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O.A.Nos.563 & 564 of 2023
in C.S.No.110 of 2023



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.09.2023

PRONOUNCED ON : 16.11.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

O.A.Nos.563 & 564 of 2023
in C.S.No.110 of 2023

Reckitt Benckiser (India) Private Limited,
Rep. by its Authorized Signatory,
Manoj Singh Bisht
Of the address
The Executive Centre,
Level 3B, DLF Centre,
Sansad Margh,
Connaught Place,
New Delhi -110 001.
Having its registered Office at
DLF Cyber Park,
6th and 7th Floor (Tower C), 405B,
Udyog Vihar Phase III,
Sector 20, Gurugram - 122 016

... Applicant /Plaintiff
[in both Applications]

versus

1.The Advertising Standards Council of India,
A-402, Floor No.4,
Aurus Chambers,
S.S.Amrutwar Marg,
Behind Mahindra Towers, Worli,
Mumbai - 400 013.



2.Godrej Consumer Products Ltd.,
Godrej One, 4th Floor, Pirojshanagar,
Eastern Express Highway,
Vikhroli (East),
Mumbai - 400 079.

...

Respondents/Defendants
[in both Applications]

PRAYER in O.A.No.563 of 2023: Application filed under Order XIV Rule 8 of O.S. Rules read with Order XXXIX Rule 1 & 2 of CPC, praying to pass an order of interim injunction, restraining the 1st respondent / 1st defendant, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions from creating impediments in the broadcasting of the advertisement of the applicant / plaintiff which is the subject matter of the present suit and filed as documents 4 and 5 with the list of documents with the present plaint pending disposal of the above suit.

PRAYER in O.A.No.564 of 2023: Application filed under Order XIV Rule 8 of O.S. Rules read with Order XXXIX Rule 1 & 2 of CPC, praying to pass an order of interim injunction, restraining the 1st respondent / 1st defendant, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions from entertaining or adjudicating upon the complaints against the advertisement of the applicant / plaintiff filed as documents 4 and 5 of the documents filed with the present plaint pending disposal of the above suit.

For Applicants
[in both Applications]

: Mr.Chander Lal
Senior Counsel
for Mr.Jawahar Lal
for Mr.A.B.Rajasekaran

For Respondent No.1
[in both Applications]

: Ms.Avni Singh



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O.A.Nos.563 & 564 of 2017
in C.S.No.110 of 2017



For Respondent No.2
[in both Applications]

: Mr.M.S.Bharath

COMMON ORDER

These Applications have been filed to pass an order of interim injunction, restraining the 1st respondent / 1st defendant, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions from creating impediments in the broadcasting of the advertisement of the applicant / plaintiff which is the subject matter of the present suit and from entertaining or adjudicating upon the complaints against the advertisement of the applicant / plaintiff and filed as documents 4 and 5 with the list of documents with the present plaint pending disposal of the above suit respectively.

2. Heard Mr.Chander Lal, learned Senior Counsel for the applicant / plaintiff, Ms.Avni Singh, the learned counsel for the first respondent / defendant and Mr.M.S.Bharath, learned counsel for the second respondent / defendant and perused the materials available on record.



Averments and submissions of the applicant / plaintiff in brief:-

3. The plaintiff company is manufacturing, marketing, distributing and selling various health care, home care and nutrition products. The first defendant had given an illegal direction on 13.06.2023 by directing the plaintiff to withdraw an advertisement for its product under the brand name *Mortein Smart + Liquid Vaporiser*. The plaintiff has made the following claims:-

“(i) “India's fastest and most powerful formula” with disclaimer - “As tested against the leading competitor refills in Mortein device on culex quinquefasciatus mosquitoes”.

“(ii) “2 Hrs Extra Protection” with a disclaimer - “extra 2 hours protection against Aedes aegypti and Anopheles stephensi mosquitoes after use of the product in high mode for 60 minutes under standard lab test conditions.”

“(iii) Creative tagline at the end of the advertisement, associated with the brand “Mortein” viz., “More Smart and Safe”.”

