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

% *Date of Judgment: 11th April, 2018*

+ **FAO (OS) (COMM) 62/2018 & C.M.13949/2018 (stay) & 13950/2018 (for additional documents)**

HINDUSTAN UNILEVER LTD.

..... Appellant

Through: Mr.Sudhir Chandra and Mr.Akhil Sibal, Senior Advocates with Mr.Ajay Bhargava, Ms.Vanita Bhargava, Mr.Nishad Nadkarni, Mr.Ankur Sangal, Ms.Sucheta Roy, Ms.Pragya Mishra and Ms.Richa Bhargava, Advocates.

versus

RECKITT BENCKISER (INDIA) PVT. LTD.

..... Respondent

Through: Mr.Chander M.Lall, Senior Advocate with Mr.Jawahar Lal, Ms.Nancy Roy and Mr.Rupin Bahl, Advocates

CORAM:

**HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE REKHA PALLI**

G.S.SISTANI, J. (ORAL)

1. This is an appeal filed by the appellant herein (defendant in the suit) against the order dated 06.04.2018 passed in a suit for permanent injunction and damages on account of disparagement and unfair trade practices instituted by the respondent herein (plaintiff in the suit).
2. At the outset, it may be noted that the appellant/defendant had appeared before the learned Single Judge on a caveat having been filed. We are informed that the matter was heard before the pleadings

could be completed and after the grant of an injunction, time has been granted to the appellant/defendant to file the written statement and the matter has been placed before the Joint Registrar on 20.04.2018 for completion of the pleadings.

3. In the impugned advertisement, the appellant/defendant has compared its 'Lifebuoy Soap' with the respondent's/plaintiff's product i.e. 'Dettol Antiseptic Liquid'. The advertisement appeared for the first time through the electronic media on 02.04.2018.
4. Mr.Chander M.Lall, learned Senior Advocate appearing for the respondent has contended that the suit was instituted within the shortest possible time on 04.04.2018 and the matter was listed for the first time on 5th April 2018 and thereafter on 6th April, 2018 when the impugned order was passed. By an order dated 06.04.2018, the appellant has been restrained from inserting or adding any such kind of piece/feature in the advertisement which would otherwise directly or indirectly result in disparaging the said product of the plaintiff/respondent herein. To appreciate the arguments of the learned Senior Counsels appearing in this case, we deem it appropriate to scan the storyboard of the impugned advertisement which we find at page 44 to 49 of this appeal which we extract herein below :-

Screen Shots	Description and Voice over
	Child Sneezing.



Male Protagonist:

Phir Se Bimar?

(Translation: Sick again?)



Male Protagonist:

Ab se NahanekePani Mein
Antiseptic Liquid
MilanaPadega..

(Translation: From now on
will have to add Antiseptic



liquid in bath water)

Bottom of the screen shows:
**FOR BATHING WHAT IS
STRONGER THAN
ANTISEPTIC LIQUID?**



Male protagonist is shown
pouring antiseptic liquid in
bath water



A confident Female
protagonist is shown acting
as a Doctor saying: “Doctor
Se Suno!”

(Translation: Listen from the
Doctor)



Male Protagonist stops pouring Antiseptic Liquid in bath water and is shown looking with a disturbed expression towards the female protagonist.



The Female protagonist is shown standing next to the sick child and pointing at him with a laser light.



Female Protagonist states: Ye paanikekitanunikalega.

(Translation: This will only remove germs from bath water)



Female Protagonist: Par Body
kekitanutoh...

(Translation: But the germs
on body...)

Female protagonist is shown
throwing laser light revealing
many germs on the body of
the sick child from his hand
to his mouth depicting that
the germs will travel from the
sick child's hand to mouth.

