

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment Reserved on: 20.07.2016

Judgment delivered on: 23.08.2016

+ FAO(OS) 185/2016

RECKITT BENCKISER (INDIA) PVT LTD

..... Appellant

versus

GILLETE INDIA LTD

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr C.M.Lall, Ms Nancy Roy and Mr Adya Khanna.

For the Respondent : Mr Sudhir Chandra, Sr.Advocate with Mr Kapil Arora,
Ms Amita Katragadda and Ms Shruti Khanijow.

AND

+ FAO(OS) 206/2016

GILLETE INDIA LIMITED

..... Appellant

versus

RECKITT BENCKISER (INDIA) PVT LIMITED

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sudhir Chandra, Sr.Advocate with Mr Kapil Arora, Ms
Amita Katragadda and Ms Shruti Khanijow.

For the Respondent : Mr C.M.Lall, Ms Nancy Roy and Mr Adya Khanna.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

**CM No.24688/2016 in FAO (OS) No.185/2016&CM No.25348/2016 in
FAO (OS) No.206/2016 (Exemption)**

Exemptions are allowed subject to all just exceptions.

Caveat No.580/2016 in FAO(OS) No.206/2016

Since the counsel for the caveator has entered appearance, the caveat stands discharged.

CM No.25347/2016 in FAO (OS) No.206/2016 (condonation of delay)

For the reasons stated in the application, the delay of 10 days in filing the appeal is condoned.

This application stands disposed of.

FAO(OS) 185/2016 & CM 23298/2016 (Stay) & FAO (OS) No.206/2016

1. Both the appeals which arise out of the order dated 01.06.2016 passed in IA No. 6420/2016, under Order 39 Rules 1 & 2 of the CPC in CS(OS) No. 251/2016, preferred by the defendant and the plaintiff respectively have been heard together and are being disposed of by this common judgment and order.
2. For easy reference, the description of the parties would be referred to, in this order, in terms of the array of parties in CS (OS) No. 251/2016 wherein Gillette India Ltd. is the plaintiff and Reckitt Benckiser India Pvt. Ltd. is the defendant.
3. Gillette India Ltd. filed the said suit bearing CS (OS) No. 251/2016, seeking the following reliefs:-

"(a) pass an order of mandatory and permanent injunction restraining the Defendant, its directors, officers, employees, agents, advertisers, distributors, franchisees, representatives and assigns or otherwise howsoever, from issuing, broadcasting, publishing or printing the Impugned Advertisement or in any other manner directly or indirectly, disparaging the goodwill and reputation of the Plaintiff and any of its products in 'hair removal category' including through any other advertisements and in all media whatsoever including electronic and/or print media;

(b) That the Plaintiff be decreed and awarded damages against the Defendant to the tune of Rs. 2,00,09,600/- for disparagement, denigration and tarnishing of its goodwill and reputation by the Defendant by its Impugned Advertisement;

(c) pass an order of interim injunction restraining the Defendant, Its directors, officers, employees, agents, distributors, advertisers, franchisees, representatives and assigns or otherwise howsoever from issuing, broadcasting, publishing or printing the Impugned Advertisement or in any other manner directly or indirectly disparaging the goodwill and reputation of the Plaintiff and any of its products in 'hair removal category' including through any other advertisements and in all media whatsoever including electronic and/or print media during the pendency of the present suit;

(d) for interim and ad-interim reliefs in terms of prayer clause (c) above;

(e) for costs; and

f) Pass such other or further orders as this Hon'ble Court deems fit and proper under the facts and circumstances of the case."

4. An application on behalf of the plaintiff was also filed under Order 39 Rules 1&2 of the CPC seeking an ex-parte ad-interim injunction in favour of the plaintiff and against the defendant in taking out the impugned advertisement or in any manner disparaging the goodwill and reputation of the plaintiff and any of its products in "hair removal category", as well as for restraining the defendant and its agents from publishing such advertisement having deleterious effect on the products of the plaintiff.

5. The plaintiff being one of the subsidiaries of Proctor and Gamble Co. USA, which is engaged in manufacturing, selling, importing and exporting men's and women's grooming category products, came out with a razor, specially designed for women, under the brand name

VENUS in September 2015, which brand is stated to have become a premier product in women's shaving category globally. Prior to the launching of the aforesaid product, a disposable razor for women namely SIMPLY VENUS was launched. VENUS was launched for the reason that market surveys revealed complete non-availability of gender sensitive and gender specific razors.

