Products Limited and Another

RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Cable Television Networks Rules, 1994 — Rule 7(9)
Constitution of India, 1950 — Article 19(1)

Citation : (2011) 1 CHN 204

Hon'ble Judges : Pinaki Chandra Ghose, J; Harish Tandon, J

Bench : Division Bench

Advocate : Anindya Mitra, S. Mitra, Arijit Banerjee, S. Roy Chowdhury, G.P. Dutta and S. Ganguli, for the Appellant; S.K. Kapoor, Ranjan Deb, Sakti Nath Mukherjee, Ranjan Bachawat, Ravi Kapoor, Rudraman Bhattacharya, Sayan Roy Chowdhury and Rohitendra Deb, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an judgment and order dated 5th March, 2010 passed by His Lordship in G.A. No. 614 of 2010 (C.S. No. 43 of 2010) and was pleased to grant an order in terms of prayer (d) of the Notice of Motion till twelve weeks. By the said order the Hon"ble First Court has held that the impugned advertisement is disparaging the Petitioners" product TIDE and has resisted the Appellant from broadcasting the same.

2. Being aggrieved, this appeal has been filed.

The facts of the case briefly are as follows:

3. The Appellant/Defendant, Hindustan Unilever Limited (HUL) manufactures and sells different varieties of detergents, one of which is RIN. The Plaintiffs/ Respondents are market leaders in respect of detergents in most countries. The Plaintiffs/Respondents state that washing powder/detergents bearing the mark

Tide are sold in several countries through out the world. The said mark TIDE had developed extensive goodwill and reputation throughout the world and is associated with quality products of the Plaintiffs. The Plaintiffs/Respondents to protect their goodwill and reputation of the said mark they applied for and obtained registration thereof in various countries throughout the world.

4. Since May, 2000, TIDE products have been manufactured and marketed in India extensively by the Plaintiff No. 1 under a license from Plaintiff No. 2. TIDE detergents are sold in various variants, such as TIDE, TIDE (Jasmine and Rose) and TIDE (Naturals). Such products are sold in distinctive and eye catching packaging with distinctive get up, colour scheme and trade dress. The said mark TIDE and the packaging are associated extensively with the Plaintiffs. The same are original artistic works within the meaning of the Copyright Act, 1957 and the Plaintiffs are the owners thereof.

5. The Plaintiffs have incurred enormous expenditure towards promotion and marketing of their products under the said trade mark TIDE. The Appellant/Defendant is the competitor of the Respondents products in the field of detergents. The allegation of the Respondents is that a new advertisement campaign has been launched by the Appellant/Defendant which specifically targets the Plaintiffs/Respondents TIDE product, denigrates and disparages it harshly and attempts to show the Plaintiffs and their products in poor, inferior, unworthy and contemptible quality. It is alleged that the said advertisement is slanderous and amounts to slander of goods. The advertising campaign was broadcast for the first time on 26th February, 2010 and ever since has been aired at regular intervals on prime time television throughout India. The concept of such advertisement is to convey a message to the consumer public that the Plaintiffs (Respondents herein) product TIDE is bad, of substandard quality, grossly inferior and a detergent and a worthless product.

6. It is further alleged that the advertisement on the various channels telecast and/or broadcast and/or published by the Defendant convey inter alia the following visual and spoken matter which are slanderous and disparaging:

(a) Two women are shown waiting at a school bus stop; each of them carrying vegetable baskets with them.

(b) Both the baskets are shown as kept next to each other, one containing a Rin packet and the other a TIDE (Naturals) packet.

(c) The woman with the Rin packet is shown looking into the TIDE (Naturals) basket of the lady with the TIDE (Naturals) packet.

(d) The TIDE (Naturals) woman smiles confidently and says "TIDE (Natural) woman and the voiceover says "TIDE hai". The Rin woman smirks back at her.