Female protagonist states:
Yahan Se Yahan

(Translation: From here to
here)

There is an illegible super at
the bottom of screen stating
"Creative visualization"

	Female protagonist is shown looking concerned while telling the father of the sick child “Aurphirhosaktihaibeemari!!” (Translation: And then it can cause diseases)
	Male protagonist is shown extremely concerned and distressed and asks the female protagonist “Par Nahanemeinisse strong kyahai?” (Translation: But what is stronger than this for bathing)
	A pack of Lifebuoy Total is shown being put on a slab causing the slab to be broken with its strength. Female protagonist answers the question posed by the male protagonist: Lifebuoy Strong... With Active Silver!!

	Screen shows the boy taking bath. The screen is split in two parts, one showing the boy bathing only with water containing Antiseptic Liquid and the other showing the boy applying Lifebuoy soap on his body. At the beginning of the split screen, the number of germs on the body of the boy on both sides of the screen are same.
	As the boys are shown to be bathing, while the number of germs on the body of the boy bathing with only water containing antiseptic liquid remain the same, the number of germs on the body of the boy bathing with Lifebuoy soap almost completely vanish. There is an illegible super at the bottom of the screen stating “Creative visualisation. As per lab test, based on prescribed quantity of antiseptic liquid in bath water, i.e. one teaspoon (5 ml) in one bucket (10 lts.)”



The boy using water with antiseptic liquid is also shown being distressed while pouring water containing antiseptic liquid over himself, whereas the boy bathing with Lifebuoy is shown looking very happy.



Female Protagonist: Jo de kitanuon se 100% Stronger suraksha.

(Translation: which gives 100% stronger protection from germs)



The screen shifts to a happy family with the child holding Lifebuoy soap and the mother caressing him. The female protagonist states: MeraStrong Boy!!

(Translation: My Strong Boy)

	The child looks very happy and showcasing Lifebuoy soap says: Lifebuoy Strong!!
	The entire family is shown looking very happy.
	Pack of Lifebuoy soap is shown on the screen with active silver around it and a voiceover: Lifebuoy. An illegible super at the bottom of screen is shown stating “Creative visualisation. As per lab test”

5. The prime grievance of the learned Senior Counsels appearing for the appellant/defendant is that in the absence of a reasonable opportunity having been granted to file the written statement and reply to the application under Order 39 Rules 1 & 2 of CPC, serious prejudice has

been caused to the rights of the appellant/defendant. It is also contended that the learned Single Judge has extensively relied upon an order passed in CS(OS) No.1832/2012 dated 13.05.2013 in an earlier litigation between the parties concerning the same very product. Mr. Sudhir Chandra, learned Senior Advocate appearing for the appellant contends that the terms as set out in the said order do not apply to the facts of the present case and the advertisement in question. He contends that the order dated 13.05.2013 had laid down the following four terms before the advertisement subject matter CS(OS) No.1834/2012 could be released:

- a. remove the 'toys' in the advertisement.
 - b. remove the phrase "two dhakans" and the particular portion featuring the lady shown pouring liquid in the bucket by holding the bottle of the antiseptic liquid in her hand.
 - c. remove the shot showing the cloud formation.
 - d. since green is the colour majorly associated with 'Dettol', therefore also change the colour scheme showing the comparison between the two products in the television commercial and change the green colour to a different shade.
6. It is urged before us that in the present advertisement no toys have been shown. The catch line of the respondent/plaintiff 'two dhakkans' is not part of the present advertisement. The liquid poured in the bucket of water does not show a cloudy formation; a feature specific to the product of the respondent/plaintiff and the green colour which is majorly associated with Dettol has not been used. Thus, for the learned Single Judge to have been persuaded by the order dated 13.05.2013, is misplaced for the reason that in the impugned advertisement neither the product of the respondent/plaintiff has been

shown nor the bottle, which could identify the antiseptic liquid nor the catch line ‘two Dhakkans’ nor the green colour has been shown. It is also contended that the advertisement does not show the product of the respondent/plaintiff in a poor light nor there is anything disparaging against the respondent’s/plaintiff’s product. It is highlighted by Mr. Sudhir Chandra that it is also the case of the respondent/plaintiff that the antiseptic liquid is a germ killing product and the use of Dettol antiseptic liquid is prescribed to ensure that the water used for bathing is free from germs.

