

(2015) 01 DEL CK 0216
In the Delhi High Court
Case No : CS (OS) No. 1913/2014

Philips India Pvt. Ltd.

APPELLANT

Vs

Shree Sant Kripa Appliances Pvt. Ltd.

RESPONDENT

Date of Decision : 19-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Constitution of India, 1950 — Article 19(1)(a)

Citation : (2015) 2 AD 209 : (2015) 217 DLT 429 : (2015) 62 PTC 424

Hon'ble Judges : Rajiv Shakdher, J.

Bench : Single Bench

Advocate : Anish Kapur and Mohit Mathur, for the Appellant; Shailen Bhatia and Priti, Advocates for the Respondent

Judgement

Rajiv Shakdher, J.

IA No. 11819/2014 (u/O 39 R 1 and 2 r/w S. 151 CPC for stay)

1. The present suit has been filed to seek a decree of permanent injunction qua the defendant against what the plaintiff construes as false, misleading and disparaging representations. The representations, according to the plaintiff, are essentially in the form of advertisements/internet representations. The captioned application, which is what I am concerned with presently, is filed in aid of the reliefs claimed in the suit.

1.1 The suit, as framed, is in the nature of trade libel, which is also interchangeably, referred to as an action for injurious falsehood or, more appropriately, an action for malicious falsehood.

1.2 The peculiarity of the present action is that the impugned advertisements are generic in nature which, while comparing two rival products do not specifically name the plaintiff. The two rival products being Light Emitting Diode (hereafter referred to as LED bulbs) and Compact Florescent Lamps (hereafter referred to as the CFL bulbs).

1.3 This aspect becomes even more involved by virtue of the fact that the advertisements issued by the defendant, which extols the virtues of LED bulbs over those of CFL bulbs; is a product, which is also manufactured by the plaintiff. There is, however, no averment in the plaint with regard to the fact that the plaintiff is also in the business of manufacturing LED bulbs. On the other hand, the plaintiff, which apart from LED bulbs also manufactures CFL bulbs, has approached the court for grant of injunction against the defendant on the ground that the representations made qua CFL bulbs in the impugned advertisement, are false and misleading.

1.4 It is in this context that the plaintiff claims that the impugned advertisements, though generic in nature, affects its goodwill and market reputation. In support of this assertion, the plaintiff has made the following averments that:

(i) It is the largest manufacturer of the CFL bulbs having, approximately, 30% of the market share.

(ii) It is the only player in the business with direct reach in 1000 semi-urban markets and has, therefore, invested large sums of money to support conventional lighting distribution in these markets.

(iii) Nearly 13% of the plaintiff's annual turnover comprises of CFL bulbs.

(iv) The plaintiff has the biggest CFL manufacturing unit; which is located at Mohali and is capable of producing nearly six (6) million CFL bulbs per month. Towards this end, it has engaged two thousand (2000) permanent and temporary employees, which is supported by a full-fledged quality and development department.

2. The plaintiff is, as indicated above, essentially, aggrieved by the following impugned advertisement dated 19.5.2014, published in Dainik Bhaskar:

2.1 This apart the plaintiff is also aggrieved, as stated above, by what it claims are a false and misleading averments made by the defendants on its website: <http://syskaledlights.com>.

2.2 According to the plaintiff, the aforementioned advertisement issued by the defendant makes the following false and/or misleading representations, while extolling the virtues of the LED bulbs manufactured and sold by it under the brand name: "SYSKA":

(i) 5 watt SYSKA LED is equal to any 15 watt CFL bulb.

(ii) The price of 5 watt SYSKA LED is equal to any 15 watt CFL bulb.

(iii) SYSKA 5 watt LED lasts up to 50,000 hours.

(iv) "It's game over for CLF"

3. In order to demonstrate the falsity of the defendant's claim, the following

assertions are made by the plaintiff:

(i) The defendant's 5 watt LED bulb is almost five (5) times the cost of a 15 watt CFL bulb sold by various other manufacturers in India and is seven (7) times the cost of a 14 watt CFL bulb manufactured by the plaintiff. It is stated that the plaintiff manufactures only fourteen (14) watt CFL bulbs and not fifteen (15) watt bulbs. The price of defendant's five (5) watt LED bulb is Rs.700/- as opposed to the price range of a 14/15 watt CFL bulb which, ranges between Rs.150/- and Rs.175/-.

