

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07 .07.2008

+ CS (OS) 1359/2007

RECKITT BENCKISER (INDIA) LTD.

... Plaintiff

- versus -

HINDUSTAN LEVER LIMITED

... Defendant

Advocates who appeared in this case:

For the Plaintiff : Mr Chander M. Lal with Ms Shikha Sachdev and Ms Kirpa Pandit.

For the Defendant : Mr Gourab Banerji Sr Advocate with Mr Aditya Narain, Mr Sameer Pareekh, Mr Sumit Lao, Mr Nitin Thukral, Mr Kush Chaturvedi, and Mr Arun Krishnan.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

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| 1. | Whether Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to the Reporter or not ? | Yes |
| 3. | Whether the judgment should be reported in Digest ? | Yes |

BADAR DURREZ AHMED, J

1. This is a suit for permanent injunction and damages for disparagement and unfair trade practices. The plaintiff and the defendant are competitors. The plaintiff is aggrieved by the defendant's advertisement on television, which allegedly disparages the plaintiff's soap sold under the trade mark "DETTOL". The defendant's advertisement is for promotion of its soap "LIFEBUOY".

Reliefs sought by the plaintiff:

2. The plaintiff has prayed that the defendant be restrained by a permanent injunction from (i) issuing or telecasting the impugned advertisement, or in any other manner disparaging the goodwill and reputation of the plaintiff and its product sold under the trade mark DETTOL, in any other advertisements and in all media whatsoever including the electronic media; (2) using the depiction of the plaintiff's soap or any other soap deceptively similar to that of the plaintiff's in its advertisement or in any other manner disparaging the goodwill and reputation of the plaintiff and its product sold under the trade mark DETTOL; (3) using any other indicia whatsoever to associate with/depict the plaintiff or its products in its advertisements issued in any and all media whatsoever including the electronic media. The plaintiff also seeks damages to the extent of Rs 20,00,050/- for disparagement, denigration and tarnishment of its goodwill and reputation by the defendant by its impugned advertisement. Additionally, the plaintiff has also prayed for punitive and exemplary damages against the defendant as well as for costs of the suit.

The Complaint:

3. It is stated in the complaint that the plaintiff has been involved in the manufacture of the famous antiseptic disinfectant under the trade mark DETTOL, for over 70 years and that the mark DETTOL has become synonymous with good hygiene and, today, it is a household

name and is the most widely used antiseptic disinfectant in the country. It is stated in the plaint that the history of DETTOL dates back to the year 1929 when the DETTOL antiseptic liquid was developed. It is alleged, that as an antiseptic germ disinfectant, DETTOL has an unparalleled reputation in the medical profession. It is also averred that DETTOL has continuously evolved to meet modern day demands, and now incorporates a range of innovative antiseptic, disinfectant and cleaning products ranging from antiseptic liquid, hand wash and the DETTOL toilet soap which has been manufactured and sold by the plaintiff continuously since 1981.

4. It is further stated in the plaint that the present action concerns the alleged intentional and deliberate disparagement by the defendant of the plaintiff's DETTOL toilet soap which is identified by the members of the trade and public by its colour and its new modern, distinctive and unique shape, a representation of which is as under:-



[Front view of DETTOL Original soap]

It is stated that on the front of the soap the trade mark “DETTOL” and the sword devise is clearly visible. The plaintiff contended that the consumers

recognise the plaintiff's product by the colour and distinctive shape of the soap.

5. It is further alleged that the DETTOL toilet soap, when packed, is also identified by its distinctive green coloured packaging. A representation of the plaintiff's product packaging is as below:-



[Photograph of the wrapper of Dettol Original soap]

6. It is further stated in the plaint that in 1981 the DETTOL soap was launched as an orange coloured bar and rectangular in shape without any curves. The present shape with the curved edges and the curvature in the middle was adopted by the plaintiff on or about May, 2006. The new improved DETTOL soap has an all new modern shape with curved edges and a distinctive curvature in the middle which helps consumers easily identify and distinguish the product from other products. It is averred that while there are other orange coloured soaps in the market, the plaintiff's soap is the only one with the distinctive shape, as indicated above. It is also stated that the new improved DETTOL soap has three variants available in

the market. One being the said DETTOL Original and the two others being DETTOL Skincare, a white soap, and DETTOL Cool, a blue soap. As per the plaint, out of the three variants, the DETTOL Original bar of soap, which has an orange colour, is the most popular. According to the plaint, the sale of DETTOL Original constitutes 80% of the total DETTOL soap sales.

7. The plaintiff has further stated that the packaging of the soap has always been of the distinctive green and white colour combination and the packaging has become synonymous with the famous DETTOL brand of the plaintiff. It is alleged that the purchasing public perceives the orange coloured bar with its distinctive shape and the distinctive green and white packaging to be synonymous with the DETTOL Original soap. It is alleged that the plaintiff has been continuously and uninterruptedly marketing its DETTOL products with the distinctive packaging consisting of the green and white colour combination including sword device in India since the year 1933.

8. The plaintiff has further stated in the plaint that it had recently announced in a press release that it is contemplating to introduce new variants of its flagship brand DETTOL and it launched a new ad campaign -- "Surakshit Parivar" -- to create awareness of the practice of hygiene at the family level. The plaintiff has allocated a budget of about Rs 5 crores for the aforementioned programme. It is also stated that by virtue of extensive sales and sales promotion activities, the orange coloured DETTOL soap, its

new curved shape along with the distinctive green and white packaging is associated exclusively with the Plaintiff.

9. It is alleged that the plaintiff was shocked when it was recently brought to its attention that the defendant has introduced an advertisement on television, which intentionally and deliberately disparages the soap of the plaintiff sold under the trade mark DETTOL and the unique and distinctive packaging described above. The defendant's said advertisement is for its LIFEBUOY soap. The plaintiff alleges that a bare viewing of the said advertisement would be sufficient to convince this Court of the malicious intention of the defendant to increase the market share of its LIFEBUOY soap by tarnishing the goodwill and reputation of the plaintiff's soap i.e. DETTOL Original Soap.

10. It is alleged that the soap which has been disparaged in the impugned advertisement is virtually identical to the plaintiff's product. The contours and the curvature in the middle on the toilet soap in the defendant's advertisement is virtually identical to the contours of the plaintiff's DETTOL Original soap. The only difference being that the name of the plaintiff's product and the logo are not shown in the advertisement. The colour of the soap in the defendant's advertisement is also virtually identical to that of the DETTOL Original soap of the plaintiff. The packaging of the toilet soap used in the defendant's advertisement is also similar to the packaging of the plaintiff's said soap. It is alleged that from the above, it is apparent that the

soap featuring in the defendant's advertisement is designed to give an impression to the buyers that the offending soap is the plaintiff's DETTOL Original soap. The advertisement then, allegedly, proceeds to disparage the soap in the following manner:-

(i) The advertisement begins with a couple returning home after getting wet in the rain. The wife then proceeds to take a new soap to go and have a bath. The green coloured packaging, the orange coloured soap and the distinctive DETTOL shape is clearly visible in the advertisement. The intention of this scene is to convey to the audience that the offending soap pertains to an established soap i.e., DETTOL Original soap presently being used by the family.

(ii) The next frame shows the husband, a medical doctor, and the children telling the lady of the house not to use the soap and the vocals state:

“Oh God bachaa lena naadaan ko aql dena....Hum sab ko bachaa lena”.

It is alleged that the use of a doctor protagonist is once again relevant as DETTOL is an established brand in the medical profession.

(iii) The next frame shows the doctor husband explaining to the wife the reason as to why she should not use the offending soap and, instead, should use the Defendant's LIFEBUOY soap by stating that normal antiseptic soaps make the skin dry leading to cracks in the skin thereby permitting the germs to enter the cracks in the skin while the defendant's soap fights germs and keeps the skin protected. According to the plaintiff this scene is clearly intended to give out the message that the Plaintiff's soap

is not effective against fighting germs whereas the Defendant's soap is effective against fighting germs. The words used in the advertisement are:-

“Dua ki zarurat padegi is dawa ke saath. Aam antiseptic sabun twacha ko rukha kar dete hai jis se dararon mein kitani ghus jaate hain...isi liye naya Lifebuoy skin guard jo kare kitani per waar aur banaye suraksha ki bhi deegar.”