7. Mr.Sudhir Chandra, learned Senior Advocate has drawn the attention of the Court to para 19 of the plaint, which we reproduce as under:

“19. In addition to the above, whilst being a germ killing product, owing to the quality of water in India and presence of germs in bathing water, the plaintiff recommends use of Dettol Antiseptic Liquid in certain prescribed quantities (“one teaspoon to a bucket”) to ensure that the water used for bathing is free from germs. The plaintiff has never recommended use of DETTOL Antiseptic Liquid, as a substitute for soaps or bathing gel or any other product. It is relevant to state that soap has an entirely different function while bathing, as soap contains surfactants which when come in contact with the human body cause germs to be attached to them and when soap is rinsed with water, it removes the germs from the body. The use of Dettol Antiseptic liquid in bath water ensures that fresh germs are not deposited on the body after ringing as opposed to untreated water. Accordingly, the plaintiff’s Dettol Antiseptic Liquid used in limited quantity in bathing water acts as accessory to each other to give a complete bath that too in a scenario where the water is impure. Accordingly, to promote its product, as an accessory to soap and certainly not as a substitute to soap, the plaintiff prescribes use of its Dettol

Antiseptic Liquid in limited quantities in bath water.”

8. Relying on para 19, Mr. Sudhir Chandra contends that it is the case of the respondent/plaintiff that Dettol Antiseptic liquid is not a substitute for soaps or bathing gels or any other product and thus, the advertisement in fact, only reiterates what is the stand of the respondent/plaintiff and has been averred in para 19 of the plaint that the antiseptic liquid be used to remove germs from the bathing water and not the germs from the body. It is also the case of the appellant/defendant that in case, reasonable opportunity is granted for filing the written statement and reply to the IA filed under Order 39 Rules 1 & 2, the appellant would be able to show that the comparison made in the advertisement is truthful and not that the product of the appellant has been puffed up or the product of the appellant/defendant has been denigrated in any manner. In the light of the above submissions, Mr. Sudhir Chandra has prayed that the interim order dated 06.04.2018 be vacated, since the respondent has not been able to make out a strong prima face case nor balance of convenience is in favour of the respondent nor the respondent has been able to establish that irreparable loss would be suffered by them.
9. Mr. Chander M. Lall, learned Senior Advocate appearing for the respondent/plaintiff submits that besides the reliance placed by the learned Single Judge on the judgment passed on 13.05.2013, various other grounds were also urged by him but the same may not have been reflected in detail in the order as the pleadings were yet to be completed and a full hearing is to be granted to both sides after the pleadings are completed. Mr. Lall also submits that the parties before

this Court have been locked in litigation in various matters including two suits which were filed before the Calcutta High Court by the appellant/defendant and two suits were filed by the respondent/plaintiff. The Calcutta High Court granted injunctions in all the four suits. However, the products in three suits were different being 'Vim' on the one hand and 'Dettol Healthy Kitchen' on the other, while in one case the products were the same 'Dettol Antiseptic Liquid' and 'Lifebuoy Soap'. Mr.Lall contends that the orders passed in the aforesaid four matters have attained finality although the suits are still pending as an appeal filed before the Division Bench by both the parties in all the four matters were dismissed with slight modifications to the order of the learned Single Judge and thus the orders have attained finality. Mr.Lall has relied on the order passed by the learned Single Judge of the Calcutta High Court extensively in support of his submissions that the grounds sought to be urged by the appellant before this Court today were also raised before the Calcutta High Court and the same were rejected. Mr.Lall has also submitted that the advertisement in issue falls foul of the Code for-Advertising Standards Council of India, the advertisement also falls foul of Section 4 of the Drugs and Magic Remedies (objectionable advertisement) Act, 1954 read with Drugs and Cosmetics Act. It has also been contended that the similar advertisement of the appellant/defendant has been restrained by the learned Single Judge of this Court. The order which we have noticed in the foregoing paras as also the order of the learned Single Judge of the Calcutta High Court, which was affirmed by the Division Bench of the Calcutta High Court, which we