(ii) The defendant's claim in the impugned advertisement that the LED bulb manufactured by it lasts nearly 50,000 hours is false as the packaging in which the defendant sells its five (5) watt LED bulbs is clearly indicative of the fact that LED bulbs manufactured by it last for "more than 30,000 hours". Therefore, according to the plaintiff, the defendant has employed deception in making the said statement in the impugned advertisement.

(iii) As regards the defendant's claim that its five (5) watt LED bulb can be used in place of any fifteen (15) watt CFL bulb, the plaintiff avers, that this statement, is also false, as the packaging of the defendant's product itself indicates that defendant's five (5) watt LED bulb is equivalent to a ten (10) watt CFL bulb.

3.1 The plaintiff has also relied upon a report of an expert, namely, one TUV Rheinland India Private Ltd. (in short TUV), to demonstrate, that the, defendant's five (5) watt LED bulb emits light, which is, only 33.93% of the light that is emitted by a fourteen (14) watt CFL bulb manufactured by it.

3.2 The plaintiff avers that the defendant by making the aforementioned false representations and, in particular, making a representation that it is, "game over for CFL bulbs", has disparaged the plaintiff's product, resulting in, dilution of goodwill and reputation.

3.3 The plaintiff asserts that the impugned advertisement deludes the general public into believing that the defendant's five (5) watt LED bulb is superior to a fifteen (15) watt CFL bulb, as a class. Since, the plaintiff's product falls in the class of products (i.e. CFL bulbs) which are disparaged by false and misleading advertisements, it is entitled to bring this action and claim interim protection, as sought in the captioned application.

4. The defendant, on the other hand, relies upon the advertising material of the plaintiff to demonstrate that, even according to the plaintiff, the LED bulb as a product is much superior to a CFL bulb. Parts of the plaintiff's advertising material have been extracted in the written statement in the form of a chart which compares a ten (10) watt LED bulb with a fifteen (15) watt CFL bulb and a sixty (60) watt ordinary bulb. The chart shows that not only the life in hours of a ten (10) watt LED bulb is higher, but that, the total electricity cost and the total cost of ownership of a ten (10) watt LED bulb is, much lower, when compared to a fifteen (15) watt CFL bulb and a sixty (60) watt, ordinary bulb. Based on this,

comparative chart and other assertions made in the advertisement issued by the plaintiff, it is averred by the defendant that even according to the plaintiff the following comes through when an LED bulb is compared with a CFL bulb:

(i) LED bulb is far more efficient energy-wise when compared to CFL bulb.

(ii) The brightness (which is measured in lumens) of a LED bulb, is greater than that of a CFL bulb.

(iii) Though, the initial cost of a LED bulb is higher than that of CFL bulb, since, the former lasts longer and saves nearly 50% more electricity, than a CFL bulb, it turns out to be cheaper, in the long run.

5. In other words, it is contended that the assertions made in the impugned advertisement that it is game over for the CFL bulb is no different than what is stated in more explicit terms in the plaintiff's own advertising material which is kept-back from the court. The defendant has compared this statement with the plaintiff's own advertisement which reads as follows:

"Phillips LED gives 50% savings over CFL." 5.1 The defendant thus avers that the plaintiff has not only compared the attributes of an LED bulb as against a CFL bulb, but in a different form and, words, conveyed the message that the former is superior to the latter.

5.2 Furthermore, the defendant avers that insofar as the consumer is concerned, it cannot be misled in view of extensive dissemination of the attributes of the two rival products (i.e. LED and CFL bulb) on the internet. It is the defendant's stand that in fact it is also now a Government policy to promote the usage of LED bulbs over CFL bulbs.

5.3 As regards the inconsistency in defendant's stand with regard to period for which an LED bulb would last, it is averred that the plaintiff has in one advertisement taken the stand that its LED bulb has a life of fifteen (15) years whereas the life expectancy of an LED bulb manufactured by it has been claimed in other advertisements as ten (10) years.

SUBMISSIONS MADE BY COUNSELS

6. In the background of the aforesaid facts, submissions have been advanced by counsels for parties herein.

6.1 On behalf of the plaintiff, submissions have been advanced by Mr. Anish Kapur, while on behalf of the defendant, arguments have been made by Mr. Shailen Bhatia.