3.1. The above claim was given by the first defendant in view of the complaint made by the second defendant, who is also a competitor in the market. The first defendant's claim was passed without following due



process and it is in contravention to ASCI (Advertising Standards Council of India) Code. The deadline given to stop the release of the advertisement and to inform such withdrawal to all media was set on 15.06.2023.

3.2. The order of the first defendant is arbitrary and the first defendant had ignored the test report on a flawed reasoning. As per the first defendant's own Code, a claim should be true and the truthfulness of the claim should be tested through scientific test as per the standard protocol. In the instant case, the test was conducted by a third party which is an independent and well reputed laboratory by following the standard protocol and they did not find any fault with the report submitted by the plaintiff or its findings.

3.3. The preliminary report of the Technical Expert of the first defendant has upheld the report of the plaintiff. It is said that two of the claims made by the plaintiff have been partially substantiated. During the personal hearing with the Technical Expert of the first defendant, it appeared that he got convinced with the justification for the claims given by the plaintiff. He also assured that the plaintiff would revisit his opinion.

3.4. As per the complaints procedure adopted by the first defendant, the final opinion provided by the Technical Expert is not shared with the



advertiser/complainant and it was directly placed before the Fast Track Complaint Process (FTCP) meeting. The said procedure completely disregards the principles of natural justice. So far as the tagline '*more smart and more safe*' is concerned, the first defendant held that it is a claim and not a tagline. The plaintiff's product certifies safe as it undergoes a strict scrutiny by the Registration Committee, which is the statutory body constituted under the Insecticide Act, 1968. The first defendant has failed to note the claim of the plaintiff that was evaluated as '*India's fastest and more powerful formula*'.

3.5. The correctness and truthfulness of the claims made in the advertisement have been ignored. The first defendant has got no statutory authority to pass such orders curtailing the fundamental rights of the plaintiff. Fast Track Complaints shall not be entertained if the complainant member has 'any Court proceedings against any CCC / Re-examination / CCCR / FTCP / IRP recommendations or before any regulatory authority'. But the first defendant continues to entertain Fast Track Complaint against the plaintiff's advertisements.

3.6. The plaintiff's company is an internationally renowned corporation and it operates in several countries all over the world through



its subsidiaries and affiliated companies. Its business comprises of various consumer and healthcare products including antiseptic liquid, toilet care products, surface care products, pharmaceuticals, insecticides, dettol, harpic, veet, mortein and cherry blossom.

3.7. *Mortein Smart + Liquid Vaporiser* is one such product of the plaintiff. Many competitors hold registration for a chemical formulation with ingredients Transfluthrin 1.6%. With an aim to provide a better product to the consumers, the plaintiff launched a new formulation for *Mortein Smart + Liquid Vaporiser* branded products containing active ingredient Metofluthrin 0.32% in January 2023.

3.8. The plaintiff is the first company in India to launch the product using this new formulation. As per the test reports, the formula with an active ingredient present in the plaintiff's product performs considerably better than the applicant's formulation. So the plaintiff launched an advertisement of its product on 20.03.2023, as under:-

“(i) “India's fastest and most powerful formula” with disclaimer - “As tested against the leading competitor refills in Mortein device on culex quinquefasciatus mosquitoes”.

“(ii) “2 Hrs Extra Protection” with a disclaimer - “extra 2 hours protection against Aedes aegypti and Anopheles



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stephensi mosquitoes after use of the product in high mode for 60 minutes under standard lab test conditions.”

(iii) *Creative tagline at the end of the advertisement, associated with the brand “Mortein” viz., “**More Smart and Safe**”.*

3.9. The plaintiff was informed by the first defendant that the Fast Track Complaint was received from the second defendant against the above advertisement of the plaintiff with the following allegations:-

“(i) The claim that the Mortein product has India's fastest and most powerful formula is misleading and violative of the ASCI Code

(ii) The claim that the Mortein product provides 100% protection even after switch-off is misleading and violative of the ASCI Code

(iii) The claim that Mortein is 'More Safe' is misleading and violative of ASCI Code.”