6. It is averred in the plaint that the defendant released an advertisement on YouTube and other TV channels seeking to promote its product, a hair removal cream under the name and style “VEET” but with the intention of maliciously denigrating the product of the plaintiff by displaying a razor in the impugned advertisement, which is deceptively similar to the razor of the plaintiff under the brand name VENUS or SIMPLY VENUS. The assertion in the plaint, therefore, was that an average consumer with imperfect recollection would always associate a light blue coloured razor with that of the plaintiff's brand VENUS. The advertisement maliciously targeted, according to the plaintiff, usage of razors in general as well as specifically against the product of the plaintiff by resorting to a falsehood viz. razors do not leave a smooth skin and in comparison, the product of the defendant namely VEET hair removal cream leaves “two times smoother skin than razors”. The aforesaid assertion of the defendant in the advertisement is stated to be not only completely false but without any scientific data. The advertisement also depicted, in the estimation of the plaintiff, a comparative analysis of the working of razors, which, though, was claimed to be an ordinary razor but is strikingly and deceptively similar to the product of the plaintiff. The advertisement also notoriously depicted that improper use of razors without foam, soap, lather or cream has a bad effect on female skin and leaves behind a “stubble”. It is stated that such a statement is not only

misleading but is not based on any scientific data and therefore the advertisement disparages, generically, the goods of the plaintiff.

7. The allegation, in sum and substance, is that the story line in the impugned advertisement has the potency of messaging the public at large to eschew razors for hair removal by depicting a deceptively similarly coloured and styled razor with the razor marketed and sold under the brand name of VENUS and SIMPLY VENUS. The advertisement was also stated to be venturing beyond the permissible limits of comparative advertising as it was with a clear intention to cause an adverse impact on the product of the plaintiff, thereby causing damage to the reputation and goodwill of the plaintiff. The relevant portion of the storyboard of the impugned advertisement is reproduced below:





Girl picks up a disposable razor showing it to Shraddha

Girl VO : Check!



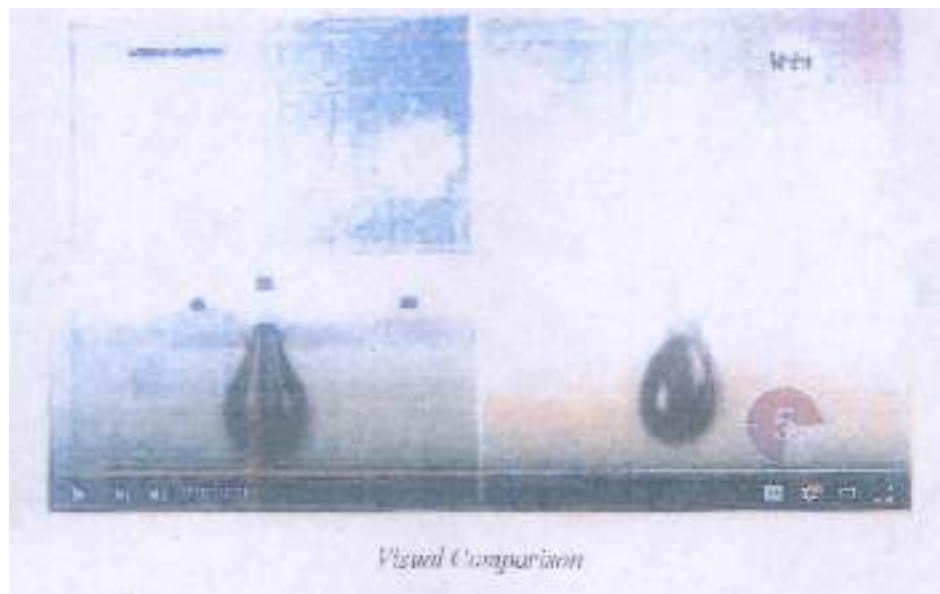
Shraddha gives the girl the Veet Silk & Fresh

Shraddha VO : Try new Veet..

Shraddha VO : No! My cheek!



Shraddha VO : It leaves the skin



8. The learned Single Judge, while adjudicating the injunction application (IA No. 6420/2016) referred to **Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd.**, 167 (2010) DLT 278 (DB); **Tata Press Ltd. vs. MTNL & Ors.**, (1995) 5 SCC 139; **Colgate Palmolive (India) Ltd. vs. Hindustan Lever Ltd.**, (1999) 7 SCC 1; **Pepsi Co. Inc. & Ors. vs. Hindustan Coca Cola Ltd. & Another**, (2003) (27) PTC 305 (Del.) (DB), **Reckitt & Coleman of India Ltd. vs. M.P. Ramchandran and Anr.**, 1999 (19) PTC 741, with regard to disparaging comparative advertisement and

puffery, and formulated the following issues for deliberation for the purposes of injunction:-

I. Whether the defendant was justified in using a blue razor in the impugned advertisement, as it was identical to the colour of the razor of the plaintiff sold under the trademark VENUS and SIMPLY VENUS?

II. Whether the impugned advertisement is misleading and false as it showed the use of razor without the use of lather/foam which, according to the advisory of the plaintiff, is required to be used while using the razor for hair removal?

III. Whether the defendant could have contended through the advertisement that using of a depilatory cream of the defendant would cause two times smoothening of the skin as compared to removal of hair by razors?

IV. Whether the plaintiff would be justified in claiming that the advertisement showed difference in the colour of the skin namely dark when a razor was used and fair when a depilatory cream was used, thereby suggesting that removal of hair by a razor leads to dark and uneven skin and removal of hair by depilatory cream leaves fairer and softer skin; (which would, in any way, be a misrepresentation or a false statement)?

V. Whether an injunction could be sought against the defendant in depicting that the use of razors can leave a stubble on the skin?