6.2 Mr. Kapur's submissions can be broadly paraphrased as follows:-

(i) The plaintiff is a leading manufacturer of CFL bulbs having approximately 30% of the market share. Insofar as the LED bulbs are concerned, it has a market share of 34%.

(ii) The turnover of the plaintiff for the calendar year 2012-2013 qua CFL bulb was a sum of Rs.714.10 crores, while during the same period vis-?-vis LED bulbs, it achieved a turnover of Rs.74.36 crores. Similarly, for the period March 2014 to September 2014 the plaintiff had achieved a turnover of Rs.490.53 crores in respect of CFL bulbs and a turnover of Rs.1103.40 crores vis-a-vis LED bulbs.

(iii) The misleading statements/representations made by the defendant which disparage the CFL bulb as a class includes the plaintiff.

(iv) While, the defendant, is entitled to extol the virtues of its product, it cannot disparage rival products even as a class by use of deceptive, misleading and/or false representations. In support of this submission, reliance was placed on the representations made by the defendant in the impugned advertisement which, as indicated above, according to the plaintiff are false and misleading. In support of the aforesaid submission, reliance was placed on the following judgments: Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Others, ; Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara - Lee, ; and Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., .

(v). As regards the stand of the defendant that the plaintiff had withheld a material fact, which was that, it was in the business of manufacturing LED bulbs - it was contended that the said aspect would have no bearing on the decision to be rendered by this court for the following reasons:

(v)(a) Firstly, the aspect, of which disclosure is insisted upon, has to pertain to a fact, which is not known. The fact that plaintiff is in the business of manufacturing LED bulbs is in the public domain and, therefore, could not amount to suppression or concealment of a material fact. Secondly, the non-disclosure of a particular aspect should pertain to a material fact which, if disclosed, would disentitle the plaintiff to the reliefs claimed by it. The fact that the plaintiff manufactures LED bulbs cannot disentitle the plaintiff to claim the reliefs that are sought for in the present action.

6.3 Mr. Bhatia, on the other hand, relied, largely, upon the stand taken in the pleadings to demonstrate the following:

(i) The plaintiff itself has been comparing in the advertisement material published or circulated by it, the advantages of a LED bulb over that of a CFL bulb. The comparisons, according to the learned counsel, pertain to attributes such as energy efficiency, cost and luminosity. It is this material, which, according to Mr. Bhatia, the plaintiff chose not to file and, thus, in a sense, kept-back material from court, which would ultimately be crucial in deciding the fate of the action.

(ii) Learned counsel also drew my attention to the advertising material of the plaintiff, which was brought on record by the defendant, to demonstrate the alleged inconsistency in the plaintiff's representation to its own consumers. By

way of example, Mr. Bhatia referred me to the advertisement material of the plaintiff which showed different percentages of energy saving achieved when a LED bulb was used say in an office or, a retail shop or, for street lighting as against a single page advertisement which showed a saving in energy up to 50%, without such like classification.

(ii)(a) According to Mr. Bhatia, this itself was a misleading statement preferred by the plaintiff.

(ii)(b) Another example which was cited by Mr. Bhatia was pertaining to the price of the bulb which was shown as Rs.150/- while the carton indicated that there was a saving of Rs.700/-.

(iii) It was Mr. Bhatia's contention that the fact the plaintiff kept-back such material from the court, should itself, result in the dismissal of the suit.

(iv) In support of his submissions, Mr. Bhatia relied upon the judgments in the cases of Godrej Sara Lee Ltd. Vs. Reckitt Benckiser (I) Ltd., ; Reckitt Benckiser (India) Limited Vs. Naga Limited and Others, ; and Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd., .

(v) Mr. Bhatia thus contended that since it was in the interest of the public, to know and be educated about the advantages of a LED bulb over that of a CFL bulb, no injunction could follow. For this submission, Mr. Bhatia relied upon the judgment of this court in Mother Dairy Foods and Processing Ltd. v. Zee Telefilms Ltd., 2005(30) PTC (Del.).