have also noticed in the foregoing paragraphs. Mr. Lall has also relied on *Hindustan Unilever Limited Vs. Gujarat Co-operative Milk Marketing Federation reported in (2017) 71 PTC 396* in support of his submission that merely because the products of the respondent/plaintiff has not been named would not mean that such an advertisement would be permissible. Mr.Lall has also contended that the balance convenience is in favour of the respondent/plaintiff as it has repeatedly been held that the advertisements on electronic media are likely to have a stronger impact on the public at large and at a quicker pace than the print media advertisement. It is also submitted by Mr. Lall that no prejudice would be caused to the appellant/defendant, if the injunction is continued till such time the pleadings are complete and the matter is finally heard and on the contrary, the product of the respondent/plaintiff would be shown in a poor light and public would be misled in case the interim order is vacated.

10. Mr. Sudhir Chandra has relied on a judgment of the Division Bench of this Court in *Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. & Ors.* reported in ILR (2010) IV DELHI 489.
11. We have heard learned counsels for the parties.
12. We have examined the impugned order. A careful reading of the impugned order passed by the learned Single Judge in CS (OS) no.1832/2012 would show that the learned Single Judge was persuaded by the reasoning in the order dated 13.05.2013. The aforesaid order of learned Single Judge has been quoted in the impugned order in para 3, which we reproduce below:

3. The learned senior counsel appearing on behalf of the plaintiff has taken me through an order dated 13.05.2013 passed in IA No.11467/2012 in CS (OS) No.1834/2012 between the same parties wherein the facts as alleged by the plaintiff are noted in para No.4, more specifically in sub paras (iv) (v) and (x) to (xiv) which are as under:

“4.

iv. Plaintiff is the manufacturer of the famous antiseptic liquid DETTOL for over 70 years. 'Dettol' antiseptic liquid has an unparalleled medical history of capturing over 85 % of the market in India in this segment.

v. The active ingredient of 'Dettol liquid is chloroxylenol (PCMX). The other ingredient includes isopropyl alcohol, pine oil, castor oil soap, caramel, water basically used for first aid purpose. The exclusive attribute of the said trademark is - its amber gold colour and the fact that it becomes milky when diluted in water. Also, the packaging of DETTOL is distinct, having a sword on the pack that acts as a mnemonic for fighting against germs and infection.

xxx xxx

x. The peculiar features that have been copied are:

a. visual of a liquid that is being poured is of the same colour as that of the plaintiffs product.

b. The liquid is poured from a bottle which is virtually identical to that of the plaintiffs antiseptic liquid bottle.

c. The liquid when poured into water becomes milky exactly like the plaintiffs product.

d. Thereafter, the advertisement claims plaintiffs product to be completely ineffective in warding off germs whereas shows that lifebuoy gives "100% germ protection."

xi. Virtually identical advertisement was issued by the Defendant's group in South Africa and by a detailed order passed by the Advertising Standards Authority of South Africa, the respondent therein (defendant herein) was directed to withdraw the claims made by it.

xii. The language used by the father of the sick child in the advertisement emphasising on "nahane ke paani mein 'do dhakkan' antiseptic liquid" clearly indicates towards Dettol.

xiii. No other liquid except 'Dettol' create a cloud formation when diluted in water.

xiv. The disclaimer flashing below the screen in the television commercial is also very vague and blurred.