3.10. Upon the receipt of the complaint, the plaintiff had sent a detailed reply on 31.05.2023 with supporting materials. Upon receipt of the reply from the plaintiff, the first defendant sought a technical report from one of the Technical experts Prof.Jayesh Bellare. The said expert provided a



draft opinion to the first defendant and a copy was also mailed to the plaintiff on 05.06.2023. The following observations have been made:-

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- “(i) Regarding Claim 1 – Expert noted that both 2nd defendant's and plaintiff's reports were contradictory to each other, to the plaintiff's claim was '**partially substantiated**' - This is despite the fact that the expert noted that some details were missing from the reports filed by the 2nd defendant.*
- (ii) Regarding Claim 2 –The Expert stated that the claim is '**partially substantiated**' since the report filed by the 2nd defendant was available but the report by the plaintiff was not.*

In this regard the plaintiff had subsequently provided the report and asked the expert to revise his opinion.

- (iii) Regarding Claim 3 – Expert' opinion stated that the claim is '**not substantiated**'- In this regard it is submitted that there was no such claim of 'More Safe' in the advertisement but only a tagline 'More Smart and Safe'. The expert ought not to have expressed any opinion on this, as this was a tag line. However, expert concluded that this 'claim' is 'not substantiated'. ”*

3.11. On 06.06.2023, a meeting was held between the plaintiff representatives, experts and the first defendant to discuss the draft opinion.

During the meeting, the plaintiff has explained the case to revisit the report



in the light of the submissions of the plaintiff. The expert appeared convinced with the justifications provided by the plaintiff and assured the plaintiff that he would consider the submissions of the plaintiff and revisit his opinion.

3.12. Another meeting was held with Fast Track Complaint Process of the first defendant where the plaintiff and the second defendant were allowed to make their submissions. Even the most important documents were not shared with the plaintiff, no reasons have been given by the Committee.

3.13. The Fast Track Committee of the first defendant has decided on the complaint and passed the following order:-

*“(i) With regard to the claim 'India's Fastest and Most Powerful Formula**' - the FTC panel of the 1st defendant observed that the claim was qualified with a disclaimer to mention, 'As tested against the leading competitor refills in Mortein device on culex quinquefasciatus mosquitoes'. The FTC panel of the 1st defendant discussed that the complainant and the advertiser submitted test reports from different independent third-party test laboratories and that the findings of both the test reports demonstrated that they have fastest knockout time. The plaintiff's test report included two features that are not*



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*included in the report of the 2nd defendant – weight loss measurements and subsequent determination of amount of active released; and rating of the goods evaluated using an Anova ranking scheme. In a weight loss measurement, the FTC panel of the 1st defendant discussed the ways that a consumer could relate to see whether this product is better or not. One if there is an actual weight loss, the difference in weight loss, so the product usage could be for longer. However, from the reports it was seen that there is no difference in amount of liquid that is used up. The FTCP of the 1st defendant observed that from an actual consumer benefit point of view it was not clear that how an active reduction or the amount of active being used is understood by the consumer. The FTC panel of the 1st defendant further deliberated that because both the test reports submitted by the 2nd defendant and the plaintiff have the same structure and there is minimal statistical difference between them, there is no way of comparing them. Therefore, the superiority claim of 'India's Fastest' was **inadequately substantiated**. The claim of 'most powerful formula' was also held to be **not substantiated** as there was no noticeable distinction for the consumer to conclude that the product is powerful. FTCP of the 1st defendant held that according to the consumer perspective, it should be indicated how much of the product is utilized in the given amount of time. The claim, 'India's Fastest and Most Powerful Formula**' was held to be*



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misleading by exaggeration and likely to lead to widespread disappointment in the minds of consumers. The said claim contravened Chapter I, Clause 1.1, 1.4 and 1.5 of the ASCI Code.