(vi) Lastly, Mr. Bhatia submitted that in order to succeed in its action the plaintiff would have to demonstrate that the issuance of the advertisement was motivated by malice. Learned counsel submitted that there is no allegation of malice in the plaint qua the defendant and, therefore, no case for injunction was made out. In support of this submission learned counsel relied upon the judgment in the case of Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd.,

REASONS

7. Having heard the counsels for the parties and perused the record, what necessarily emerges is as follows:

(i) The defendant in the impugned advertisement has made representations which extol the virtues of a LED bulb over that of a CFL bulb.

(ii) In extolling the virtues of a LED bulb over that of a CFL bulb, the defendant has taken recourse to attributes such as luminosity, price and the lifespan of the two rival products.

(iii) In doing so, the defendant has displayed, to say the least, inconsistency. The comparison of a LED bulb with that of a CFL bulb is generic in nature. There is no specific mention of the plaintiff's product.

(iv) The plaintiff, on the other hand, claims a 30% market share qua the CFL

bulbs. There is, therefore, a sizeable majority apart from the plaintiff, which deals in CFL bulbs.

(v) The plaintiff is, undoubtedly, also in the business of manufacture and sale of LED bulbs and towards that end has published and circulated advertisements which demonstrate the comparative advantage of a LED bulb over that of a CFL bulb.

7.1 Therefore, having regard to the above, the grievance gets narrowed down to not the comparison per se made by the defendant but to the alleged falsehood with regard to the attributes brought into play by the defendant in comparing the two products. The question really boils down to the degree of truth contained in the representations made by the defendant. The plaintiff has sought to demonstrate falsehood in the defendant's statement. Therefore, before I proceed further, in fitness of things, it may be relevant to bear in mind the principles elucidated by various judgments of this court and that of the Supreme Court, and other texts, and judgments of English courts with regard to the tort of disparagement or trade libel or malicious falsehood, as it is inter-changeably known.

7.2 An actionable disparagement is a statement made about a competitor's goods which is untrue or misleading and which is made to influence or tends to influence the consumer to not buy the goods. While one is allowed to boast about the virtues of one's own goods, it is not permissible to disparage or denigrate a rival's product. In other words, where words go beyond mere puffery, it is actionable. Claiming superiority of one's product over the product manufactured by a rival without negative connotations does not constitute a tort of malicious falsehood. (see Words and Phrases permanent Edition Vol. 12B page 325 and Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara - Lee, .

7.3 For an action of malicious falsehood to succeed, the plaintiff is required to plead and prove the following:

- (i) Firstly, that the impugned statement/representation is untrue;
- (ii) Secondly, that the impugned statement/representation is made maliciously, that is, without just cause or excuse; and
- (iii) Lastly, the plaintiff has suffered special damage by virtue of the impugned statement/representation. In common law, pleading and proving special damages is essential for institution of an action of malicious falsehood. There are, however, some jurisdictions where, by statute it is not necessary to allege or prove special damage in certain cases. [See Defamation Act, 1952 of United Kingdom]. Even where plaintiff intends to rely upon statutory exceptions, it is still required to give details of the alleged probable damage on which he seeks to place reliance, unless, it can be ascertained from the factum of the publication alone.

[See Royal Baking Powder Co. v. Wright Crosslay and Co., 1901 (18) RPC 95;

Ucan v. Hilti, (1968) F.S.R. 248 and Halsbury Laws of England, Vol. 32, P. 493 para 778 and 780].

7.4 It will have to be borne in mind that where there is a generic disparagement of a product as a class without naming or specifying a particular manufacturer, dealer or seller, disparagement is difficult to establish, at least at the interlocutory stage unless the entity against whom the disparaging representation is directed is the only rival in the trade.

7.5 Similarly, where the defendant is a competitor, malice is difficult to prove as it could be argued that the impugned representations were directed only to further the defendant's business by extolling the virtues of its product and not to tear down the plaintiff's product. In the case of an uninterested defendant such as a dissatisfied customer or say a newspaper it may be easier to establish malice.

7.6 Insofar as special damage is concerned, it could be established by pleading and proving a general decline in business evidenced by record maintained in the usual and normal course of business. Decline in business should be attributable to the impugned representations and not on account of general economic regression in the concerned industry or otherwise. (See : Villanova Law Review, Vol.7, 1962, Article 5, pages 271 and 273).