(e) The TIDE (Naturals) woman again proudly smiles and says - "TIDE (Naturals) woman [and the voiceover says] Khushbu hai aur safedi bhi. Aur kya chahiye.... The Rin woman again smirks at her and still says nothing.

(f) The women are shown as looking at a bus coming towards them. They walk towards the bus.

(g) A child gets out of the bus wearing a visually dingy dirty school uniform.

(h) The Mother of the child [the lady with the TIDE (Naturals) packet walks towards her child and says - "TIDE (Naturals) woman [and the voiceover says] Aur kya chahiye.... As she says this, suddenly she is shown as getting shocked and surprised expression on her face.

(i) Next a child of equal age shown wearing a crisp sparkling white shirt is shown coming out of the bus and walking along side the other boy with the dingy and dirty shirt.

(j) The TIDE (Naturals) woman is shown as getting extremely shocked and surprised seeing the child in the sparkling white shirt.

(k) This child is shown smiling and walking confidently towards his mother.

(l) He asks his mother: [and the voiceover says] Mummy aunty chaunk kyon gayi"?. Now the woman with the Rin packet is shown smiling confidently.

(m) Then a side-by-side comparison of a white shirt with the Rin mark on it on the left side of the frame and a dingy dirty shirt on the right side with a TIDE (Naturals) pack kept on it are shown and the voiceover says "TIDE se kahi behtar safedi de Rin".

(n) Next the Rin woman with her child are shown walking and smiling confidently. In the background the TIDE lady and her child are shown with expression on their faces shocked and surprised. Next the pack appear on the screen with Rs. 35 being crossed to reveal a unit icon of Rs. 25 price.

(o) In the last frame we see the Rin logo with the super reading "issued in the interest of Rin users".

7. A copy of the storyboard is annexed to the stay petition. It is further alleged on behalf of the Plaintiffs that the impugned advertisement and the visual and spoken content thereof are defamatory and slanderous of the Plaintiffs product TIDE which are also false, untrue and misleading besides being false and malicious.

8. It is alleged that the said advertisement has conveyed and meant directly as well as insinuations and innuendos to convey that the product TIDE is inferior and sub-standard quality. The said advertisement of the Defendants/ Respondents categorically and unequivocally disparages the Plaintiffs product namely, TIDE. In these circumstances, a suit has been filed and in the said suit an interim order was prayed where the Hon''ble Court was pleased to pass an order after hearing the parties.

9. The question arose the display of the advertisement in television channels has disparaged the goods of the Respondents.

10. Mr. Anindya Mitra, learned Senior Counsel appearing on behalf of the Appellant/Defendant contended that this is a comparative advertisement between RIN and TIDE Naturals. The claim made by the Defendant/Appellant is that RIN produces superior whiteness than TIDE Naturals.

11. Mr. Mitra in support of this appeal submitted that comparison is made between TIDE Naturals and RIN. The claim made by the Defendant/Appellant is that RIN produces superior whiteness than TIDE Naturals. There is no claim in the impugned advertisement that TIDE Naturals is bad or useless as a detergent or that it does not deliver the purpose for which it is intended. The Appellant has emphasized only one quality (delivery of whiteness) of RIN is better than TIDE Naturals. According to him comparative advertisement is permissible in law. The Appellant/Defendant has claimed that RIN produces better whiteness than TIDE Naturals. There is no denigration of TIDE Naturals as a detergent. Such advertisement does not give the message that TIDE Naturals is bad or rubbish or useless for its intended purpose.

12. In support of this he relied upon the decision in the case of Reckitt and Colman of India Ltd. v. M.P. Ramchandran and Anr., reported in 1999 (19) PTC 741, where five tests have been laid down and it would be evident that it is permissible to compare the advantages of one's goods over another.

13. He further relied upon the decision in the case of Timothy White v. Gustau Mellin, reported in 1895 AC 154 where the Court held that it was also a case of comparative advertisement where injunction was refused. It was also held that three things should be proved by the Plaintiff in order to make a case for injunction:

(i) The Defendant has compared with the Plaintiffs goods;

(ii) The comparison was false; and

(iii) Damages has resulted or was likely to result.