9. While answering the above posers, the learned single Judge held that the identical blue colour of the razor shown in the advertisement is relatable to the razors of the plaintiff, and, therefore the blue coloured razor shown in the advertisement disparages the plaintiff's razors in general thereby causing irreparable prejudice and harm to the reputation

of the product of the plaintiff. The defendant was therefore restrained from depicting the razor in the advertisement in blue colour. The learned Single Judge, in arriving at the aforesaid opinion, relied upon an earlier judicial proceeding (CS (OS) No. 3190/2015) initiated by the defendant wherein the plaintiff was restrained from using a spatula of the same colour as that used by the defendant.

10. The prayer of the plaintiff regarding injunction against the defendant in showing the use of razor without lather or foam, as is the advisory of the plaintiff, was declined on the concession of the parties that the instructions given over the cover of the razor clearly states that use of foam/lather would only be a better alternative and not essential and therefore such issue could only be decided in the suit finally.

11. The learned Single Judge restrained the defendant from claiming in its impugned advertisement that hair removal by the depilatory cream of the defendant is twice as good as compared to hair removal by a razor by holding that the report of Global Depilatories R&D Laboratories, Hull, UK which was relied upon by the defendant in making such statement, could not have been relied upon as such report was obtained at the instance of the defendant and cannot be termed as a report submitted by a neutral third party for the court to accept it at the interim stage.

12. However, the claim of the plaintiff that the impugned advertisement showed differences in the colour of skin with different mode of hair removal, namely by a depilatory cream and a razor (dark skin when hair is removed by razor and fair skin when hair is removed by a depilatory cream), and therefore the advertisement contained a misrepresentation and false statement, was rejected on the ground that the same could not have been visible to the eye by the public at large while

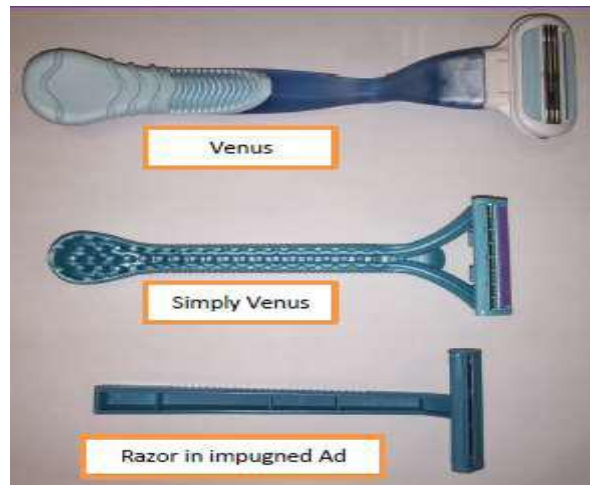
viewing the impugned advertisement. Hence the aforesaid injunction was refused.

13. Since the plaintiff relied upon the report of M/s Nielson dated 24.12.2014, that use of razor of the plaintiff did not leave behind any stubble, in order to adversely comment upon the impugned advertisement as being disparaging, the learned single Judge refused to grant injunction against the defendant in the impugned advertisement regarding leaving behind stubble in case of hair removal by a razor on the same ground of the report being commissioned by the plaintiff's company, therefore, lacking in objectivity.

14. The defendant, which also claims to be a reputed company dealing in cosmetic depilatories, has challenged the aforesaid order on various counts, but primarily on the ground that the advertisement sought to be impugned does not disparage or denigrate the product of the plaintiff. The defendant was not provided a full opportunity of being heard. The impugned order is further assailed as flawed because the very premise of the order, being of ad interim nature was incorrect, specially seen in the light of the impact of the order whereby an advertisement which was being run uninterruptedly since 01.04.2016 was suddenly brought to a grinding halt.

15. On merits, it was argued that the razor used in the advertisement is not of the colour and shape of the razor of the plaintiff. The colour of the razors of the plaintiff are a shade of green and purple (SIMPLY VENUS) and a combination of white and blue (VENUS) whereas the razor used in the advertisement is of blue colour. Even the shape of the razor used in the advertisement is absolutely different from the shape of both the products of the respondent. A visual comparison would make it obvious

that neither the product of the plaintiff was shown nor identified in the impugned advertisement.



16. It was contended by the defendant that the impugned order did not take into account the fact that a similar complaint was raised by the plaintiff against an advertisement campaign “don’t shave it, just VEET it” before the Advertising Standards Council of India (ASCI), a self regulatory body, objecting to the tag line in the advertisement “#don’t shave” on the ground of the same being misleading and thereby putting the product of the plaintiff and razors as a category in general to a lower estimation by the viewer. The aforesaid complaint was dismissed by the ASCI holding that such advertisement did not denigrate the razor as a category of products which included the product of the plaintiff.

17. Mr. C.M. Lall, learned Advocate for the defendant, submitted that the injunction against the defendant in so far as the part of the advertisement relating to a representation by the defendant that the use of a razor leaves stubble whereas use of a depilatory cream (VEET) does not and that the depilatory cream of the defendant leaves the skin upto two times smoother than razors, was not justified as the plaintiff, on their own website have represented the advantages of using a depilatory cream

which impacts the skin by dissolving the hair shaft, leaves behind a rounded edge at the skin surface, thereby making the regrowth of hair softer and of a longer duration than after shaving.