63. Adverting to the facts of the present case, having gone through the commercial not only in its text (as reproduced above) but also having watched it on a DVD, the question here is whether the advertisement disparages or denigrates the antiseptic liquid of the plaintiff and also whether it only seeks to project the superiority of the defendant's LIFEBUOY soap over an ordinary antiseptic liquid? The advertisement begins with the scene showing a sick child lying with a few toys around in the display and the doctor entering the house and commenting that he has been invited yet again. Thereafter, the doctor inquires about the hygiene habits of the child and the doctor asks: "kya ye nahata hai roz", to which the mother of the child replies: " haan nahane ke paani mein do dhakkan antiseptic liquid bedaltehai" and the doctor mocking and ridiculing in reply says: " aap bhee nahane mein sirf do dhakkan, use balti toh bimar nai padegi, paani ke kitani shayad nikal jayen, lekin body ke, yeh yahan se yahan , fir zukam, khansi, flu" . In the meanwhile, the commercial runs to demonstrate a lady pouring brown liquid with a tilted bottle in the bucket of water. The mother of the child then proceeds to ask the doctor: "to nahane mein isse better? And the doctor replies: "100% germ protection, Advanced Lifebuoy" and then appears two different shields of protection, green signifying Dettol and Red signifying Lifebuoy wherein , the green side is left with a few germs and the red shows "kill of all". Once again lifebuoy is shown to have excellent germ killing capability whilst an antiseptic liquid is completely ineffective. The voice-over also indicates the same. It is obvious that the advertisement displays the said so called "antiseptic liquid" in bad light and as something harmful. Thereafter, the advertisement proceeds with the introduction of the defendant's LIFEBUOY soap and the manner in which it spreads a protective red wall thereby removing and dissipating the germs.

65. With aforesaid discussion, it is ostensibly clear that the advertisement disparages the plaintiff's antiseptic liquid 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 liquid. When the commercial is displayed before the public at large, the basic principle that is followed is that the public tries to find the connectivity and the impact that advertisement probably creates on them. If 'X' would raise the standards of its product by claiming the rivals products 'Y' to be bad and not effective displaying similar/ comparative attributes of the two, the same would be bad in law. 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 betokened a permissible

"better" or "best" statement. The advertisement comprises of two parts; one which denigrates and disparages the product of the plaintiff and the other which promotes the purported superiority of defendant's LIFEBUOY soap. There is thus a hint of some malice involved in the commercial in respect of the defendant's product -

indeed, it would be appropriate to delete certain relevant attributes of the defendant's advertisement which clearly hits on the plaintiff's product and portrays the same in bad light. Without a doubt comparative advertising is beneficial as it increases consumer awareness and therefore, it is permissible but not by pulling down the reputation of your competitor by showing its product in debauched light. Moreover, advertising is a medium through which an advertiser can establish his brand in the market, but at the same time there are certain set of laws that cannot be deserted. Denigrating or causing direct harm to one's product which has attained appreciation in its genre in terms of usage and application, would amount to slander, which would also cause great prejudice to the public interest, as the question is not of deciding which product is better, but also of public awareness. Because, misleading and disparaging advertisement would not only mellow down the faith of the public but would also result in misleading them.

68. *Therefore, I am of the view that the defendant can telecast the advertisement only after deleting the following attributes as under:*

- a. remove the 'toys' in the advertisement.*
- b. remove the phrase "two dhakkans" and the particular portion featuring the lady shown pouring liquid in the bucket by holding the bottle of the antiseptic liquid in her hand.*
- c. Remove the shot showing the cloud formation.*
- d. Since green is the colour majorly associated with 'Dettol', therefore also change the colour scheme showing the comparison between the two products in the television commercial and change the green colour to a different shade.*

69. *I am, therefore, inclined to grant ad interim relief to the plaintiff and as against the defendant thereby restraining the defendant from telecasting the impugned advertisement. However, the defendant will be well within its rights to telecast the same only after following the conditions as envisaged in paragraph 68 (a) to (d) of the said judgment. Defendant is also restrained from inserting or adding any such kind of piece/feature in the advertisement which would otherwise directly or indirectly result in disparaging the said product of the plaintiff till the final disposal of the case at hand."*

13. After extensively quoting the order passed in Suit being no.1834 of 2012, in para 7 of the order, the learned Single Judge observed as under :-

7. It is cannot be said the conditions imposed vide order dated 13.05.2013 were only limited to the facts of the said case itself. In the earlier advertisement too the word DETTOL was never used but because of the peculiar facts such conditions were imposed. A bare perusal of the impugned advertisement do reveal features of earlier advertisement.