According to the plaintiff it is relevant to mention that as DETTOL is used in respect of an extremely well known brand of antiseptic liquid, the use of the term “*dawa*” (medicine) is clearly intended to draw the attention of the viewer to the Plaintiff's product.

(iv) In the next frame the lady is then shown to go and have a bath with the Defendant's soap and come out very satisfied with the same. According to the plaintiff, this falsely indicates that the defendant's soap is effective against fighting germs while the plaintiff's DETTOL soap is not.

11. It is further alleged by the plaintiff that the defendant's said advertisement is nothing but a slanderous attempt of the defendant to increase the market share of its LIFEBUOY soap by defaming and disparaging the worth and reputation of the plaintiff's product. It is also alleged that the said advertisement outreaches the limits of allowed competitive advertising and blatantly denigrates the reputation and goodwill of the plaintiff's well established and leading brand. The said advertisement not only shows that the defendant's product is good but also very clearly depicts that the plaintiff's product is completely worthless. Consequently, the said advertisement amounts to disparaging, denigrating and defaming the

products of the plaintiff. It is also alleged that the use of the soap bar including its unique curved shape and the distinctive packaging which is virtually identical to that of the plaintiff's by the defendant is resulting in dilution and debasement of the hard earned reputation and goodwill of the plaintiff's world-known and widely used products.

12. The plaintiff has further averred that the defendant had also filed a caveat dated 16.7.2007 which clearly indicates the defendant's mala fide intentions as against the product of the plaintiff inasmuch the defendant was aware that the soap depicted in its advertisement is the plaintiff's soap and also knew that the plaintiff would initiate action against it and hence they filed a caveat. It is alleged that the cause of action first accrued to the plaintiff in or around July 2007, when they first came to know of the impugned advertisement of the defendant and that the cause of action is a continuing one. The said advertisement is being telecast on various television channels in Delhi and is being watched by thousands of people in Delhi. The present suit has been filed for the reliefs indicated above in these circumstances.

The Written Statement:

13. The defendant in its written statement raised preliminary objections. The first objection was that the jurisdiction of this Court is specifically excluded under Section 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') in respect of the present suit, being a

Suit for Permanent Injunction and Damages for Disparagement and Unfair Trade Practices, which is specifically covered under the provisions of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the 'MRTP Act') and the Consumer Protection Act, 1986.

14. It has also been alleged by the defendant that the plaintiff's suit is misconceived as no cause of action against the defendant has accrued in favour of the plaintiff and against the defendant inasmuch as the advertisement, in question, refers to ordinary antiseptic soaps and the plaintiff's soap is neither an antiseptic soap, nor an ordinary (unbranded) soap. A reference was also made to a decision of this Court in the case of **Reckitt Benckiser (India) Limited v. Naga Limited & Others: 2003 (26) PTC 535 (Del.)**, wherein it was allegedly held that the plaintiff's soap is not an antiseptic soap. The defendant has also taken the objection that the plaintiff's suit deserves to be dismissed as not maintainable as the plaintiff does not have a monopoly over the colour or over the shape of the soap and cannot claim exclusivity over the colour, shape or packaging of the soap. It has also been alleged that the defendant further believes that the shape, contours and curvatures of the plaintiff's orange coloured soap DETTOL is not registered under the Design's Act to give the plaintiff an exclusive right to use the same. The defendant has also alleged that the plaintiff has approached this Court with unclean hands and is guilty of suppression of material facts.

15. Apart from the said preliminary objections, the defendant has taken the stand that it is engaged in the marketing of several toilet soaps including the toilet soaps being sold and marketed under the brand name “LIFEBUOY” and that its product, LIFEBUOY soap, through an extensive marketing network across the country and its intrinsic quality, enjoys considerable goodwill and reputation among the Indian consumers. It is stated that LIFEBUOY is a global brand, which was launched in the United Kingdom in 1894 as a product for personal hygiene and that it is India's oldest toilet soap brand and has been synonymous with health and hygiene in India since 1895. It is alleged by the defendant that the said product sold under the brand name LIFEBUOY for over 110 years has acquired substantial goodwill in the market and, in fact, has become a household name. It is alleged that the defendant's soap has been associated with hygiene and protection against germs long before the plaintiff was incorporated or even started manufacturing or marketing their soap.

16. With regard to the allegations of disparagement, the defendant submitted that the intent of the defendant's advertisement is not to disparage the product of the plaintiff but rather aims at educating the consumers and public at large to understand the difference between toilet soaps containing glycerine, which have a moisturizing effect on the skin and give a long term benefit, on the one hand and ordinary antiseptic soaps in the market, on the other, which may not contain glycerine and do not give to the consumers the benefit of moisturizing the skin and removing the possibility of formation of

cracks which is a breeding ground for germs. It is further stated that the defendant's claims about its soap being better than any other ordinary antiseptic soap is based on the laboratory test conducted by it.

17. The defendant submitted that the said TV advertisement has to be seen in its totality and cannot be seen in an isolated and unnatural manner frame by frame. It is further contended on behalf of the defendant that the intent, manner and story line and message of the defendant's advertisement is that its soap is better than ordinary antiseptic soaps because it is rich in glycerine and vitamin E. It is further stated that the plaintiff's soap, being a Rs 200 crore brand, cannot be termed as an ordinary soap and in any event, the plaintiff's soap is not an antiseptic soap. In the entire advertisement, there is no reference whatsoever to the trademark DETTOL or the sword device and, therefore, there is no reference to the plaintiff's product.

18. In the written statement, the defendant has further stated that the soap appearing in the defendant's advertisement is not the plaintiff's soap, *inter alia*, for the following reasons:-

- (a) The colour of the soap shown in defendant's advertisement is yellow in comparison to the plaintiff's orange soap;
- (b) The soap shown in defendant's advertisement is taken out of a pale green single-colour packaging, whereas the plaintiff's DETTOL TOTAL is sold in green and white and its other variants are sold in blue and white packaging;

(c) There are many other soaps in the market with curvatures and contours similar to the plaintiff's soap.

(d) The brand name DETTOL and/or the Sword device are embossed on all the plaintiff's products but the same are admittedly missing from the soap shown in the defendant's advertisement.

19. The defendant has also stated that without prejudice to the above, even assuming, without admitting, that the soap shown in the defendant's advertisement was that of the plaintiff, still it is settled law that a tradesman is entitled to declare his goods to be the best in the world, even though the declaration may be untrue. He can also say that his goods are better than his competitors; even though such statement may be untrue. And, 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 spell out the advantages of his goods over the goods of others. It is alleged that the plaintiff itself has been showing its soap to be better than that of the defendant's in its various advertisements, both in India and abroad. The written statement contains further detailed statements countering the allegations made in the plaint. However, the sum and substance of the defendant's case is clear from what has been noticed above.

Documents & Witnesses:

20. The plaintiff has filed several documents being Ext. PW1/1 to PW1/19 and PW1/DX1. The defendant has filed Ext. DW1/1 to DW1/18 and DW2/1 to DW2/9. The video clip of the advertisement has been filed in a CD and is marked as Ext. PW1/2. The plaintiff had produced one witness - Mr Mohit Marwah, Brand Manager (Dettol) of the plaintiff company as PW1. The defendant has produced three witnesses – (1) Mr Anuj Kumar Rustagi, Global Marketing Manager, Lifebuoy Soaps (DW1); (2) Dr Rajan Raghavachari, Regional Senior Product Development Manager of the defendant (DW2) and (3) Dr Hemangi Jerajani, Dermatologist (DW3). The evidence of these witnesses were in the form of affidavits in the first instance and they were subjected to cross-examination by the opposing counsel.