18. That the learned Single Judge did not grant injunction against the defendant regarding representation in the advertisement that use of the razor leaves a stubble, is a vindication of the fact, it is argued, that the depilatory cream of the defendant leaves the skin upto two times smoother.

19. An objection has been raised with regard to framing of the poser, regarding leaving the skin “up to two times smoother than razors”. The learned Single Judge, it has been urged, has, in an erroneous manner, framed the issue as hereunder:-

“The next issue is as to whether the defendant can contend as per the impugned advertisement that using of hair removal cream of the defendant causes two times smoothening of the skin as compared to hair removal by razors”

20. The depiction in the advertisement and the formulation by the learned Single Judge is at complete variance and “leaving the skin upto two times smoother” is not the same as “causing two times smoothening of skin”. The injunction on that count against the defendant thus was unnecessary as no such claim has been made in the impugned advertisement.

21. As a corollary to the aforesaid argument, it has been suggested that if injunction was refused with respect to depicting in the advertisement that removal of hair by razor causes a stubble then the depilatory cream (Veet) of the defendant can definitely be canvassed as a better option for hair removal. If removal of hair by a depilatory cream does not leave a

stubble, then perhaps it would not be a wrong representation that use of the product of the defendant leaves behind a better/smooth skin. Thus representing that use of VEET would leave the skin twice as smooth, would fall in the category of puffery which is permissible.

22. It has been submitted that the learned single Judge fell in error in not accepting the report filed by an independent UK based laboratory namely Global Depilatories R&D Laboratory, Hull, UK on the ground of the report being non-objective as it completely ignores the fact that the report includes the finding on smoothness of the skin and not the duration during which the skin remains smooth. The report of the aforesaid laboratory was also trashed by the learned Single Judge on the issue of the size and number of sampling, even when the report dealt with the tests of different VEET products on different persons with different skin types of approximately 200 persons.

23. The plaintiff is also dissatisfied with the impugned order for only partial relief was granted and the injunction regarding showing the use of razor in the advertisement without its proper method of application using soap, foam or lather; portraying that razors cause skin darkening by showing comparison between product of the plaintiff and the defendant in dark and light skin respectively in the impugned advertisement and portrayal in the advertisement of the razors causing “stubble trouble” were declined.

24. Mr. Sudhir Chandra, learned Senior Advocate appearing for the plaintiff, submitted that even though the learned Single Judge referred to the judgments of *Colgate Palmolive Company & Anr. vs. Hindustan Unilever Ltd.*, 2014 (57) PTC 47 (Del.) (DB) and Dabur India Ltd. (Supra)

but did not correctly apply the ratio of the aforesaid judgments to the facts of the case.

25. It has been argued that the impugned advertisement was taken out by the defendant and therefore it lay upon the defendant to demonstrate that the assertions in the impugned advertisement were correct and not false. The report of the Global Depilatories does not include any statement as to whether, in case, a razor is used it will result in causing stubble and that the use of depilatory cream would not. It was further submitted that even if the tall claims in the advertisement were taken to be correct, then also it would not be open for anybody, much less the defendant, to malign the product of a competitor like the plaintiff. It was thus stressed that even showing the use of razor without the proper method of its application and depicting darkening of skin in comparison when razor was used for hair removal as compared to the depilatory cream of the defendant and hair removal by razors leaving "stubble trouble" in the impugned advertisement be also enjoined.

26. In order to appreciate the contentions of the parties and evaluate the impugned order it would be necessary to refer to certain concepts namely, disparagement, puffery, trade libel, comparative advertising and damages vis-a-vis the right to freedom of Speech under article 19(1)(a) of the Constitution of India.

27. The expression disparagement means to speak about something in a light manner so as to undervalue or discredit it. It amounts to denigration which, in other words, means putting the product at low estimation or valuation.

28. Black's law dictionary, Eighth Edition, defines disparagement as "*A derogatory comparison of one thing with another; the act or an*

instance of castigating or detracting from the reputation of, esp. unfairly or untruthfully; a false and injurious statement that discredits or detracts from the reputation of another's property, product or business."

29. For an act of disparagement, especially in an advertisement, the contents of the advertisement must depict the malicious intent of the advertisement; improper manner in which the advertisement has been made to run; the storyline of the advertisement and the message sought to be conveyed by it must have the potency of putting another product to disrepute. By the manner of running the advertisement, it is meant that if an advertisement intends to ridicule or condemn or denigrate a product of a competitor, then it would amount to disparagement. However, if the manner is only to show that one product is better or even the best would not come in the category of disparagement if the other product of a competitor is not denigrated.

30. However, the meaning of "trade disparagement" given in Black's Law Dictionary, Eight Edition, is as hereunder:-

"The common-law tort of belittling someone's business, goods, or services with a remark that is false or misleading but not necessarily defamatory. To succeed at the action, a plaintiff must prove that; the defendant made the disparaging remark; the defendant intended to injure the business, knew that the statement was false, or recklessly disregarded whether it was true; and the statement resulted in special damages to the plaintiff, by passing off."