14. A reading of the order dated 13.05.2013 which we have extracted hereinabove would show that four distinct features of the product of the respondent/plaintiff had been shown in the impugned advertisement subject matter of the said suit. The basic features being (i) colour of the liquid; (ii) the liquid being poured from a bottle which was virtually identical to that with the respondent's/plaintiff's antiseptic liquid bottle (iii) the liquid when poured into the water becoming milky. The learned Single Judge vide order dated 13.05.2013 imposed four conditions on the appellant/defendant which we have extracted hereinabove. We are constraint to note that none of the four conditions would apply in the present advertisement as upon examining the story board and visually examining the advertisement on the i-pad provided by the appellant, we find that this advertisement does not contain any reference of 'two dhakkans', no cloud formation, green colour associated with Dettol. Thus, prima facie the reasoning of order dated 13.05.2013 would not apply *stricto sensu* to the present advertisement. We may also note that in the concluding para 69 of the judgment dated 13.05.2013, the learned Single Judge had not restrained the appellant/defendant from telecast of the advertisement but directed removal of the four features which we have extracted above. We find that in the present advertisement none of the above

four features are available. Mr.Lall has strongly urged before us that it is not necessary for the appellant/defendant to have named the product of the respondent/plaintiff for the reason that the respondent/plaintiff is the market leader with more than 80% share and any reference to an antiseptic liquid is obviously referred to the product of the respondent/plaintiff. Mr.Lall has also strongly urged before us that the advertisement does not compare two like products as lifebuoy is a cosmetic product while Dettol Antiseptic Liquid is a drug. In support of his submission, he has taken us extensively through the judgment of the Calcutta High Court and some parts of the judgment of the Delhi High Court.

15. In the advertisement subject matter of the Calcutta High Court, the advertisement showed Lifebuoy soap on the shelf while Dettol Antiseptic Liquid is being poured in a bucket. This advertisement has been filed along with this appeal at page 260 and the same is scanned below:



16. A mere glance at this advertisement would show that the attack was blatant as the exact product was not only shown but named. Similarly, in the advertisement, subject matter of the decision before the Delhi High Court, all the necessary features of the product of the respondent/plaintiff were shown. The effect of which will certainly be considered after the pleadings are complete and the matter is heard.
17. At this stage, learned counsel for the respondent submits that in case the Court is inclined to set aside the impugned order and to enable learned Single Judge to hear the matter afresh, detailed reasoning should not be given as it would cause serious prejudice to the rights of the respondent/plaintiff, who has an excellent case on merits. He also submits that in case the Court is inclined to set aside the order a time-frame should be fixed for completion of the pleadings and hearing of the application. We set aside the impugned order dated 06.04.2018. As rightly suggested by Mr. Lall, we refrain from giving detailed reasons lest it causes his prejudice to the rights of the respondent/plaintiff at the time of hearing before the learned Single Judge.
18. With the consent of the parties, we fix the following time schedule for completion of pleadings :
 - (i) The appellant/defendant would file their written statement and reply to the interim application within seven days along with all the relevant documents as per the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. Replication and rejoinders shall be filed within four days thereafter.

(ii) I.A. 4428/2018 would be listed before the concerned court on 23.04.2018 for hearing.

19. We have fixed this schedule with the consent of both the parties and the parties have agreed to adhere to the same.
20. Till the hearing of the application, the order dated 06.04.2018 would be kept in abeyance. We request the learned Single Judge to hear the application expeditiously with liberty to both the parties to urge all grounds available to them including the grounds urged before us today unaffected by any observation made by us in the order passed today.

C.M.13949/2018 & 13950/2018

21. The applications stand disposed of in view of the order passed in the appeal.

G.S.SISTANI, J

REKHA PALLI, J

APRIL 11, 2018

ck/