14. Mr. Mitra further submitted that defence of truth is an absolute defence and no interim injunction should be granted. In support of this he relied upon the following decisions:

1. Reckit Benckiser (India) Limited Vs. Naga Limited and Others,

2. (1998) FSR 9, (Macmillan Magazines Limited v. RCN Publishing Company Limited);

3. Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd.,

4. Imperial Tobacco Co. Vs. Albert Bonnan,

5. 2006 (52) PTC 677 (Del.) (Dabur India Ltd. v. Wipro Limited, Bangalore).

15. Mr. Mitra contended that the Hon"ble First Court had proceeded on the wrong basis that the finding of defence of truth in the said judgment was arrived at only

after filing of affidavits. He submitted that this is incorrect since no affidavits were filed in the said case when the Court arrived at the said finding. The proposition of the Hon''ble First Court is that whether truth is a complete defence can be arrived at only after filing of affidavits and such is not the case here as affidavits are awaited.

16. He further submitted that the correct proposition of law is that unless the Court finds that the defence of truth is wholly illusory and without any basis, the Court should refuse ad-interim injunction. The Hon''ble First Court has not recorded any finding that the plea of truth vis-a-vis RIN and TIDE Naturals is illusory or without any basis. He next contended that no prima facie case is a case of malicious falsehood, in which the burden of proof lies on the Plaintiff as held in the case of Imperial Tobacco Co. (Supra) and also in the case of Timothy White (supra).

17. Therefore, according to Mr. Mitra, the Plaintiffs/Respondents have no ground to ask for injunction restraining any advertisement by the Appellant/Defendant claiming that RIN produces better whiteness than TIDE Naturals. He further drew our attention to the report on laboratory tests and contended that no prima facie case has been made out.

18. According to him, TIDE has three categories of packets viz.

i) TIDE Dirt Magnet;

ii) TIDE Dirt Magnet Jasmine Rose; iii) TIDE Naturals.

19. Mr. Mitra further contended that first two packets are drastically different from TIDE Naturals both in colour composition and get up and there is little or no scope of confusing Natural packets with a TIDE Dirt Magnet or Jasmine Rose pack. Also, no specific case in the petition/plaint has been made that the Voice Over would have viewers to think that RIN is being compared with TIDE Dirt Magnet and TIDE Dirt Magnet Jasmine Rose.

20. It is submitted that overall impact of the advertisement of audio-visual is to be considered, as theme/message cannot be attributed to one frame or word. It is submitted that any reasonable viewer will understand that TIDE in this advertisement means TIDE Naturals having regard to the visual display of the packet of Tide Naturals only. Hearing and seeing are simultaneous and visual impact is more important and has deeper impact. Seeing is believing. Hon''ble First Court has accepted that "Has a very strong impact because of it being visual". The Hon''ble First Court at the highest could have directed modification of Voice Over from "Tide se kahin behatar safedi de Rin" to "Tide naturals se kahin behatar safedi de Rin".

21. Learned Counsel further contended that the following cases have also been considered by the Hon''ble First Court:

i) 2001 FSR 541

ii) 1998 FSR 383

iii) Lakhanpal National Limited Vs. M.R.T.P. Commission and Another,

22. According to Mr. Mitra there is no justification of passing this ad-interim injunction and submitted that it is pertinent to mention that the Hon"ble Court First Court found one picture frame of the impugned advertisement to be objectionable as had been recorded in the impugned order. The Hon"ble First Court has felt that "in the sequence of the frame the attribution of dullness to the Tide shirt becomes clear when the packet of Tide is put on the dull shirt". The Hon"ble First Court suggested that the packet be removed from the dull shirt and this suggestion was accepted by the Appellant. The Appellant has submitted a storyboard of a version of the impugned advertisement, in which the packet has been removed from the frame. It is usual for a Court to issue injunction not in a blanket form as prayed by the Plaintiff but in a modified way asking the Defendant to remove some of the objectionable frames from the advertisement. Therefore, at the highest, the picture frame No. 13 at page No. 96 of the Stay Petition, if removed, there would not be a case of disparagement of Tide Naturals even according to the Hon"ble First Court. Therefore, the injunction restraining the entire impugned advertisement and not merely for removing the objectionable frame is bad in law.