(ii) *With regard to the claim '100% Protection even after switch off*!' (pack claim) – the FTC panel of the 1st defendant noted that as per the plaintiff the claim is a standalone claim and is not comparative in nature. The plaintiff submitted a test report which gave 100% mortality for their product. The results of the study concluded that the product was found to be highly effective against Anopheles Stephensi Culex quinquefasciatus species of mosquitoes by showing repellent efficacy in terms of landing when tested using human volunteers. However, the FTC panel of the 1st defendant deliberated on the comparative visual depiction comparing the advertiser's product 'Mortein Refill' with that of a 'leading brand refill'. The claim stated, '2 Hrs Extra Protection*' with a disclaimer - 'extra 2 hours protection against Aedes aegypti and Anopheles stephensi mosquitoes after use of the product in high mode for 60 minutes under standard lab test conditions.' The visual shows that there were no mosquitoes when the plaintiff's product was switched off whereas there were few mosquitoes seen moving around the leading brand refill. The FTC panel of the 1st defendant considered this comparative visual to be misleading by exaggeration and is likely to lead to*



widespread disappointment in the minds of consumers, and hence contravened Chapter I, Clause 1.4 and 1.5 of the ASCI Code. The FTCP of the 1st defendant noted that the plaintiff had agreed to withdraw this visual from the advertisement.

(iii) With regard to the claim 'More Smart and Safe' the FTC panel of the 1st defendant did not agree with the plaintiff's argument that the phrase, 'More Smart and Safe' is only a creative tagline and it is not a claim. The FTC panel of the 1st defendant was of the view that the tagline appears as a claim which is used as a description of a product benefit that is being conveyed to the consumer. The FTC panel of the 1st defendant discussed that the phrase 'More Smart and Safe' implies two claims of 'more smart' and 'more safe' basis a comparative product. The plaintiff explained that the 'more smart' aspect was the smart use of lesser concentration of active to give equivalent performance. The competitor product or basis of comparison for 'more' was other products of the advertiser. The FTC panel of the 1st defendant discussed that usage of less active is not a consumer perceptible quantity and as such this claim of, 'more smart' is **not substantiated**. As regards 'more safe', the plaintiff explained that when used as per directions and with precautions mentioned on label and leaflet, the product is rated by the Insecticides Rules, 1971, as being generally safe for humans and animals when used in prescribed dosage and in accordance with instructions. The



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FTC panel referred to Rule 19(8) of the Insecticides Rules, 1971, which does not allow usage of the word 'safe' on the labelling of the product as it is a Category-III (moderately toxic) product. The FTC panel of the 1st defendant discussed that if the act says that an advertiser cannot use the word 'safe' on the packaging then it is incorrect to use the term 'safe' in an advertisement unless it is qualified to mention 'when used as directed'."

3.14. The merits of the plaintiff's first claim was not properly appreciated. So far as the second claim is concerned, the plaintiff agreed to remove the visuals and make sure that the consumer understands it as a stand alone claim. Regarding third claim FTC panel did not agree with the plaintiff's claim that '*More Smart and Safe*' is a tagline and it is stated that the tagline appears to be a claim. But the first respondent failed to appreciate the claim in a proper manner. The decision of the ASCI in this regard is due to an incorrect understanding of the product category. The first defendant had threatened the plaintiff that any non compliance of the order would result in reporting of the non compliance to the concerned Government authorities.



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3.15. The plaintiff is left with no other alternate relief than to file a suit. The first defendant is trying to file frivolous complaints against the competitors. The party should not be highly sensitive with regard to advertisements. There is no procedure to cross examine the plaintiff asking for the discovery of the document. There is also a procedure for filing a review / re-examination before the first defendant against the order. The plaintiff has not preferred a review/re-examination because the conditions imposed for filing a review/re-examination are themselves completely unjust and arbitrary.

3.16. The plaintiff has a bonafide and genuine apprehension that the Government authorities or its officials will act upon the order of the first defendant and the advertisement in relation to which the first defendant has passed the order. Before passing any order, the first defendant did not give any opportunity to the plaintiff and hence the order of the first defendant against the plaintiff is in violation of principles of natural justice. The final expert opinion has not been furnished to the plaintiff by the first defendant till date. No cogent reason has been given by the first defendant for arriving at any conclusion. The panel list made decisions that the first defendant is



not qualified to adjudicate upon the issue. Hence the direction issued by the first defendant is arbitrary and illegal.