The Issues:

The following issues have been framed by virtue of the order dated 17.8.2007:-

- “1. Whether the depiction in the advertisement of the defendant of soap refers to the Dettol soap of the plaintiff? (OPP)
2. Whether the advertisement of the defendant disparages or denigrates the soap of the plaintiff? (OPP)
3. Whether the impugned advertisement seeks only to promote the superiority of the defendant LIFEBUOY soap over an ordinary antiseptic soap? (OPD)
4. Whether the plaintiff is guilty of suppression of material facts? If so, its effect? (OPD)

5. Whether the impugned advertisement constitutes an attack on the goodwill and reputation of the Dettol brand of the plaintiff? (OPP)
6. Whether the present suit is barred on account of the provisions of the MRTP Act, 1969 and/or the Consumer Protection Act, 1986? (OPD)
7. Whether the plaintiff is entitled to any damages for disparagement, denigration, loss of goodwill and reputation? If so, the extent thereof? (OPP)
8. Whether the plaintiff is entitled to punitive and exemplary damages? If so, the extent thereof ? (OPP)
9. Relief.”

Issue No.1: *Whether the depiction in the advertisement of the defendant of a soap refers to the Dettol soap of the plaintiff? (OPP)*

21. The video clip (Ext. PW1/2) of the advertisement in question, as indicated in the form of a story board, shows:-

1. A man and his wife returning home on a rainy day. The wife exclaims “*Kya baarish hai*” (what rain). The man places his white coat and stethoscope which indicates that he is a doctor. He goes and sits with his children (boy and girl) on the sofa. The children are watching a cricket match on television.



2. The next frames show that his wife plans to take a bath saying “*chalo main naha leti hoon*” (come, let me take a bath). She is then shown taking out an orange bar of soap from a green wrapper.



3. On seeing the orange soap in his wife's hand, the husband has a shocked look on his face and says “*Oh God, bachaa lena*” (Oh God, Save her).



4. The next frames show the husband and children pointing at the wife and singing a song in chorus “*Naadaan ko aql dena, ham sab ko bachaa lena.....*” (show reason to the naive, save us all).



5. The wife has a surprised look on her face and asks “*Kya kar rahe ho*” (what are you doing?).



6. The next frames show the husband displaying the orange soap in his raised right hand and looking at his wife and saying “*Dua ki zarurat padegi iss dawaa ke saath*” (prayers would be required with this medicine).



7. This is followed by a cut to a bathing shot where a woman is shown using the said orange bar of soap. In this cut, there is a male voice-over stating: “*Aam antiseptic sabun twacha ko rukha kar dete hain..*” (Ordinary antiseptic soaps make the skin dry..).



8. Then there is a close-up of the upper-arm under a magnifying glass which reveals skin with cracks and green germs lodged in the cracks. At this juncture the male voice-over states: “*..Jis se dararon me kitanu ghus jate hain*” (.. as a result of which, germs get into the cracks). Simultaneously, the following words appear on the bottom left of the screen:-



“*Aam antiseptic sabun*”
(ordinary antiseptic soap)

9. Then there is a cut to a water shot, where we see a bar of the red LIFEBOUY soap emerging out of the water. On the top left hand corner of the screen, the words “Glycerine” and “vitamin E” appear and the male voice-over states “*Isi liye naya Lifebuoy Skin Guard*” (that is why, new Lifebuoy Skin Guard).



10. Then there is a cut again showing a part of the arm under a magnifying glass and the green germs are seen getting washed away. The male voice-over states that : “.. *jo kare kitanoon pe waar*” (.. which attacks the germs).



11. The next frames show a layer of glycerine flowing from left to right under the magnifying glass and the voice-over states: “.. *aur banaye suraksha ki bhi deewar*” (.. and also builds a protective wall).



12. The clip then proceeds to a new cut showing the wife, apparently after having had a bath, coming into the living room where the husband and children are watching the cricket match on television. On seeing her they, once again break into the same song “*Bachaa lena*” (Save us).



13. The wife stops them and, referring to the cricket match being shown on TV, says “*Aa hah, doctor saheb dua inke liye bachaa lena*” (Aa hah, doctor saheb, save the prayers for them).



14. The next frames show that the wife joins her husband and children at the sofa and says: “*Hame koi dar nahin*” (we have no fear).



15. The next shot shows the LIFEBOUY Skinguard bar of soap and its package and the LIFEBOUY logo zooms onto the package. At this juncture the male voice-over announces: “*Naya Lifebuoy Skin Guard*” (new Lifebuoy Skin Guard).



16. This is followed by a cut to the Hindustan Lever Limited logo and the advertisement ends there.



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



[photographs from Ex. PW1/11 showing the orange soap bar]

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

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

23. It is true that the plaintiff's soap – DETTOL Original – is not an antiseptic soap whereas the soap shown in the advertisement has been referred to as “an ordinary antiseptic soap”. An argument was advanced on the part of the defendant that because of this, the soap shown in the advertisement did not and could not refer to the plaintiff's soap. The learned counsel for the plaintiff submitted that the reference to an antiseptic soap in the said advertisement is, in fact, a further pointer to the plaintiff's product, although, the plaintiff's soap – DETTOL Original – is not an antiseptic

soap. According to him, this is so because of the well known fact that the plaintiff's antiseptic liquid product has been utilised for years in homes as well as in hospitals for various cuts and wounds and other antiseptic purposes. The public at large, therefore, carry an impression, right or wrong, in their minds that all DETTOL products are antiseptic. The defendant, being aware of this, has specifically shown an antiseptic soap so that the viewers of the advertisement shall immediately be directed towards the plaintiff's DETTOL products. This, along with the other features mentioned above, clearly establishes the link between the soap shown in the advertisement and the plaintiff's soap. I agree with these submissions.

24. It has been contended on behalf of the defendant that the plaintiff has not produced any evidence of consumers to indicate that the orange bar of soap in the said advertisement appears to be the plaintiff's DETTOL Original soap. In response the learned counsel for the plaintiff submitted that producing such evidence would be counter-productive and is not necessary. He submitted that the plaintiff could produce witnesses stating that the orange bar of soap shown in the advertisement had reference to the plaintiff's DETTOL Original soap. Similarly, the defendant could also produce witnesses to state the contrary. Ultimately, it would be for the court to make a judgment from the perspective of an *average person* with *imperfect recollection*, a test which has been well established, particularly in passing off cases. Though slander of goods and disparaging advertisements stand on a slightly different footing to passing off cases, I find myself to be

in agreement with the submissions made by the learned counsel for the plaintiff. For, ultimately, it is a question of perception and the perception has to be determined from the stand point of an average person man with imperfect recollection but, with a corollary, which shall stated be shortly. One could normally expect that there would be a difference in perception between two distinct classes of persons -- (1) Persons who are using DETTOL Original soap and (2) persons who do not use that soap. A person belonging to the latter category may not be aware of the orange coloured bar of soap of the plaintiff with its distinctive shape, curvature and contours. He may also not be aware of the packaging employed by the plaintiff. Therefore, such a person may not link the bar of soap shown in the advertisement with the plaintiff's product when he sees the advertisement or when he comes upon the plaintiff's product in a shop. Such a person, in all likelihood, would perceive the orange bar of soap shown in the advertisement as being *some* unbranded bar of soap. On the other hand, a person belonging to the former category, being a user of the plaintiff's DETTOL Original soap, would immediately recognise the bar of soap shown in the advertisement as referring to the plaintiff's DETTOL Original soap. This is because, such a person is familiar with the plaintiff's product. He is "intimately" aware of the look and feel of the soap because he uses it everyday. He knows its colour, shape, size and contours. The moment, he sees the bar of soap in the advertisement, he would immediately correlate the colour, shape, size and contours including the colour of the wrapper/ packaging with that of the soap that he uses everyday, that is, the plaintiff's

DETTOL Original soap. Moreover, it is not as a matter of co-incidence that all these features of colour, shape, curvature and colour of the packaging have come together. It has been done deliberately so that it is obvious to users of the plaintiff's DETTOL Original soap that it is the very soap that they use everyday which is shown in the advertisement.

25. Since the advertisement avowedly seeks to attract consumers to the LIFEBUOY Skinguard soap and away from other computing soaps, it is obvious that the advertisement targets those persons/consumers who are currently not using the defendant's product. It is also obvious that persons who use the plaintiff's products fall within that target group. It is, therefore, important that the advertisement is looked at from the perspective of members of that target group i.e., users of the DETTOL Original soap. The hypothetical average person (with imperfect recollection) must be picked from this target group of users of the product sought to be slandered or disparaged. And, this is the corollary spoken of earlier.