23. He further submitted that the following cases support the said contention that modification orders should be granted in such cases instead of granting blanket injunction against the whole advertisement:

1) 40 PTC 653 - "Only" and "First" were directed to be deleted from the advertisement.

2) Unreported judgment of this Hon"ble Court [Sanjib Banerjee, J.]: Hindustan Unilever Limited v. Anchor Health & Beauty Care Put. Ltd.

3) Unreported judgment of Chennai High Court [Tide Naturals matter]:

Hindustan Unilever Limited v. Procter & Gamble Home Products Limited and Anr.

4) Unreported judgment of the Hon"ble Supreme Court [In Ranbaxy v. Paras Pharmaceuticals matter]: Ranbaxy Laboratories Ltd. v. Paras Pharmaceuticals Ltd. and Ors.

24. Mr. Mitra further contended that on the basis of the ratio of these judgments, the Hon"ble First Court should have restrained the impugned advertisement only so long as the packet on the other shirt (Frame No. 13 on page 96 of the Stay Petition) was not changed by removing the packet in that frame and the Voice Over was not changed from TIDE to TIDE Naturals.

25. He further submitted that the order should be set aside. It has been passed without proper application of mind or exercise of sound Judicial Principles. The order is wrong both in facts and law. It is usual for a Court to issue injunction not in a blanket form as prayed by the Plaintiff but in a modified way asking the

Defendant to remove some of the objectionable frames from the advertisement. The Appellant's legal and Constitutional right to claim superiority in whiteness of RIN vis-a-vis Tide Naturals and publicize such superiority of the product should not have been taken away by issuing injunction in this form. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and economical purchasing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of commercial speech. Therefore, any restraint or curtailment of advertisements would affect the fundamental rights under Article 19(1)(a). Reliance is placed on *Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Others*, . Further the order in terms of prayer (d) of the petition that is to say, not only restraining the impugned advertisement but also "however otherwise disparaging the Petitioners" product "Tide" or the Petitioner in any manner whatsoever is too wide and uncertain. It is submitted that the words "howsoever disparaging the Plaintiffs product Tide Naturals or the Petitioner in any manner whatsoever" is too vague and is outside the scope of the subject-matter of the suit.

26. It is further submitted that in granting an injunction against the Defendant/Appellant from "howsoever disparaging the Petitioner's produce" can give rise to frivolous contempt cases against the Defendant every time the Plaintiff/Respondent is of the view that an advertisement of the Defendant's produce, in any manner disparages the Plaintiffs product. This way, every new cause of action can be brought within the scope of the impugned order and serious allegations such as contempt of the Hon'ble Court be made through contempt cases, so long as the Plaintiff feels that the said advertisement is disparaging in any manner whatsoever, no matter how outrageous or frivolous. In fact, one such contempt petition, relating to a completely different advertisement is being heard before the First Court since the Respondent/Plaintiff is of the view that such advertisement disparages TIDE Naturals. It is further submitted that the blanket injunction in terms of prayer (d) is not in conformity with the reasons and ratio of the judgment. An order must conform to the judgment and should not be in variance to the judgment. Reliance is placed on the judgment reported in 93 CWN 35 (para 3).