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3.17. The first defendant curtails the fundamental right of the advertiser. A private body like the first defendant acts as per its whims and fancies. The first defendant being a private body has no authority to pass any orders. It is held by the Hon'ble Supreme Court in *Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited [AIR 1995 SC 2438]* that the commercial speech is the fundamental right under Article 19(1)(a) of the Constitution of India.

3.18. Even the Consumer forums like statutory bodies, follow a set of procedure for filing a complaint. But the private body like the first defendant does not have any procedure. The plaintiff has made out a *prima facie* case and established that the balance of convenience is in his favour. The balance of convenience is in favour of the plaintiff and hence an order of interim injunction should be granted till the disposal of the suit.

Averments and submissions of the respondents / defendants:-

4. The plaintiff has got no territorial jurisdiction to file the suit in this Court because no cause of action has arisen within the jurisdiction of



this Court. None of the parties resides within the territorial jurisdiction of this Court. The plaintiff has provided two places of work i.e. Delhi and Gurugan and both the defendants are situated in Mumbai. No communication between the parties had taken place in Chennai. The complaint was filed by the second defendant at Mumbai, all responses were received by the first defendant at their office in Mumbai and the complaint was processed, examined and final recommendation was issued at Mumbai. The plaintiff had deliberately and intentionally chosen to file the suit before this Court even though no material or cause of action had taken place in Chennai. The plaintiff has filed multiple suits against the first defendant before the High Court of Delhi with respect to several advertisements and now he had chosen to engage in forum-shopping. Hence the suit is liable to be dismissed for lack of jurisdiction and cause of action.

4.1. The plaintiff has not proved that there is any imminent threat or injury. The compliance or non compliance of the recommendations of the first defendant is completely and solely the decision of the plaintiff. The only action that can be taken by the first defendant in case of non compliance is to inform the regulatory authorities and thereby leaving it upto them to take action. Only if any order issued by the regulatory



authority, the plaintiff could have any cause of action. It has been so held by the High Court of Bombay in the matter of *Lotus Herbal Pvt. Ltd. Vs. Union of India and another* [W.P.(L)No.2845 of 2015]. The only apprehension is not the recommendation made by the first defendant but the action that may be taken by the regulatory / Government authorities. So no cause of action has been shown as against the first defendant in the present case and in fact the first defendant ought to have been deleted from the array of parties.

4.2. The plaintiff is not entitled to any interim reliefs in view of the fact that he has got alternative remedies. The plaintiff as a member of the first defendant is bound to follow the ASCI Consumer Complaints Council Procedure. The procedure provides for an efficacious remedy in the form of an '*Independent Review Process*', which is chaired by a retired Judge of the Hon'ble Supreme Court or High Court or as a mechanism for advertisers / complainants. Despite this remedy being offered and available to the plaintiff, he had deliberately chosen to file the suit before this Court. The plaintiff, who has efficacious alternate remedy cannot approach this Court for injunction.

4.3. The plaintiff being a member of the first defendant has in-depth knowledge of Consumer Complaints Council procedure [CCC Procedure].



The plaintiff has involved in numerous complaint proceedings before the CCC as well as Fast Track Complaint [FTC] both as an advertiser and a complainant. So he has deliberately and intentionally suppressed this fact.

The second claim '*100% protection after switch off*' has been voluntarily withdrawn and yet averments have been raised agitating this issue again.

4.4. The second respondent is an Indian Consumer Goods Company founded in 2001 and based in Mumbai, India. The second respondent's major brands like Good Knight, Hit, Cinthol, Godrej No.1, Godrej Expert Hair Colour are ranked among the '100 Most Trusted Brands' in the country by Economic Times - Brand Equity 2012. This second respondent's products are available in over 60 countries and he is the pioneer in the liquid vaporizer category since 1994. His trademark is '*Good Knight Gold Flash*' and it has been the most trusted brand of consumers and he is the leader in the Liquid Vaporizer category with around 56% of market share.