31. A cognate expression, namely, "puffery" means "the act or practice of puffing or fulsome public praise or commendation" (The New International Webster's Comprehensive Dictionary of English Language, Deluxe Encyclopedic Edition).

32. Trade Libel concerns maliciously false statements intending to defame or slander or degrade or asperse character or reputation (The New International Webster's Comprehensive Dictionary of English Language, Deluxe Encyclopedic Edition).

33. Advertisement means "the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services".

34. Comparative advertising is "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor" (see Articles 2(1) & 2(2)(a) of the Advertising Directive of EEC).

35. Damage is, generally speaking, destruction or impairment, of value; injury; harm. In the context of an action for malicious falsehood a person aggrieved has to demonstrate that he has suffered damages because of such malicious falsehood in any depiction or representation.

36. Article 19(1)(a) of the Constitution of India states as hereunder:

"19. Protection of certain rights regarding freedom of speech, etc.—

(1) All citizens shall have the right—

(a) to freedom of speech and expression;"

37. The law relating to disparagement or disparaging advertisements is no longer res integra. One might exaggerate the qualities of one's product or put it on the highest pedestal (puffery) but that, by itself, will not be countenanced as denigration or disparagement of goods of another person.

38. In **S.C. Johnson & Son Inc. vs. Buchanan Group Pty Ltd., 2010 (42) PTC 77 (Del)**, while restraining the defendants from using the

impugned advertisement, a Single bench of this Court had held as hereunder:-

“14.2 But every comparison does not necessarily amount to disparagement. Consequently, what is required to be answered is: whether there is denigration of plaintiffs’ products. The answer to this question in my mind lies in what is the fundamental purpose for which the product is manufactured. Both the plaintiffs’ and defendants’ products are kitchen cleaners. Therefore, efficacy in cleaning tough kitchen stains with minimum effort would be the core object in manufacturing a product of such kind. The impugned advertisement undoubtedly shows that "CIF Cream" which is the defendants’ product achieves this object quickly with least amount of effort in comparison to the products of its competitor. In my view in the facts of the instant case, the impugned advertisement prima facie does seem to denigrate the plaintiffs’ product. It comes within the test of the defendants alluding to a "specific defect" or "demerit" in the plaintiffs’ product.”

39. Exaggerated claims but without any false statement which is also called puffing has been accepted under the Indian law also as being legal. The concept of puffing being within the realm of legally permissible canvassing was recognized and appreciated in *Hubbuck v Wilkinson*, [1899] 1 Q.B.86. In the aforesaid case, it was observed that a comparative statement about the goods of a manufacturer claiming it to be better than the goods of others was held to be non actionable. In the aforesaid case, the defendant had published a circular which gave details of trials comparing the zinc paints of the competing parties. The conclusion of the trial which was published gave some ‘brownie’ points to the defendant's product. The product of the defendant was also cheaper than that of the plaintiff. The plaintiff had alleged that the results published by the defendant were not true. The reason behind acceptance of such a legal

proposition was that if puffing would not be permissible, then, perhaps no person in the commercial world, trying to project its/his product, would be saved/insulated from litigation.

40. In *White v Mellin*, [1894] 3 Ch.276, the defendant had purchased baby food from the plaintiff and sold it to the public. With the packaging of the plaintiff's product, a label was attached, which disclosed that in the category of baby food, the product of the defendant was more nutritious and healthy than any other yet offered. The case against the defendant failed at the House of Lords. Lord Herschell L.C. found that that the label was directed against the plaintiff but any action against the defendant would necessarily fail because the label was in the nature of a puff which would not be taken by the public seriously or would not be taken to mean that the goods of the plaintiff were not good or were lesser in quality than anyone else's. The argument that the impugned label contained a factual position and not merely an opinion was not accepted by the Court.

41. From a conspectus of the decisions rendered by English Courts, three underlying principles can safely be deduced:-

- (i) The impugned statement/representation must specifically denigrate the product of the claimant in order to be actionable;
- (ii) The representation shall not be actionable unless it is likely to be taken seriously;
- (iii) General praise of one's product/goods would not be actionable.

42. In *De Beers Abrasive Products v. International General Electric Co.*, [1975] F.S.R. 323, Walton, J expressed that Courts would take a practical approach in reading the statements complained of, given the general habit of hyperbolic statement regarding a product in an advertisement regarding the celebrity of the product. Such hyperbolic

statements are bound to be taken with a pinch of salt. In *Mc Donald's Hamburgers vs. Burgerking*, [1986] F.S.R.45 it was held that "advertisements are not to be read as if they were some testamentary provisions in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared".