27. According to Mr. Mitra the advertisement is also in conformity of the advertising standards council of India (ASCI) which is the industry-created regulator of advertising. Both the Appellant and Respondent are promoters and members of the ASCI. Chapter IV of the "Code for Self-Regulation in Advertising" (Code) gives the standards of conduct to be maintained in comparative advertising. Every advertisement aired in India must adhere to the Code as per Rule 7 Sub-rule (9) of the Cable Television Networks Rules, 1994. The impugned advertisement is in conformity with the provisions of Chapter IV. Reliance is also placed on 64 (2009) DLT 539 that allows a product to have a comparative advertisement in the interest of consumers allowed by the ASCI Code as stated above.

28. Mr. S.K. Kapoor, learned Senior Advocate appearing on behalf of the Respondents/Plaintiffs submitted that in passing the order of injunction, the Hon''ble Judge has held as follows:

(a) The depiction of the child in the dull shirt (representing TIDE) followed by a sparkling white shirt and a dull shirt kept side-by-side was objectionable.

(b) It was further aggravated by the Tide packet being imposed on the dull shirt as it depicted that white shirt washed by Tide remain dull while those washed with Rin acquired sparkling whiteness.

(c) The Defendant/Appellant submitted that it was agreeable to remove the dullness of the shirt by using brighter and whiter shirt.

(d) The Defendant/Appellant also agreed to remove the packet of Tide natural from the advertisement.

(e) Electronic media had a strong impact because of it is being visual and reaching out to millions of people.

(f) The voiceover in the advertisement was (misleading) as if referred to all Tide Products though displaying the packet of Tide Naturals.

(g) Removal of the dull shirt and the Tide packet without removal of the voiceover would not serve any purpose as the dull shirt will be associated with the Tide Lady's child.

(h) The Laboratory Reports referred to in the affidavits were in fact not depicted in the advertisement.

29. In view of the aforesaid, the Hon''ble Judge was of the view that the advertisement was disparaging and objectionable and passed orders of injunction.

30. According to him, the fact would show that the said advertisement clearly and unmistakably conveys the message that the Plaintiffs/Respondents product TIDE are bad and unfit for the purpose of cleaning clothes. This is done principally by use of visual images conveying that clothes washed with TIDE became dull and dignity while clothes allegedly washed with RIN became sparkingly bright. This clearly sends out the message that TIDE is unfit for washing clothes and discolours and damages the same.

31. Mr. Kapoor further submitted that the clear intention of the comparison as viewed in the impugned advertisement was to speak of the Plaintiff/Respondent's products in derogatory terms and in a manner which is understood by the viewing public to mean that the Plaintiff/Respondent's product was wholly unfit and damages clothing instead of clearing them.

32. He further contended that by portraying the said advertisement that the white clothes washed with TIDE become dingy, dull and discoloured, the Defendant/Appellant has belittled and disparaged the Plaintiff/Respondent's product which is not permissible. The comparisons in the impugned

advertisement are not factually accurate. It unfairly denigrates, attacks and discredits the Plaintiff/Respondent's product, directly and by use of false and manipulated images. The suggestion that TIDE produce of the Plaintiff/Respondent is not whitening is false and malicious.

33. Mr. Kapoor further submitted that there is a clear admission that the advertisement is disparaging as the Defendant/Appellant volunteered to remove from the advertisement the dull, dingy/dicoloured shirt used to depict the Plaintiff/Respondent's product and the packet of Tide Natural. Hence, it cannot be contended that the advertisement was not disparaging and there can be no question of justification.

34. He further contended that in doing so the Hon"ble Judge has followed the correct legal tests as laid down in the case of Reckitt and Colman v. M.P. Ramchandran reported in (19 PTC 741 at page 746) and in the case of Heinz India Put. Ltd. v. Glaxo Smithkline Consumer Healthcare Ltd. reported in 2009 (2) CHN 479.

35. He contended that the law is well-settled and sole question to be decided is whether the advertisement complained of disparages the product of the Plaintiff/Respondent or not?