4.5. The applicant is giving misleading advertisement of '*Mortein Smart + Liquid Vaporiser*' across various mass media platforms. The advertisements claim that the applicant's product is '*India's Fastest and has the most powerful formula*'. The advertisement portrays a lady posing to be



a scientist working at the Mortein Advanced Research Laboratory stating that:

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“In Mortein Advanced Research Lab, it was tested with a leading brand's product and it was found that between the mortein smart + and the new Mortein, the new Mortein has 2x more power even after 2 hours after the machine being switched off.”

4.6. The applicant is resorting to deceptive, misleading advertisement and trying to misguide gullible consumers to believe that the applicant's product is the most powerful and it is India's Fastest Formula and it is the most effective compared to that of the other vaporisers, especially the second respondent, which has been referred as the Leading Brand Refill, which has about 56% of the market share. In the advertisement, it has been portrayed as under:-

“a. Few mosquitoes are trying to enter the room in which a mother is peacefully sleeping with her child.

b. The mother character switches on the applicant's product (Mortein machine) in the frame, and immediately the Mosquitoes are repelled.



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c. Another Mosquito switches off the machine, tries to come near the mother and child but is unable to do so as a protective cover has been generated by the liquid vaporiser.”

4.7. It is impossible to presume how the applicant’s product works so fast and within a short span of switching the applicant’s product on and off, the vaporiser and a protective layer is created.

4.8. The second respondent has filed the Fast Track Complaint on 23.05.2023 before the first respondent against the above impugned advertisement under 3 claims along with relevant annexures to withdraw the impugned advertisements of 'Mortein Smart +' as under:-

- “i. Claim 1 – India's fastest and most powerful formula.*
- ii. Claim 2 – 100% protection for 2 hours even after the machine is switched off.*
- iii. Claim 3 – More Smarter & Safe.”*

4.9. The second respondent vehemently denies the claim of the applicant's product that it is the fastest. The second respondent is not privy to the report generated by the applicant. The claim made by the applicant was without any scientific basis.



4.10. The applicant has relied on two reports and the report dated 25.08.2022 claims to have been issued by Peet Grady Chamber on Culex for Knock Down by comparing the applicant's products with that of its competitors. However, a perusal of the said report clearly indicates that the same cannot be relied upon for the following reasons:-

- “(i) The raw data used in the Test is not mentioned in report.*
- (ii) Only the end values KT50/KT90 and rate of mortality (in percentage) are specified.*
- (iii) The active content details in product used for the Test are not mentioned. This answering respondent submits that the active content details are the core to the product, which has direct bearing on the result produced in the Test.*
- (iv) It is submitted that various machines including this Answering respondent's machine/Liquid Vaporizer are used by the applicant for the purpose of testing, but which specific product has been used in the Test is not mentioned. Also, the information of the materials used in the Report, which are present on the Machine, is not mentioned in the Report.*
- (v) It is submitted that there is no major variation in KT50 values of KN42 LV (11.05 min) and Maxo LV (11.78 min). Therefore, the result can be considered as parity and hence does not support fastest formula claim in addition to this respondent's product. On this ground alone, the report is liable*



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to be rejected and the applicant's claim that their product is 'Fastest' falls to ground.

(vi) It is pertinent to note that the procedure of time interval counting of mosquitoes mentioned in summary of the report are different.

(vii) It is also noted that though the lab is GLP accredited but the certificate of compliance of test as per GLP is not included.”

4.11. The other report dated 26.09.2022 which is said to have been generated in 20 m³ chamber on Culex and Anopheles Mosquitoes using human landing inhibition method. The said report also cannot be relied upon due to the following reasons:-

“(i) This report does not have data on Aedes as claimed in the impugned advertisement.

(ii) There is no control or standard products comparison performed for landing inhibition which is mandatory. Therefore, neither the report nor the result indicated in the report are reliable and acceptable.

(iii) There is no landing mentioned for control and Culex and Anopheles are known to bite during night / dawn period. The time of day when test was conducted is not mentioned in report and hence the results obtained is not appropriate.



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(iv) It is submitted that as per Guidelines for Spatial repellents 2013, Mosquitoes used should be 5-8 days post emergence. However, the subject report clearly indicates that Mosquitoes that are 2 to 5 days old have been used. The report is liable to be rejected on this ground as well.