26. The difference in approach in a passing off action and one for disparagement must also be highlighted. In a case of passing off, the question invariably is whether the trade mark or trade dress employed by A for his product is so deceptively similar to the established mark or trade dress of B's product that A's product could be confused by or passed off to consumers as B's product? Here the comparison is of rival products having a similar trade mark, get-up or trade dress. Familiarity with the established

mark, trade dress or get-up is presumed. Because, it is this familiarity that the person intending to pass off his goods as those of the famous or more popular, exploits. In the case of disparagement, the one who disparages another's product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor's product. The comparisons, therefore, in cases of passing off and in cases of disparagement are different. Consequently, the comparison must be from the perspective of an average person with imperfect recollection but, that person must be picked from the category of users of the product allegedly sought to be disparaged or slandered.

27. Considered from the standpoint of an average man with imperfect recollection who is also a user of the DETTOL Original soap, the inescapable conclusion would be that the soap shown in the advertisement refers to the plaintiff's DETTOL Original soap. Consequently Issue No 1 is decided in favour of the plaintiff and against the defendant.

Issue No.2: *Whether the advertisement of the defendant disparages or denigrates the soap of the plaintiff? (OPP)*

Issue No.3: *Whether the impugned advertisement seeks only to promote the superiority of the defendant LIFEBUOY soap over an ordinary antiseptic soap? (OPD)*

The Law

28. Before I examine the facts, it would be instructive to notice the law on the subject of comparative advertising. In **Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Another** : 1999 PTC (19) 741, a learned single Judge of the High Court of Calcutta had considered the concept of negative campaigning. The learned Judge after considering several English decisions including **White v. Mellin**: 1895 AC 154; **Bubbuck v. Wilkinson**: 1899 (1) OB 86 ; **De Beers Abrasive v. International General Electric Co.**: 1975 (2) All ER 599 observed as under:-

“From the law discussed above it appears to me that the law on subject is 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 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 manufacturer 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.”

29. Although, the decision of a learned single Judge in the case of **Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd: 1996 PTC (16) 393 (Del.)** was in an interlocutory application under Order 39 Rules 1 and 2 CPC, the aforesaid five principles laid down by the Calcutta High Court in **Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Another (supra)** have been followed as the law on the subject. The learned single Judge of this Court observed as under:-

“12. 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, therefore, appears that if an action lies for defamation an injunction may be granted...”

30. In **Pepsi Co. Inc. and Others v. Hindustan Coca Cola Ltd & Another: 2003 (27) PTC 305 (Del) (DB)**, a Division Bench of this Court held that comparative advertising which discredits or denigrates the trade mark or trade name of the competitor cannot be permitted. While considering what is meant by disparagement, the Division Bench noted as under:-

“What is disparagement. The New International Websters' Comprehensive Dictionary defines disparage/disparagement to mean, “to speak of slightly, undervalue, to bring discredit or dishonor upon, the act of deprecating, 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 dis-credit on, slightly of and depreciate.”

The Division Bench further observed:

“To decide the question of disparagement we have to keep the following factors in mind namely; (i) Intent of commercial (ii) Manner of the commercial (iii) Storyline of the commercial and the message sought to be conveyed by the commercial. Out of the above, “manner of the commercial”, is very important. If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable.”

Summing up the law the Division Bench held:-

“It is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior. It has been so held in the following cases:

- (i) Hindustan Lever v. Colgate Palmolive (I) Ltd, 1998 (1) SCC 720.
- (ii) Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr., 1999 PTC (1) 741.
- (iii) Reckitt & Colman of India v. Kiwi TTK Ltd., 1996 PTC (16) 393.”

31. In **Dabur India Limited v. Colgate Palmolive India Ltd: 2004**

(29) PTC 401 (Del), a learned single Judge of this Court took the following view:-

“19. I am further of the view that generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or genre of a product within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified. In this context the plaintiff has rightly rejected the offer of the defendant to drop the container from its advertisement so as to avoid the averred identification of the plaintiff's product.”

32. The learned counsel for the defendant had placed reliance on **Imperial Tobacco Co. v. Albert Bonnan: AIR 1928 Calcutta 1 (DB)**, wherein it was observed:-

“Now, to succeed in an action for slander of goods, the plaintiff must allege and prove (1) that the statement complained of was made of and concerning his goods; (2) that it was false, (3) that it was published maliciously i.e. With the intention of injuring him and (4) that he has suffered special damage thereby. A trader is entitled to commend his own goods and state that they are better than the goods of another and if he does so, no action will lie against him, whatever damage may ensue from such statement. See *White v. Mellin* [1895] A.C.154.

It is otherwise where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior in quality to his own, but goes further and makes an untrue statement of fact about his rival's goods, for example, where he states that they are rotten or unmerchantable. In a case like this, an action on the case will lie, provided it can be proved that such statement was published maliciously and that special damage has ensued: see *Lyne v. Nicholls*[1906] 23T.L.R 86. It is not malice if the object of the trader is to push his own business. To make the act malicious it must be done with the direct object of injuring the other person's business. Therefore, the mere fact that it would injure that other person's business is no evidence of malice: see *Dunlop Pneumatic Tyre Co. v. Maison Talbot* [1904]20 T.L.R 579.”

33. Two recent English decisions; one of 2000 and another of 2002 need to be noticed. In **Jupiter Unit Trust Managers Trust Ltd v. Johnson Fry Asset Managers: plc (2000) Unreported 19 April, QBD** Morland J. observed as under:-

“22. In my judgment when considering comparative advertising in relation to a claim for malicious falsehood the test that the Court should apply whether in relation to slander of goods or slander of a financial product is whether the financial service provider in puffing his own product has overstepped the permissible limit of denigration or disparagement of his rival's product so that a reasonable man would take the claim seriously.”

In *DSG Retail Ltd. v. Comet Group PLC (2002) EWHC 116 (QBD)*, while considering the question as to where the line is to be drawn between mere puffery and actionable statements, it was noticed that this question had been addressed by Walton J in *De Beers Abrasive Products Ltd & Others v. International General Electric Co Ltd*: (1975) 1 WLR 972, as under:

“What precisely is the law on this point? It is a blinding glimpse of the obvious to say that there must be a dividing line between statements that are actionable and those which are not; and the sole question upon a dry point of law such as we are discussing here is: where does that line lie? On the one hand, it appears to me that the law is that any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival's goods. Thus in the well-known case of the three adjoining tailors who put notices in their respective windows reading: “The best tailor in the world”, “The best tailor in this town”, and “The best tailor in this street”, none of the three committed an actionable wrong.

This is, I think, a proposition which extends to a much wider field than the slander of goods; for example I think it extends to other vague commendatory statements about goods or services on offer. Principal among its applications has been the case of auctioneers, who, within limits, have always been allowed to use language which has been strictly perhaps not literally true; thus for example to take note of one instance, in *Hope v. Walter* [1900] 1 Ch 257 Lindley MR stated, at page 258: “I do not attach any importance to the word ‘eligible’: it is the ordinary auctioneer's language”. In other words, in the kind of situation where one expects, as a matter of ordinary common experience, a person to use a certain amount of hyperbole in the description of goods, property or services, the courts will do what any ordinary reasonable man would do, namely, take it with a large pinch of salt.

Where, however, the situation is not that the trader is puffing his own goods, but turns to denigrate those of his rival, then, in my opinion, the situation is not so clear cut. Obviously 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”. Accordingly, I do not think such a statement would be actionable. At the other end of the scale, if what is said is: “My goods are better than X's”, because

X's are absolute rubbish”, then it is established by dicta of Lord Shand in the House of Lords in *White v. Mellin* [1895] AC 154, 171, which were accepted by Mr Walton as stating the law, this statement would be actionable.

Between these two kinds of statements there is obviously still an extremely wide field; and it appears to me that, in order to draw the line, one must apply this test, namely, whether a reasonable man would take the claim being made as being a serious claim or not.”

34. Finally, *McCarthy on Trademarks and Unfair Competition: Fourth Edition, Volume 4 at 27:38* explains “Puffing” to be exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable. It was also observed that “Puffing” may also consist of a general claim of superiority over comparable goods that is so vague that it will be understood as merely the seller's expression of opinion. It was further noted that an exaggerated advertising claim which is placed with an intent to influence the consumer's buying decision cannot be dismissed as mere puffing.