36. He further contended that the Hon"ble Judge has correctly exercised its discretion and in accordance with settled principles of law. It is a well-settled principle that an Appellate Court will not interfere with the exercise of discretion of the Trial Court on any factual matters simply on the ground that after assessing the materials it would have itself arrived at any different conclusion from that of the Trial Court unless, of course, it finds such conclusions to be wholly perverse [2009 (2) CHN 479].

37. He further contended that the Appellant can never possibly justify its depiction of white clothes being washed with TIDE turning dull and dingy.

38. Mr. Kapoor submitted that the Appellant never sought to justify this. What the Appellant has tried to justify is that its product gives superior whiteness which is wholly avoiding the Plaintiffs grievance - this is of no consequence at all. The question is whether the Defendant/Appellant was entitled to portray the Plaintiff/Defendant's products as being unfit by use of the said visual images which show that white clothes washed with Tide become dull, dingy and discoloured. In view of the law as mentioned above, this is not permissible.

39. He further contended that this cannot be decided on affidavit at the interlocutory stage but at the trial. In support of this he relied on 42 PTC 88 Glaxo Smith Kline Consumer Health Care Limited Vs. Heinz India Private Limited and Others,

40. It is further submitted that no damages had been claimed in the suit, nor was leave under Order 2 Rule 2 has been obtained. He contended that the plea of justification is not available at the interlocutory stage. Appellant has only

claimed superiority without rubbishing Plaintiffs goods. The advertisement has clearly rubbished the Plaintiffs product by showing that white clothes turn dull and dingy and are discoloured on washing with TIDE. It is well-settled that this is not permissible. In support of this learned Counsel relied on *White v. Mellin*'s 1895 AC 154 and *Reckitt & Coleman*'s, 19 PTC 741.

41. Mr. Kapoor again submitted that where the impugned advertisement "proceeds to make assertions of fact which it claims to be backed by scientific data tending to show that the Respondent's products is not suitable for the intended purpose, it falls within the realm of actionable disparagement" [2009 (2) CHN 479]. Thus it is settled that such questions of proof of falsity are to be decided at the trial and not at the interlocutory stage.

42. He further submitted that the advertisement is modified and a new story board has been adduced to the stay petition. Admittedly, this was not before the Trial Court. The Hon'ble Judge has stated in the judgment that removal/changing of some offending portions would not do and on such basis rejected the same and that the removal of some images would be inadequate as the dull shirt would still be associated with TIDE.

43. Mr. Kapoor further contended that modification/editing of advertisement by Court cannot be said to be permissible or an accepted proposition of law.

Hence he submitted that this appeal should be dismissed.

44. It is submitted that in the case of *Reckitt and Colman of India Ltd. v. M.P. Ramchandran* reported in 1999 (19) PTC 741 the learned Judge summarized the law in the following terms:

A tradesman 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.

45. The learned Judge went on to say that if there is no defamation to the goods or to the manufacturers of such goods, no action lies. The Division Bench of this Court presided over by S.S.Nijjar, C.J., (as His Lordship then was) approved of the same and followed these principles in the case of *Heniz India Private Limited v. Glaxo Smithkline Consumer Healthcare Limited* reported in 2009 (2) CHN 479.

46. After considering the facts and circumstances of this case we find that the tests are well-settled and sole question to be decided is whether the advertisement complained of disparages the product of the Plaintiff or not ? This is a factual aspect which has to be proved in each case. It is accepted proposition of law applied by the Trial Court in coming to the conclusion.

47. At the outset, we were invited to view the advertisement on the computer and we have had the advantage of viewing the advertisement. In our opinion, the advertisement clearly shows that a comparison is sought to be drawn

between the Respondent's product and that of the Plaintiff. In doing so it appear to us that the Respondent tried to denigrate the product of the Appellant and it has given a message to the viewer that the product of the Appellant is bogus one.