(v) This respondent submits that in order to achieve the desired result, the applicant's product was subject to 1 hour saturation, before releasing the Mosquitoes, which is not part of protocol and the same is in the test conducted by the applicant as indicated in the report. It is submitted that Mosquitoes released post saturation which will not result in correct knockdown activity.

(vi) It is submitted that for conducting the test, the room size should be 30 m³ while test is conducted in 20 m³ chamber. Therefore, the same is against the protocol and is liable to be dismissed, on this ground as well.

(vii) It is further submitted that for room test ideally there should be gap of 48 hours. However, a perusal of the report that the said test was completed within 4 days, which is unusually high than the industry norm. This further indicates that the applicant has breached the industry norms and practises to their preferences in order to achieve the desired results.”



4.12. The second respondent submitted that two test reports submitted by the Bioscience Research Foundation dated 13.05.2023 against all Species of Mosquitoes in India which indicates the second respondent's Liquid Vaporiser namely Good Knight Gold Flash Machine and Good Knight Gold Flash Refill is faster and powerful than the applicant's product.

4.13. The applicant's product has been tested against all available liquid vaporisers in the market on the high mode and that too against all species of mosquitoes in order to claim that the applicant's product formulation is powerful and it is better than all other available liquid vaporiser category. The claim of the applicant violates, misleads and the disclaimers are not sufficient to adequately inform the naive consumers. The second claim is that 100% protection for 2 hours even after the machine is switched off is not exclusive to the applicant's brand. The respondent's product also provides 100% protection for 2 hours.

4.14. Rule 19(8) of the Insecticide Rules, 1971 prohibits the use of the unwarranted claim of safety of such products or its ingredients and specifically prohibits the use of the term '*SAFE*' on the label. The product is classified as 'moderately toxic' in terms of the Insecticide Rules and contains statutory declaration such as '*DANGER*' & '*Keep Out of reach of children*'.



The object of the above rule is that a Liquid Vaporiser which is insecticide can never be safe because it contains toxic and poisonous substance.

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4.15. The applicant by way of the impugned advertisement '*More Smart & Safe*' is trying to achieve, what is otherwise barred under law and it is in complete contradiction to what is stated on the product packaging. The claim of '*Safe*' in the advertisement of the applicant's products is governed by the provisions of the Insecticides Act and Rules thereunder, is unwarranted and misleading to gullible consumers. While the disclaimer expressly states that the applicant's product has been tested on a note more than two species of mosquitoes, the impugned advertisement appears to carry an impression that the applicant's product is effective on all species of mosquitoes.

4.16. The second respondent is deeply concerned about the consumer's safety and hence urged that the applicant should not use the words '*More Smart and Safe*' but the applicant claimed that his product is '*Safe*'. The applicant had themselves at the back side of the product cautioned the consumers as Poisonous, Hazardous and to keep it away from the children. So the product like an insecticide should not be conceived as safe by the consumers.



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4.17. Hence the term '*Safe*' should be strictly prohibited from being used. The applicant has printed the corrosive pictogram in the back of the product packaging, which should be interrupted as highly reactive substance and that causes obvious damage to living tissue. Hence the claim of '*Safe*' is misleading the naive consumers. Only in that background of the facts, the second respondent gave the complaint to the first respondent. The advertisements were aired in various languages across mass media platforms in Hindi and Telugu versions. Currently none of the version of the impugned advertisements are accessible and the page would indicate 'video unavailable'. However the second respondent has saved a copy of the said versions in Hindi, Telugu, Marathi and other languages. The applicant has launched a new advertisement which is available in Tamil language also and that is accessible. The removal of the old advertisement and airing the modified advertisement with certain changes clearly amounts to misrepresentation of the claims by the applicant.

4.18. The applicant being the member of the first respondent is well aware of the independent process, Code, Rules and Guidelines of the first respondent because the applicant has contested many disputes in the past and had never challenged the process so far. So it is unfair on the part of the



applicant to claim that the first respondent has disregarded the law or natural justice. The first respondent is an independent body that protects consumer interests and ASCI Code contains specific chapters on consumer interest. Making advertisements without substantiating the claim amounts to violation of the ASCI Code.