7.7 While dealing with an action for malicious falsehood, one would also have to bear in mind that advertisement is a form of commercial free speech which is protected by Article 19(1)(a) of the Constitution. Having said so, free speech is not an absolute right, it is counter-balanced by an equally forceful right which is the right to conduct business. An entity cannot indulge in commercial free speech which tends to maliciously injure a rival/competitor. While the advertisement cannot make false, misleading, unfair or deceptive representations, everything stated in the advertisement need not be taken as a serious representation of a fact. [See Division Bench judgment in Dabur India Ltd. (supra)]. This is especially so in the case of a comparative advertisement. In deciding, whether the derogatory statements made by a trader against his rival (which is made in a form of a comparative advertisement), is actionable, what has to be borne in mind is, whether or not a reasonable person would take the claim made, seriously. [See De Beers Abrasive Products Ltd. vs International General Electric Co. of New York Ltd., (1975) 2 All ER 599 at 605; Vodafone Group Plc vs Orange Personal Communications Services Ltd., (1997) EMLR 84; DSG Retail Ltd. v Comet Group Plc, (2002) All ER (D) 112 (Feb.); and Colgate Palmolive Company and Another Vs. Hindustan Unilever Ltd., .

7.8 Dabur India Ltd. (supra) is a case in point where the appellant before the Division Bench claimed that it was in the business of manufacturing a popular mosquito repellent cream which had been allegedly disparaged by the respondent by issuance of an advertisement which sought to bring out, albeit falsely, the fact, that it caused "rashes", "allergy" and, was "sticky", in nature.

This was also a case of alleged disparagement, by an innuendo. There was in the impugned advertisement, no specific reference to the appellant. Furthermore, the appellant had claimed that it enjoyed in certain parts of the country 80% of the market share, while in others it had a near monopoly. The suggestion was that, the impugned advertisement, could have only been directed against it, given its expansive market share. 7.9 The injunction was refused in the first instance, inter alia, on the ground that the appellant had failed to prima facie establish that a tort of malicious falsehood had committed. The plaintiff carried the matter in appeal to the Division Bench, which dismissed the appeal. The Special Leave Petition filed against the Division Bench judgment was also dismissed.

8. In the given case, while there may be merit in the plaintiff's submission that the defendants assertions with regard to the price, the energy efficiency and the luminosity of the rival product (i.e. CFL bulb) is not accurate, it does not still, at least at this stage, establish the fact, that the impugned representations were made with the intent to injure the plaintiff's business in CFL bulbs. The fact that the defendant seeks to extol the virtues of LED bulbs over that of CFL bulbs is quite clear but what is not presently established is that it was done with a malicious intent to injure plaintiff's product. The plaintiff cannot but accept the fact (in the instant case) that even from its point of view a LED bulb is technologically superior to a CFL bulb. The only question is one of degrees. The plaintiff, therefore, has sought to pin down the defendant qua its representations based on the alleged inconsistencies in its own statements with regard to price, energy efficiency and luminosity. In my view, these inconsistencies in the defendant's statement would not be sufficient to grant an injunction as the other ingredients of the action are not even prima facie established at this stage. There is no material on record to show injury or sufferance of special damages which can be said to be attributable to the impugned advertisement/ representation. In a sense, the plaintiff stands to profit, at least partially, if the sale of LED bulbs gains momentum in the market.

9. There is another aspect of the matter, which is that, the action which purports to be in the nature of a tortious claim of disparagement or malicious falsehood stops short of a claim for damages. The only relief sought is of permanent injunction. I would be chary of granting interim injunction based on an allegation of a civil wrong said to have been committed by the defendant, which stops short of pleading particulars and laying a claim for damages. Bald pleadings which allude to degradation of reputation and loss would not suffice. The suit as framed, and material placed on record, shows that there is a slim likelihood of the plaintiff succeeding. Trial may perhaps reveal more.

10. Having regard to the aforesaid discussion, in my view, no case is made out for grant of injunction, as prayed. Accordingly, IA No. 11819/2014 is dismissed.

10.1 Needless to say, any observation made by me hereinabove will have no bearing on the final merits of the case.

CS(OS) No. 1913/2014

11 List before the roster Bench on 23.01.2015.