43. However, what cannot be doubted as a settled legal principle is that nobody would be protected if he intends to denigrate or defame the goods of his competitor in the process of making any comparison. Comparative advertising, though is permissible, but only within permissible limits. Indian Courts have recognized such denigrating comparisons as actionable wrongs (see: Hindustan Lever Ltd v. Colgate Palmolive (I) Ltd and Anr, 1998 (1) SCC 720; Pepsi Co Inc. & Ors. v. Hindustan Coca Cola Ltd & Anr., 2003 (27) PTC 305(Del) (DB); Reckitt & Colman of India Ltd. v. M.P.Ramchandran & Anr., 1999 PTC (19) 741 and Dabur India Ltd. v. Colgate Palmolive India Ltd, 2004 (29) PTC 401).

44. It would only be apposite to recount the propositions formulated in Reckitt & Colman of India Ltd v. M.P.Ramchandran & Anr, 1999 PTC (19) 741 regarding comparative advertising.

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

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

(c) 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.

(d) 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.

(e) 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."

45. Unlike in defamation cases, where there is a thumb rule that a statement could be taken to be defamatory if it is capable of one meaning only which is slanderous and not that the statement is capable of being perceived or taken in a different sense, the aforesaid rule may not have necessary application in a case of malicious falsehood as a tortious liability. If a statement is capable of being construed in a different manner which could lead to slanderous results, the same would be prohibited.

46. To understand the concept better it would be necessary to see what malice actually means. Unless the malice is akin to dishonesty or at least improper motive, the same may not be actionable. For a malice in thought to get reflected in a representation or advertisement, and specially in a comparative advertising, must involve a subjective state of mind of the wrongdoer, having necessary mental element of ill will or an intention to injure. Similarly, if a person is seeking to defend his own lawful interest but, while doing so, he is cognizant of the fact that it would cause damage to the other side, he may not be accused of malice. The trader's desire to promote his business at the expense of rivals is a proper exercise of discretion. A genuine belief in the truth of the statement made negates malice (*Horrocks v Lowe* [1975] A.C.135).

47. In *Tata Press Ltd.* (Supra) the Supreme Court has held that commercial speech is a part of freedom of speech and expression

guaranteed under article 19(1)(a) of the Constitution of India. An advertisement was taken to be a species of commercial speech. In paragraph 23 of the judgment, in the aforesaid case, the Supreme Court elucidated as follows:-

“.....Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of “commercial speech”...”

48. Nonetheless what is important is that such commercial speech should not be false, misleading, unfair, deceptive and which proposes illegal transactions. Explaining the aforesaid concept, the Supreme Court in *Colgate Palmolive Company & Anr. (Supra)* observed that commendatory expressions may not be serious representations of fact and some latitude is given in the field of advertising for gaining customers. The difficulty in identifying the borderline of permissible assertion in such advertisements which more often than not may not be discernible, was also admitted.

49. A Division bench of this Hon’ble Court in *Dabur India Ltd. (Supra)* summarized the law and the guiding principles as hereunder:

- “i) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.
- (ii) An advertisement must not be false, misleading, unfair or deceptive.

(iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.”

50. To the above extent, such advertisements would have the protection of article 19(1)(a); but any venture outside the permissible limits of puffery would surely be in the realm of false, misleading, unfair and deceptive representation and may not be entitled to any constitutional protection.

51. A cumulative assessment of the case laws of the subject leads to the only inescapable conclusion that puffery is permissible but disparaging a rival product is not. One of the guidelines to be followed has been provided in **Pepsi Co. (Supra)** wherein it was held as hereunder:

“(1) The intent of the advertisement—this can be understood from its story line and the message sought to be conveyed.

(2) The overall effect of the advertisement—does it promote the advertiser's product or does it disparage or denigrate a rival product?

In this context it must be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavourable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.

(3) The manner of advertising—is the comparison by and large truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible.”

52. In order to appreciate the contentions of the parties in the present case, it would also be necessary to refer to certain provisions of the Code

of Advertising Standards Council of India (hereinafter referred to as "ASCI Code". The relevant clauses of the Code are as hereunder:-

“DECLARATION OF FUNDAMENTAL PRINCIPLES

IV. To ensure that advertisements observe fairness in competition so that the consumer's need to be informed on choices in the market –place and the canons of generally accepted competitive behaviour in business are both served.

Chapter I

4. Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions.....

5. Advertisements shall not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers.”

Chapter IV

To ensure that Advertisements observe fairness in competition such that the Consumer's need to be informed on choice in the Market-Place and the Canons of generally accepted competitive behaviour in Business are both served.

1. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interest of vigorous competition and public enlightenment provided:

(a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.

(b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the

advertiser or so as to suggest that a better bargain is offered than is truly the case

(c) The comparison are factual, accurate and capable of substantiation.

(d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which is compared.

(e) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.”

53. Comparative advertising can be done if goods and services are towards meeting the same needs or are intended for the same purpose. But, for sure, competitors, while comparing, cannot mislead. If an advertisement deceives or is likely to deceive a person to whom it is addressed or who is attracted and which, by reason of its deceptive nature is likely to affect his economic behaviour or which for those reasons injures or is likely to injure a competitor, would be treated as a misleading advertisement.