These two decisions, and what is stated in *McCarthy*, stress the point that (a) between clear-cut cases of permissible comparative advertising and impermissible “rubbishing” of a rival’s product there may yet be a wide field of cases and (b) the dividing line in such cases would have to be drawn based on the test whether a reasonable man would take the claim of the alleged slanderer seriously or take it with the proverbial ‘large pinch of salt’ and dismiss it as mere puffery. If it is the former then, it is a case of disparagement and if it is the latter then, it is a case of mere puffery which is not actionable.

Discussion re: The Facts of this case

35. The video clip of the TV advertisement (Ext. PW1/2) and the story board (Ext. PW1/3) have been discussed in detail under Issue No.1. The question here is whether the advertisement disparages or denigrates the soap of the plaintiff and also whether it only seeks to project the superiority of the defendant's LIFEBUOY soap over an ordinary antiseptic soap? As discussed under Issue No. 1, the advertisement begins with the scene showing a man and his wife returning home. It is raining heavily outside. The man is a doctor of medicine. This is immediately indicated by the fact that he is seen carrying his white coat and stethoscope as also the fact that his wife, refers to him as *doctor sahib* later on in the advertisement. Thereafter, when the wife proceeds to bathe with the so called “ordinary antiseptic soap”, he and his children mock and ridicule her by singing “*Oh God, save her*”, “*Naadaan ko aql dena, ham sab ko bachaa lena.....*” (show reason to the naïve, save us all). He further rubbishes the orange coloured bar of soap with the words -- “*Dua ki zarurat padegi iss dawaa ke saath*” (prayers would be required with this medicine). The clip then proceeds to show a person having a bath with the said “ordinary antiseptic soap”. The bare skin of the upper arm of the person is shown under a magnifying glass as having developed cracks in which green coloured germs are lodged. The voice-over also indicates the same. It is obvious that the advertisement displays the said so called “ordinary antiseptic soap” in bad light and as something harmful. A soap which only the naïve would use and

for using which prayers would be needed to save the user. Thereafter, the advertisement proceeds with the introduction of the defendant's LIFEBOUY soap and the manner in which it spreads a protective wall of glycerine thereby removing the cracks in the skin and dissipating the germs.

36. The advertisement can be viewed in two parts. One part is where the orange coloured soap is shown as being harmful and used by people who are naïve and without any wisdom and who could be saved only through prayers. The other part is where the defendant's product is shown as having the qualities of providing a protective wall against dry cracked skin and as an eliminator of germs. There can be no grievance in respect of the second part of the advertisement, where the qualities of the defendant's soap are sought to be demonstrated: whether those qualities exist or not is not an issue. That part, even if untrue, would be mere puffery. However, the first part of the advertisement, where the orange bar of soap has been slighted and shown in bad light and in fact, as something which is harmful, cannot but be construed as disparagement and denigration of the orange bar of soap shown in the advertisement. It is one thing to say that a person's product is the best or that his product is better than somebody else's product, but, it is entirely a different matter to say that his product is good whereas another's product is bad and harmful. Puffing up of one's product is permissible in law but slighting or rubbishing or otherwise denigrating or disparaging another's product is not. From the standpoint of a reasonable person, the advertisement, in question, certainly disparages and denigrates the orange

bar of soap shown therein which I have held, under Issue No.1, to refer to the plaintiff's DETTOL Original soap.

37. From this discussion, it is apparent that the advertisement disparages the plaintiff's soap and it is not an advertisement which seeks merely or only to promote the superiority of the defendant's LIFEBUOY soap over an ordinary antiseptic soap. As I have already pointed out, if it were a case of mere promotion of superiority of the defendant's product, alone, the plaintiff would not have had a case as that would have only entailed a permissible "better" or "best" statement. The advertisement comprises of two part; one which denigrates and disparages the product of the plaintiff and the other which promotes the purported superiority of defendant's LIFEBUOY soap. The part that disparages does so because it indulges in the "good versus bad" comparison. The "good" being the defendant's LIFEBUOY Skinguard and the "bad" being the orange coloured bar of soap which has been identified, as discussed under Issue No.1, as the plaintiff's DETTOL Original soap.

Issue Nos 2 and 3 are, therefore, also decided in favour of the plaintiff and against the defendant.

Issue No.5: *Whether the impugned advertisement constitutes an attack on the goodwill and reputation of the Dettol brand of the plaintiff? (OPP)*

38. In view of the discussions and findings returned under Issue Nos 1, 2 and 3, this issue would also have to be decided in favour of the plaintiff. The advertisement does constitute an attack on the goodwill and reputation of the DETTOL brand of the plaintiff.

Issue No.4: *Whether the plaintiff is guilty of suppression of material facts? If so, its effect? (OPD)*

39. It has been contended on behalf of the defendant that the upon a reading of the plaint, it would be apparent that the object of the plaintiff is to give an impression that the DETTOL toilet soap is an antiseptic soap, which is false to the knowledge of the plaintiff. Apart from other paragraphs, paragraph 7 of the para-wise reply in the written statement was referred to in the course of arguments. In that paragraph, the defendant has submitted that the plaintiff is misleading the court into believing that its DETTOL toilet soap is an antiseptic soap. It was submitted that the emphasis is on the DETTOL brand, which incorporates a range of innovative products ranging from the antiseptic liquid to DETTOL Liquid Hand Wash and the famous DETTOL toilet soap, thereby giving an impression that the antiseptic properties are also present in DETTOL toilet soap. This, according to the defendant, is totally misleading and false. In paragraph 12 of the para-wise reply of the written statement, it is further submitted that the plaintiff is trying to confuse the court with its DETTOL Liquid Antiseptic and is passing off its soap as an antiseptic soap. The reference to DETTOL Products (not Dettol Soap) is, according to the defendant, yet another

attempt on the part of the plaintiff to mislead the Court with averments made in respect of other products which include antiseptic products and medicinal products so as to distract and divert the attention from the true fact that DETTOL soap is not an antiseptic soap. In paragraph 17 of the written statement it is further stated that the plaintiff is clearly seeking to promote the confusion in the minds of the consumers that the DETTOL soap is an antiseptic soap and consequently, any TV advertisement directed against ordinary antiseptic soaps is perceived on the basis of the consumers wrong perception, to be disparaging to the plaintiff, which is totally incorrect and denied. It is alleged that the plaintiff has in a round about manner given an impression in the plaint that DETTOL soap is an antiseptic soap.

40. Reference was also made to a decision of this Court in the case of **Reckitt Benckiser (India) Limited v. Naga Limited & Others: 104 (2003)**

DLT 490, wherein a learned Single Judge of this Court observed as under:-

“On a reading of the plaint I find the statement significant that the “consumers perceive Dettol soap as strong and effective in maintaining personal hygiene and regard it as an efficient antiseptic soap that kills harmful germs and bacteria and ensures good health and hygiene.... It is submitted that the Dettol Soap has earned the consumers' confidence because it has been tried and tested by the consumers inducing a belief in them that Dettol soap has all the properties that an antiseptic soap for personal hygiene must have.... The public perception is that Dettol soap shares the same medicinal and curative qualities as the dettol liquid. It matters little whether this misunderstanding has been contrived by the manufacturer or has developed in the consumers mind independently. However, in the present case it is the Plaintiff's own averment that this belief has been induced by it and nevertheless it is sanguine enough to expect discretion to be exercised in its favour. If any party, such as the Defendant, helps in correcting the error, it

commits no illegality. The tortious injunction, which is the backbone of the present action, is predicated on falsehood, and in the present circumstances, the falsehood can be laid at the door of the Plaintiff and not of the Defendant. Once this conclusion is arrived at, it is not possible to grant any injunctory relief.” [paragraph 7, pg 493]”

41. The defendant referred to the following documents filed on behalf of the plaintiff namely Ext.PW1/4 (Chartered Accountant's Certificate certifying the sales figures and the marketing expenses for the Dettol Antiseptic Liquid from the year 2005 to 2007); Ext. PW1/5 (the 50 ml packaging of the DETTOL Antiseptic liquid); PW1/6 (the A.C. Nielsen report showing the 2006 market share of DETTOL Liquid); Ext. PW1/7 (the IMRB report dated 23.8.2007 concluding that 85% of the consumers of DETTOL Liquid believe that the said product is recommended by Medical Professionals). The learned counsel for the defendant contended that these documents, which relate to the antiseptic liquid, were filed by the plaintiff to create an impression that the DETTOL toilet soap also had antiseptic qualities. The cross-examination of PW1 with regard to the aforesaid Ext. PW1/4, PW1/6 and PW1/7 was also referred to. Specifically, it was pointed out that the said witness had stated that the word “Dettol Liquid” mentioned in paragraph 6 of his affidavit by way of evidence referred to “Dettol Liquid” and not “Dettol Liquid Soap”. It was also stated by the said witness that Dettol Liquid and Liquid Soap are two different products and while Dettol Liquid is antiseptic, Dettol Liquid Soap is used mainly for hand wash and is not antiseptic. The witness also stated that the antiseptic liquid market referred to in Ext. PW1/6 does not include the toilet soap market.