48. There is an indication that the Respondent's product is inferior in quality than that of the Appellant. In 1999 PTC (19) 741 (supra) the Court has laid down five principles as a guiding factor for grant of an injunction of the nature as prayed for herein which are as follows:

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 my 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 the others.

IV. He, however, cannot while saying 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 word he defames his competitors and their goods, which is not permissible.

V. If there is no defamation, to the goods or to the manufacturer of such goods no action lies, but if there is such defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

49. Therefore, after taking into account the principles settled by the Court it appears to us that such comparison which has been made by the Respondent is not permissible under the law. In our considered opinion, the representation made by the Appellant is only to denigrate the product of the Plaintiff by such advertisement.

50. In the facts and circumstances of this case, we find at this stage that disparagement has been done by viewing the said advertisement on T.V. Channels by the Appellant and in our considered opinion, the Appellant has not acted within the principles laid down by the Court and hence, we do not find that there is any illegality or irregularity in the order so passed by the Hon'ble First Court.

51. The Hon'ble Division Bench of this High Court in 2009 (2) CHN 479 (Heinz India Private Ltd. v. Glaxo Smithkline Consumer Healthcare Ltd. and Ors.) held as follows:

What emerges from the aforesaid discussion by the House of Lords as a principle seems to be that a tradesman can say that his goods are better than those of the rival. In that sense, better would mean in regard to the purpose for which the goods are intended. In so doing it is permissible to emphasise one or the other qualities being better than the quality of the rival product. Every extravagant

statement may imply disparagement of the goods of others in the same field. Such disparagement is not actionable. In order to constitute actionable disparagement, the Plaintiff must show, that the Defendant's representations were made about the Plaintiff's goods, the statements were untrue and they were disparaging the goods of the Plaintiff and that they have caused special damages to the Plaintiff.

52. In "Dabur India Ltd. case" (supra) a learned Single Judge of the Delhi High Court held that "It is one thing to say that the Defendant's product is better than that of the Plaintiff and it is another thing to say that the Plaintiff's product is inferior to that of the Defendant. This will always happen in a case of comparison. It is permissible for an advertiser to proclaim that its product is the best." On the other hand, "disparagement of a product should be defamatory or should border on defamation. In other words, the degree of disparagement must, be such that it would tantamount to, or almost tantamount to defamation." In *Pepsico Inc.* (supra) again a learned Single Judge of the Delhi High Court has held that "it is well known law that merely puffing is not dishonest and mere "poking fun" at a competitor is a normal practice of comparative advertising and is acceptable in the market." It is further observed that "In order to succeed in an action, the Plaintiff's have to establish the following key elements:

1. A false or misleading statement of fact about a product.
2. That statement either deceived, or had the capacity to deceive, a substantial segment of potential consumer, and
3. The deception was material, in that it was likely to influence consumer's purchasing decisions.

53. It is also held in the case of *Reckitt and Colman of India Ltd. v. Kiwi T.T.K.*, 1996 PTC (16) 393 as follows:

The settled law on the subject appears to be that a manufacturer 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 manufacturer 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.

54. We have examined the entire issue on the basis of well-recognized principles of law as indicated above. On a prima facie view of the advertisement it is apparent that intention has been shown by the Appellant to disparage or denigrate or to defame the product of the Respondent.

55. At this ad interim stage it appears to us that the rival claims of the parties are still in fluid state. In our opinion, discretion has not been shown to have been

exercised by the Hon''ble Trial Court arbitrarily or capriciously or perversely ignoring the settled principles of law regulating the grant of injunction in this case.

56. Accordingly, we do not find at this stage any illegality or irregularity in respect of the order so passed by the Hon''ble First Court and accordingly, we do not find any reason to interfere with the discretion so exercised by His Lordship in granting the interim relief.

57. We see no justification to interfere with the impugned order of the Hon''ble Judge and we find no merit in this appeal.

58. For the reasons stated hereinabove, the appeal is dismissed.

59. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Harish Tandon, J.

I agree.