54. On a careful perusal of the impugned advertisement (text and video, both), not from the view point of an intelligent consumer who is in a position to identify hyperbole and rhetoric but from the view point of a sensitive/gullible and unsuspecting customer, we are of the view that the razor shown in the impugned advertisement has neither been identified directly or indirectly as one of the products of the plaintiff. In the impugned advertisement, a generic razor is shown which cannot be correlated to a women’s razor and specifically to the plaintiff’s product which is claimed to be disparaged. Even the shape and the design of the razor used in the advertisement is dissimilar to the product of the plaintiff. The identification of the product which is claimed to be disparaged with the one shown in the advertisement is one of the

prerequisites for an actionable wrong for denigration or disparagement. It would be an overreach to claim monopoly over blue colour and therefore we feel that the restraining order passed by the learned single Judge with regard to the blue coloured razor was not warranted.

55. In *Reckitt Benckiser (India) Ltd. V. Hindustan Unilever Limited*,¹⁵¹ (2008) DLT 650, the product claimed to be denigrated was sought to be identified through the colour blue but the Court was of the opinion that the product sought to be denigrated could not be identified by the colour only. In the aforesaid case, the product was HARPIC, a toilet cleaner, which is identifiable as “blue and thick” whereas what was represented in the advertisement was “blue but thin”. The designs of VENUS and SIMPLY VENUS are different from the razor which has been shown in the impugned advertisement.

56. The reliance of the learned single Judge on an earlier proceeding initiated by the defendant (CS(OS) No. 3190/2015) is not apt for drawing a comparison of the present case with the earlier proceeding initiated by the defendant against the plaintiff wherein the plaintiff was prevented from using the same colour of the spatula in the impugned advertisement (of CS(OS) No. 3190/2015) which was of the same colour as the spatula of the defendant. In the aforesaid case, the present plaintiff had admitted on affidavit that they were showing the exact product i.e. the VEET spatula. Therefore there was a direction for change of the colour of the spatula at the interlocutory stage. In the present case, the shape of the razor is absolutely different and the colour of the products of the plaintiff are also different.

57. We, therefore, set aside the ad interim injunction against the defendant of using a blue-coloured razor in the advertisement.

58. However for fair play, the defendant is directed to increase the font size by 2 points in the disclaimer which should be printed in bold letters. It should also clearly indicate that the image shown in the advertisement is a man's razor.

59. We do not approve of the complete restraint over the defendant from claiming, in the advertisement, that hair removal by using the depilatory cream of the defendant (VEET) "leaves the skin up to two times smoother than razors" for the following reasons:

- a. The plaintiff has admitted that men's razors are not appropriate for use by women ["refer to the message on the website of VENUS – *When it comes to shaving, men may be from Mars, but for women, it's all Venus. Sure, men and women both want the kind of smooth skin they get with a perfect shave but Venus understands that women's shaving needs are different and call for a different kind of razor.*

Let's get to the root of shaving differences Manscaping aside, most guys only shave their faces and necks. You, on the other hand, are faced with legs, underarms and your bikini area. That's about 676 square inches, or 18 times the 38 inches he's shaving each day. (And he wonders why it takes you longer to get ready!) In addition, your body hair is finer and grows faster and in more directions than his facial hair.....

Then there's the way that men and women shave. Most men shave at the sink, in front of a mirror. Many women, though, find it easier to shave in the shower, where they can't see everything they're trying to reach (like the backs of knees). They have to depend on the feel of the razor to get the job done. Plus, women tend to move

their razors more quickly than men, and over curvier spots, like ankles and knees.

These differences all add up to the need for a women's razor, designed to glide over skin quickly, easily and without missing any spots.”]

- b. In a previous advertisement of VEET, the tagline of the advertisement “don’t shave it...VEET it” was objected to by the plaintiff before the ASCI, which objection was overruled.
- c. The plaintiff, on its website has explained the advantages of depilatory cream over razor by stating “depilatory creams work by dissolving the hair shaft, leaving a round edge at the skins surface - so regrowth appraise to be softer and take longer than after shaving. No risks of nicks and cuts.” (refer to pg. 310 of vol. 2 of FAO (OS) No. 185/2016)

60. However, the learned Single Judge is correct in observing that an independent agency maybe appointed by a court for the purposes of giving a report, before any definitive conclusion could be arrived at as to whether the contention of the defendant of the hair removal by depilatory cream Veet would leave the skin “up to two times smoother” as compared to the process of hair removal by a razor. The extent of the comparison between the product of the plaintiff and the defendant with regard to the degree to which the skin remains smoother borders on misrepresentation as it is not based on any objective analysis.

61. Hence, the order of the learned Single Judge is modified to the extent that the defendant is restrained from claiming in the impugned advertisement that the hair removal would leave the skin “up to two times” smoother than razors and is permitted to advertise only “leaves the skin smoother than razors”.

62. The argument on behalf of the plaintiff that the impugned advertisement denigrates razors in general for causing "stubble trouble" and comparisons showing razors being used without foam and on darker skin to mislead the consumers to believe that razors cause skin darkening was not accepted by the learned single Judge. The reasons have been explained by him as hereunder:

“10(i) That takes us to the issue as to whether the plaintiff is justified in claiming that in the advertisement by showing differences in the colour of the skin of dark when shown with the use of razor and fair when used with cream, hence it is to be implied that using of a razor leads to dark and uneven skin whereas use of hair removing cream leads to fairer skin and which is a misrepresentation and a false statement in the impugned advertisement.