Importantly, the said witness stated that Dettol soap was not an antiseptic soap. Similarly, Dettol Liquid soap was also not antiseptic and that the plaintiff does not produce any antiseptic soap under the brand name DETTOL.

42. On the basis of the aforesaid, it was contended on behalf of the defendant that although, the plaintiff's DETTOL Toilet Soap was not an antiseptic soap, the tenor of the plaint and the documents filed by the plaintiff seeks to create an impression that the plaintiff's DETTOL Toilet Soap was also an antiseptic soap and, therefore, the antiseptic soap referred to in the advertisement had a direct connection with the plaintiff's soap Dettol Original Soap. According to the defendant, this amounts to suppression and, therefore, the plaintiff would not be entitled to any equitable remedy including the remedy of injunction.

43. As against these submissions, the learned counsel for the plaintiff submitted that the decision in the case of ***Reckitt Benckiser (India) Ltd*** (*supra*) relates to an entirely different advertising campaign of the plaintiff and that too, against a different defendant and, therefore, has been decided on a different set of facts which has no relevance to the present proceedings. It was also submitted that the plaintiff has been careful in ensuring that the distinction between the Dettol Liquid and Dettol Toilet Soap is not lost sight of. The learned counsel for the plaintiff submitted that the description of the DETTOL Original Soap as a toilet soap can be discerned from paragraphs 7,

8, 9, 19 (i) and 19 (iii) of the plaint. It was contended that while the plaint describes how the DETTOL brand had been extended from an antiseptic liquid to toilet soaps, nowhere is the claim made that the Dettol toilet soap had any antiseptic qualities.

44. I am inclined to agree with the submissions made on behalf of the plaintiff. Nowhere in the plaint has a claim been made that the plaintiff's Dettol Original Soap, which is the toilet soap in question, is an antiseptic soap. As noted in *Reckitt Benckiser (India) Ltd. (supra)*, there is a general public perception that DETTOL toilet soap shares the same medicinal and curative qualities as the DETTOL Liquid. But, for the purpose of the present suit, what is important is: whether the plaintiff has made any averments in the plaint indicating or suggesting that the DETTOL Original soap is an antiseptic soap? The plaintiff has made statements explaining the development of its brand name through time. Initially, the plaintiff's product was the DETTOL Liquid which was used and is used as an antiseptic. Under the mark/brand name DETTOL, the plaintiff diversified its product range to include liquid hand washes and toilet soaps, which were not antiseptic products. The plaintiff has, no doubt, highlighted the goodwill and extensive reach of its brand DETTOL created through its primary product Dettol Liquid. However, at the same time, the plaintiff has clearly stated, as would be apparent from paragraph 7 of the plaint that in terms of product development, DETTOL has continuously evolved to meet modern day demands, and now incorporates a range of innovative antiseptic,

disinfectant and cleaning products ranging from the antiseptic Liquid through to DETTOL Liquid Hand wash and the famous DETTOL toilet soap which has been manufactured and sold by the plaintiff continuously since the year 1981. In paragraph 8 of the plaint, it is stated that *“the present action concerns the intentional and deliberate disparagement by the defendant of the plaintiff's product “DETTOL”, a toilet soap which is identified by the members of the trade and public by the colour of the soap bar and its new modern, distinctive and unique shape.....”*. The plaintiff has placed the packaging of the DETTOL toilet soap on record which also does not indicate that the soap is an antiseptic soap.

45. Considering the averments made in the plaint in this light, I am of the view that the plaintiff is not guilty of the alleged suppression of material facts. While, there may be a general public perception that the DETTOL soap shares the same qualities as the DETTOL Liquid, what is material is that the plaintiff has not sought to give this impression through its pleadings in the present suit. The distinction between the DETTOL Antiseptic Liquid and its new cleaning product range of soaps and hand wash has been made, as noted above. Nowhere has the plaintiff claimed that its DETTOL Original Soap is an antiseptic soap. Consequently, this issue is decided against the defendant and in favour of the plaintiff.

Issue No.6: *Whether the present suit is barred on account of the provisions of the MRTP Act, 1969 and/or the Consumer Protection Act, 1986? (OPD)*

46. At the outset, the learned counsel for the defendant submitted that this issue has been raised more as one directed against the grant of any relief and not as much as a jurisdictional issue. This issue is based on the plea taken in paragraph 1 of the written statement which reads as under:-

“That the jurisdiction of this Hon'ble Court is specifically excluded under section 9 of the Code of Civil Procedure 1908 (CPC) in respect of the present suit, being a suit for Permanent Injunction and Damages for Disparagement and Unfair Trade Practices, which is specifically covered by the provisions of the Monopolies and Restrictive Trade Practices Act 1969 (hereinafter referred to as the said “MRTP Act”) and the Consumer Protection Act, 1986 (hereinafter referred to the “Consumer Act”) and consequently, their cognizance is expressly barred. The same deserves to be returned to be presented in the proper forum.”

The learned counsel referred to the provisions of Section 36A(1)(x) of the MRTP Act which defines Unfair Trade Practice to mean a trade practice which, for the purpose of promoting the sale, use or supply of any good or for the provision of any services, adopts any unfair method or unfair or deceptive practice, *inter alia*, including the practice of making any statement, whether orally or in writing or by visible representation, which gives false or misleading facts disparaging the goods, services or trade of another person. The learned counsel then referred to the provisions of Section 36D of the MRTP Act, which describes the powers which may be exercised by the Commission inquiring into an unfair trade practice. The said Section 36D reads as under:-

“36D. Powers which may be exercised by the Commission inquiring into an unfair trade practice. - (1) The Commission may inquire into any unfair trade practice which may come before it

for inquiry and, if, after such inquiry, it is of opinion that the practice is prejudicial to the public interest, or to the interest of any consumer or consumers generally, it may, by order direct that -

- (a) the practice shall be discontinued or shall not be repeated;
- (b) any agreement relating to such unfair trade practice shall be void or shall stand modified in respect thereof in such manner as may be specified in the order;
- (c) any information, statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published, as the case may be, in such manner as may be specified in the order.

(2) The Commission may, instead of making any order under this section, permit any party to carry on any trade practice, if it so applies and takes such steps within the time specified by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest or to the interest of a consumer or consumers generally, and, in any such case, if the Commission is satisfied that necessary steps have been taken within the time so specified, it may decide not to make any order under this section in respect of that trade practice.

(3) No order shall be made under sub-section (1) in respect of any trade practice which is expressly authorised by any law for the time being in force.”

47. It was further contended on behalf of the defendant that the Consumer Protection Act, 1986 also deals with unfair trade practices. Section 2 (c) defines “complaint” to mean any allegation in writing made by a complainant, *inter alia*, that an unfair trade practice or a restrictive trade practice has been adopted by any trader or a service provider. Section 2 (r) of the said Act defines “unfair trade practice” to mean a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or

deceptive practice, *inter alia*, including the practice of making any statement, whether orally or in writing or by visible representation, which gives false or misleading facts disparaging the goods, services or trade of another person. This can be immediately seen to be virtually identical to the definition under section 36A(1)(x) of the MRTP Act.