(ii) This aspect pleaded by the plaintiff however in my opinion doesnot necessarily emerge on account of fleeting glimpses of a dark and a fair skin in the impugned advertisement with the fact that showing of hair removal by a razor on a dark skin does not necessarily and in all cases lead to a necessary conclusion that what is intended to be shown by the advertisement is that the use of a razor causes dark and uneven skin. This prayer for injunction by the plaintiff is therefore rejected.

11(i) The next issue is as to whether the plaintiff can claim an injunction against the defendant that defendant in the impugned advertisement is showing that use of a razor can leave stubble.

(ii) In this regard, counsel for the plaintiff places reliance upon the report of M/s Nielsen dated 24.12.2014 showing that use of the plaintiff's razor leads to smooth arms and legs i.e. no stubble is left. It is seen that this report of M/s Nielsen is the report of an agency commissioned at the instance of the plaintiff and therefore it cannot be said to be a report of a third party neutral agency. Reliance placed by the plaintiff on other reports does not help the plaintiff because those reports only state that use of the razor does not necessarily lead to faster or thicker hair growth after shaving. As also stated immediately hereinafter that there are various pros and cons of both the products of the

parties and that use of the products may or may not leave stubble depending on various aspects and persons as detailed below. Plaintiff therefore cannot be granted injunction that defendant be restrained from claiming in its impugned advertisement that use of a razor leaves a stubble.

12. I may note that both the parties to the suit are rivals to each other. Products in question are different alternatives for hair removals. It goes without saying that unless there are exhaustive tests and reports of various neutral laboratories it cannot be confidently said today one way or the other as to whether or not the use of razor leaves stubble or not that a hair removal cream is twice as good as a razor. There are many ifs and buts and variations whether of use of a razor or a hair removing cream, in as much as, one method may be suited to one set of individuals/ladies whereas another method may be suited to another set of individuals/ladies. Also a lot depends upon how a razor or a hair removing cream is used including the type of skin of a particular lady, the type of hair of a lady i.e. hard or soft or the amount thereof or the positioning of the hair on the body and issues of any individual specific allergies etc. Possibly therefore both the parties to the present suit are saying something which may or may not turn up to be ultimately correct, or may or may not to be false, and the statements may or may not be only partially true/partially false i.e. a statement on any of the aforesaid issues which are called for decision may not be absolute but would be conditional on many factors and hence what are the exact conditions to be laid down for airing of an advertisement or non-airing of the same or in what manner the same is to be done whether it amounts to falsehood or disparagement are aspects which will be decided finally at the stage of hearing of the injunction application. For the present, the limited interim orders which are issued in favour of the plaintiff while declining other reliefs, and as an interim measure, will sufficiently protect the rights of the parties to the present suit inasmuch as there cannot be a perfect solution at this stage of the matter till completion of pleadings as also having reports of neutral and independent laboratories/agencies on various aspects of

the matter qua the products of the plaintiff and the defendant”

63. The learned Single Judge has taken into account the fact that an advertisement is normally viewed in the perspective of the impression obtained by an average person with imperfect recollection.

64. We are in agreement with the opinion of the learned single Judge that the above aspects of the advertisements do not disparage or denigrate the product of the competitor plaintiff. By no stretch of imagination can it be said that the aforesaid contents of the impugned advertisement has rubbished the image of the plaintiff’s product while the defendant promoted its own product.

65. Thus for the foregoing reasons we deem it appropriate to dispose of both the appeals (FAO(OS) 185/2016 and FAO(OS) 206/2016) by partially modifying the order of the learned single Judge in the following terms:

- a. Injunction against the defendant for using a blue coloured razor in the advertisement is set aside. However, the defendant is directed to increase the font size by two points in the disclaimer which shall be printed in bold letters in the advertisement, clearly indicating that the image shown in the advertisement is a man’s razor.
- b. The injunction against the defendant of not using the phrase “leaves skin up to two times smoother” is modified and the defendant is only restrained from claiming in the impugned advertisement that its product (depilatory cream) would leave the skin “up to two times smoother” than razors. The words “up to two times” is thus required to be removed from the impugned advertisement.

- c. The order of the Learned single judge refusing to grant injunction against the defendant regarding “stubble trouble” and comparison showing razors being used without foam, on a darker skin which according to the plaintiff, has the tendency to mislead the consumers to believe that razors cause skin darkening, is hereby sustained and upheld.

66. Thus, FAO(OS) 185/2016 (Reckitt Benckiser (India) Pvt Ltd v Gillete India Ltd) is partly allowed to the extent indicated above and FAO(OS) 206/2016 (Gillete India Ltd v Reckitt Benckiser (India) Pvt Ltd) is dismissed.

67. The observations made and conclusions arrived at in this judgment are, of course, only prima facie in nature and will not come in the way of the parties at the trial of the suit.

68. The parties shall bear their own costs.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

AUGUST 23, 2016

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