48. The learned counsel submitted that a distinction must be drawn between a common law right which may be prosecuted in a civil court and a statutory right that is to be enforced in a special forum. It was contended that a fair reading of the plaint, appears to suggest that in fact the ingredients of malicious falsehood/slander of goods have not been pleaded. On the contrary, it is contended, what has been pleaded are the ingredients of section 36A(1)(x) of the MRTP Act (and, section 2(r) of the Consumer Protection Act) and that the plaint itself has been titled as a “suit for permanent injunction and damages for disparagement and unfair trade practice”.

49. It was also contended on behalf of the defendant that injunction ought to be refused where an adequate alternate remedy is available in view of the provisions of Section 41 (h) of the Specific Relief Act, 1963. The learned counsel also placed reliance on ***Reckitt Benckiser (India) Limited*** (*supra*) and ***ITC v. Shri Krishna Moktan: AIR 1992 Sikkim 1*** and submitted that the present suit be dismissed granting the plaintiff liberty to approach the appropriate forum.

50. The learned counsel for the plaintiff replied to this argument by submitting that there is no bar to the jurisdiction of this Court for entertaining the present suit. No such bar has been stipulated in the MRTP Act either expressly or impliedly. He also referred to the provisions of Section 9 CPC which stipulates that the courts have jurisdiction to try all suits of civil nature excepting suits of which cognisance is either expressly or impliedly barred. The learned counsel also referred to Section 4 of the MRTP Act, which clearly states that the application of other laws are not barred. Section 4 (1) provides that “[s]ave as otherwise provided in sub-Section (2) or elsewhere in this Act, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.” Sub-Section (2) of Section 4 relates to the Reserve Bank of India Act, 1934, the Banking Regulation Act, 1949, the State Bank of India (Subsidiary Banks) Act, 1955 and Insurance Act, 1938, none of these are in issue in the present case. The learned counsel for the plaintiff further pointed out to the provisions of Section 12B of the MRTP Act which stipulates that the power of the Commission to award compensation is without prejudice to the right of the concerned Government, trader or class of traders or consumer to institute a suit for the recovery of any compensation for the loss or damage caused as a result of a monopolistic or restrictive or unfair trade practice.

51. It was further contended by the learned counsel for the plaintiff, with reference to a decision of a learned single Judge of this Court in the case of **CITICORP & Another v. Todi Investors & Another: 2006 (33) PTC 631 (Del)**, that -- (1) the established law is that under Section 9 CPC, the jurisdiction of civil courts can only be ousted by an express or implied bar; (2) it is well established that where a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement is provided, without expressly excluding the Civil Courts' jurisdiction, then both the common law remedy and the statutory remedy might become concurrent remedies, leaving open an element of election; and, (3) it is trite law that an alternative statute must provide for the determination of all the rights and liabilities of the parties for there to be an ouster of the jurisdiction of civil courts. It was submitted that there is no express or implied bar in the MRTP Act with regard to the institution of a suit such as the present one. The common law remedy of false advertising was available even prior to the enactment of the MRTP Act and the act does not take away such remedy. It was also contended that the MRTP Act does not determine all the rights and liabilities of the parties which are in issue in the present case. The common law remedies that are sought in the present suit are far wider than what the MRTP Commission can grant. It was also contended that the MRTP Act is not a statute which seeks to protect the rights of one competitor against the other and is designed more for redressing the grievances of consumers or the public at large. It was contended that *ITC v. Shri Krishna Moktan* (*supra*), a decision cited by the learned counsel for the defendant, related to

a complaint of a consumer for an unfair trade practice, and, therefore, the said decision would not cover the situation which arises in the present case. With regard to the decision in the case of ***Reckitt Benckiser (India) Ltd.*** (*supra*), the learned counsel for the plaintiff contended that Section 41 (h) of the Specific Relief Act, 1963 only deals with injunctions not being granted and that too if an “equally efficacious” relief could “certainly” be obtained by any other usual proceedings and these words, according to the learned counsel for the plaintiff, do not deal with the availability of an alternative forum and to that extent, it was submitted, the said decision has misread the statute by adding the words “available in an alternative forum”.

52. Considering the arguments advanced by the learned counsel for the parties, it is apparent that the defendant has not raised any serious contention with regard to the Consumer Protection Act, 1986. In any event, a complaint under that Act can only be qua a “consumer dispute” and that, too, by a consumer or a consumer association or the government. It does not contemplate a complaint by a competitor. Furthermore, section 3 of the Consumer Protection Act, 1986 also makes it clear that it shall not be in derogation of but in addition to the provisions of any other law for the time being in force. Thus, the Consumer Protection Act, 1986 does not stand in the way of the plaintiff from seeking remedies by way of this suit.

53. As pointed out above, even the submissions made by the learned counsel for the defendant on the basis of the provisions of the MRTP Act,

had been advanced more as an issue disentitling the plaintiff from the relief of injunction than as a jurisdictional one. The learned counsel for the defendant was candid in this regard, perhaps, being aware of the fact that the MRTP Act does not set up any bar, either express or implied, to the institution of the present suit. The provisions of Section 9 CPC are clear and the decision of this Court in the case of *Citicorp & Another (supra)* is also clear. The plaintiff's right to seek the common law remedy in the civil courts has not been taken away by the enactment of the MRTP Act. The provisions of Section 4 as well as Section 12B of the MRTP Act put the case beyond any doubt that the MRTP Act does not in any way bar the institution of a suit such as the present one.

54. As regards the arguments purportedly based on Section 41 (h) of the Specific Relief Act, 1963, it must be noted that it only deals with injunctions. The present suit concerns itself not only with injunction but also damages and punitive damages. Apart from this, Section 41 (h) carries several important expressions. They being: “equally efficacious relief”; “can certainly be obtained”; and “by any other usual mode of proceedings.” The remedies under the MRTP Act are certainly not as efficacious a relief as an injunction granted by a court. Section 36D of the MRTP Act, as indicated above, empowers the Commission to inquire into any unfair trade practice which may come before it for inquiry and, if, after such inquiry, it is of the opinion that the practice is prejudicial to the public interest, or to the interest of any consumer or consumers generally, then the Commission may

by order direct, *inter alia*, that the practice shall be discontinued or shall not be repeated. It is clear that the Commission has to examine the case of an unfair trade practice from the stand-point of prejudice to public interest or to the interest of any consumer or consumers generally. It does not examine or inquire into an unfair trade practice from the stand-point of competitor which is purely a private interest. Therefore, the scope of an inquiry into an unfair trade practice before the MRTP Commission is entirely different from the scope of consideration of an unfair trade practice in a civil court in a suit instituted by a competitor against another competitor with regard to disparaging advertisement. I do not see how the directions which may be passed under Section 36D of the MRTP Act can be regarded as an equally efficacious relief.

55. The second expression contained in Section 41 (h) of the Specific Relief Act, 1963 is also of great significance. The expression is:- “certainly be obtained”. Thus, not only must the relief be equally efficacious but it must also be “certainly ” obtainable. If there is any uncertainty about the obtaining of such relief then Section 41 (h) would not come in the way of the injunction being granted. Lastly, the expression “by any other usual mode of proceeding” does not, as rightly contended by the plaintiff, refer to an alternative forum.

56. For all these reasons, it is clear that the present suit is not barred on account of any of the provisions of the MRTP Act or the Consumer

Protection Act, 1986. The provisions of these Acts read with section 41(h) of the Specific relief Act, 1963 also do not constitute a bar to the grant of any of the reliefs prayed for in this suit. This issue stands decided accordingly.

Issue No.7: *Whether the plaintiff is entitled to any damages for disparagement, denigration, loss of goodwill and reputation? If so, the extent thereof? (OPP)*

Issue No.8: *Whether the plaintiff is entitled to punitive and exemplary damages? If so, the extent thereof ? (OPP)*

Issue No.9: *Relief.*

57. These issues are taken up together as they all pertain to the entitlement of the plaintiff to the reliefs prayed for in the plaint. Insofar as the relief of injunction is concerned, it was contended on behalf of the defendant that the nature of the orders sought by the plaintiff are overly wide and would amount to a gagging order and ought not to be granted in the form prayed for. It was contended that, first of all, the defendant has already ceased to telecast the said advertisement. Secondly, the prayer seeking an order restraining the defendant from taking out any other advertisement and in any media whatsoever including the electronic media would amount to a gagging order, which is not permissible. Thirdly, the prayer seeking the restraining of the defendant from using any other indicia whatsoever to associate with/depict the plaintiff or its products in its advertisements issued in any media whatsoever including the electronic media would run counter

to the principles of law which permit comparative advertisements without entailing any denigration or disparagement.

58. It was also contended that the settled legal position for grant of an injunction, assuming a case of malicious falsehood or slander of goods has been made out, is that the relief available to a successful claimant in malicious falsehood is damages (or an inquiry as to damages) and an injunction to restrain the repetition of the statement complained of or an equivalent statement, i.e., statements which have been found to be false. It was also contended on the strength of observations noted in *Kerly's Law of Trade Marks and Trade Names, 13th Edition*, that the relief (and, particularly costs) may be refused where one or both parties are conducting the proceedings for the purpose of publicity rather than in pursuit of genuine grievances. In this background, it was contended that the only injunction order, if at all, that could be granted is, with regard to restraining the defendant from repeating the publication of the said advertisement, something, which the defendant has already ceased to do. It was further contended that the present suit was only for the purposes of publicity and, therefore, the injunction even to that extent ought to be refused.

59. As regards the compensatory relief of damages, the learned counsel for the defendant contended that insofar as the loss of goodwill and reputation is concerned, the tort of malicious falsehood requires proof of special damage, i.e., the plaintiff must establish a direct casual connection

between the impugned advertisement and loss caused to him. It was contended that the plaintiff must show that the advertisement has resulted in damage to him, in order to satisfy the requirement of special damage. In the present case, it was contended, the plaintiff has failed to establish any loss of goodwill or reputation. It was for the plaintiff to prove damages suffered by him, for which no evidence whatsoever has been led and which has admittedly not been proved and, therefore, the plaintiff would not be entitled to any damages or compensation.

60. As regards the prayer for exemplary/punitive damages, it was contended on behalf of the defendant that the law in this regard has been summarized in **Organo Chemical Industries and Another v. Union of India & Ors: (1979) 4 SCC 573** as under:-

“For instance, `exemplary damages, are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called “punitive” damages or “vindictive” damages, and (vulgarly) “smart-money”.

The learned counsel for the defendant submitted that the present case does not fit within the four corners of the test necessary to qualify for the grant of punitive damages.

61. The learned counsel for the plaintiff, on the other hand, submitted that the plaintiff was entitled to all the reliefs claimed by it. It was contended that the defendant in its written statement has admitted that plaintiff's soap is a Rs 200 crore brand and, therefore, any denigration caused will be caused to at least a Rs 200 crore brand. Ext. PW1/19, which is a comparative chart of the channels in which advertisements of both products appeared, in the month of July, 2007 and part of August, 2007, was referred to by the learned counsel for the plaintiff to submit that the defendant has targeted all channels on which the plaintiff advertises. It was further contended that Ext. DW1/12 to DW1/14 are advertisements of the plaintiff. In each advertisement a mother is portrayed as encouraging her child to bathe with DETTOL soap. The defendant's advertisement has denigrated and undermined this entire advertisement campaign which, admittedly, was run on various TV channels and viewed by consumers and the public at large on almost a daily basis. It was contended that the defendant's advertisement has seriously damaged the entire campaign of the plaintiff by showing the children now mocking and ridiculing their mother for using DETTOL soap.

62. It was also contended that the reputation of good quality for its toilet soap and the brand DETTOL which the plaintiff painstakingly developed over the past many years has been destroyed by the mischievous and malicious advertisement campaign of the defendant. With reference to Ext. DW1/17, the learned counsel for the plaintiff submitted that the sales of

the defendant's soap shown in the advertisement have increased during that period. According to the learned counsel for the plaintiff, a large part of this is attributable to the advertisement in issue. A reference was also made to the affidavit by way of evidence filed by PW1, and in particular, paragraph 26 thereof wherein it is stated that the plaintiff does not have the exact sales figures of the defendant but has reasons to believe that the sale of the defendant has increased substantially and the entire increase in sales of the entire LIFEBOUY category of goods can be attributed to the negative publicity given to the plaintiff's product. It is further stated that it is apparent that customers have shifted their loyalty from the plaintiff's product to the defendant's product owing to the misleading and disparaging advertisement introduced by the defendant.

63. With regard to the punitive damages, the learned counsel for the plaintiff placed reliance on a decision of this Court in the case of Microsoft Corporation v. Deepak Raval, decided on 16.6.2003 in CS (OS) 529/2003 as also on the earlier decision in the case of Time Incorporated v. Lokesh Srivastava: 2005 (30) PTC 3 (Del.). The trend for grant of punitive damages and exemplary damages was set by the latter decision with a view to curb the tendency to violate the law and infringe the rights of others. Both the said decisions were in respect of infringement of copyrights. On the basis of the aforesaid, the learned counsel for the plaintiff pressed for the prayers as prayed for in the plaint.

64. Since issue Nos 1, 2, 3 and 5 have already been decided in favour of the plaintiff and against the defendant, it is obvious that the plaintiff is entitled to relief. What is the exact nature of the relief to be granted to the plaintiff is the question at hand. I agree with the submissions made by the learned counsel for the defendant that a blanket injunction amounting to a virtual gagging order cannot be passed. The defendant cannot also be restrained from bringing out comparative advertisements. The only grievance of the plaintiff which needs to be addressed is the disparagement and denigration of its products and goodwill. Consequently, the injunction that the plaintiff is entitled to would be to restrain the defendant from issuing or telecasting the impugned advertisement or in any other manner disparaging the goodwill and reputation of the plaintiff and its product sold under the trade mark DETTOL. It is clarified that it would be open to the defendant to employ comparative advertising comparing its products with those of the plaintiff without, of course, indulging in any disparagement or denigration of the plaintiff's products.

65. As regards the question of award of damages by way of compensatory relief, I agree with the learned counsel for the plaintiff that the said advertisement has caused some loss/damage to the plaintiff. There is indication that the plaintiff's consumers have shifted to the defendant's product which has been advertised. However, no evidence of the extent of the loss or damage that has been caused has been produced by the plaintiff.

Therefore, quantification of the extent of damage and loss has become well nigh impossible.

66. Since the findings returned by me are that the said disparaging advertisement was a deliberate act on the part of the defendant aimed at reducing the sales of the plaintiff's product and thereby increasing its own sale, through the device of slander of goods/disparaging and/or denigrating advertising, the plaintiff would be entitled to punitive damages in the same manner as was awarded in *Time Incorporated (supra)*. Cases of slander of goods, malicious falsehood and disparaging advertising have to be decided on the crucible of fairness. There is no impediment to a trader employing any means possible, provided such means are fair, to increase his sales, even at the cost of its competitors. But the law does not permit any person to use unfair means or practices to gain and profit to the detriment of his competitors. Such unfair means or practices include disparaging advertisements/slander of goods. In the fiercely competitive world that we live in, businesses compete with each other on various fronts including quality of goods. The differences in quality of the goods are sought to be made known to the public through advertising. While providing such information, the law permits a businessman to puff up his product and show it in a better light than that of his competitors. However, as we have seen above, the law does not permit a manufacturer or a trader to advertise in such a manner that it slanders the products of its competitors, virtually rubbishing the same, while promoting his own product. As the competition

gets fierce, price differences get reduced and businesses tend to play for a larger market share by employing practices such as slandering of goods/disparaging advertising which are unfair business practices and ought to be curbed. Since the question is of fairness versus unfairness, when this Court has found that the defendant has been deliberately unfair in its said advertising campaign, it is reason enough for this Court to impose punitive damages so as to discourage such a sharp practice and to put to an end to this growing tendency. Consequently, I am of the view that the plaintiff is entitled to punitive damages from the defendant, which I quantify as Rs 5,00,000/-.

67. In view of the forgoing discussion, there shall be a decree of injunction in favour of the plaintiff and restraining the defendant from issuing or telecasting the impugned advertisement or in any other manner disparaging the goodwill and reputation of the plaintiff and its product sold under the trade mark DETTOL. There shall also be a decree of punitive damages of Rs 5,00,000/- in favour of the plaintiff and against the defendant. Costs of the suit are also awarded in favour of the plaintiff and against the defendant. The formal decree be drawn up accordingly.

BADAR DURREZ AHMED
(JUDGE)

July 7, 2008
J