4.19. The second respondent has obtained the Expert report dated 13.05.2023 which supports his claim that the second respondent's TFT 1.6% formulation is more efficacious than the applicant's Metofluthrin 0.32%. The very fact that the applicant participated in the proceedings and the detailed order passed by the first respondent after receiving the both sides submissions itself is adequate to conclude that the proceedings could not have been arbitrary. In the last couple of years various competitors have successfully challenged the advertisements of the applicant and that would show that he is habitually abusing the competition to gain the attention of the consumers by relying on wrong facts and unsubstantiated claims.

Discussion:-

5. Certain advertisement of the plaintiff's liquid vaporiser by name '*Mortein Smart + Liquid Vaporiser*' is objected by the second



respondent, who also owns a product in the same category by name '*Good Knight Gold Flash*'. Both the brands are popular in the market and are widely used by the consumer public. The applicant claims that his product gives better protection against mosquitoes. This was objected by the second respondent who is another leader in the market who also manufactures and sells liquid vaporiser.

6. The first respondent is a self-regulatory body in which both the applicant and second respondent are members. The above advertisement was challenged by the second respondent and he has given a complaint to the first respondent Advertising Standing Counsel of India by claiming that the applicant's advertisements mislead the consumers. The first respondent after appreciating the matter had passed the impugned order.

7. Mr.Chander Lal, learned Senior Counsel for the applicant submitted that the first respondent ASCI has entertained the complaint of the second respondent through Fast Track Complaint Process (FTCP) and it did not furnish the entire facts of the complaint but has given only the summary it. It is further submitted that the final expert report is also not



furnished to the applicant and the expert was appointed unilaterally by the first respondent and even the expert's report on technical aspect was not appreciated and no reason is given for disregarding the expert's report. It is claimed by the applicant that the first respondent did not follow due process and no opportunity was given to the applicant to cross examine the second respondent and the experts.

8. The attention of this Court was drawn to the judgment of the Bombay High Court held in *Teleshop Teleshopping Vs. Advertising Standards Council of India & Another*, reported in *2015 SCC Online Bom 8777* to canvass his point that failure of furnishing a copy of the complaint to the plaintiff in that case by ASCI is improper and hence the order of the ASCI suffers from inherent flaws. In the said judgment it is held as under:-

“2. The Plaintiff is the Sole Proprietary concern of one Mr.Kashi Ram. The Plaintiff makes and produces what are called Infomercials, i.e., media broadcasts for television of a longer duration than regular commercials and containing more information. These infomercials, some of which are interminable, display telephone numbers so that consumers



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may call these numbers and place orders for the products being showcased.

xxx...

9. I am not at this stage on merits of the ASCI's CCC's so-called decision but the manner in which it arrived at its conclusion. This is prima facie wanting in every respect. There are no reasons. There is the mere expression of an opinion with no material. The use of phrases such as "undesirable" and "unhealthy" is not a substitute for a reasoned decision. What is even more curious is that in summarizing decision, the ASCI's CCC says that "it has arrived at this conclusion in the absence of comments". I fail to understand how the Plaintiff could have been expected to respond if it was never given notice and a copy of the complaint in the first place On this basis to arrive on a "decision" that the claim made is "false and misleading" is entirely unsustainable.

xxx....

17. It is made clear that should the ASCI attempt once again to obstruct the broadcast of these infomercials without following the process of law (and which expression is to be construed not as per the ASCI's understanding of it but as established by law), ASCI and its principal officers will be held in contempt of this Court. It is not an option available to the ASCI to arrogate to itself judicial and quasi-judicial powers. It is not an option



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available to the ASCI to violate fundamental principles of natural justice and to strong-arm third parties into submission.

18. I am making it clear that the general principles reiterated here apply to the ASCI in all its conduct in all matters, and not just to the present plaintiff or this particular case. The ASCI is not at liberty to issue any orders or any decisions on any complaint brought to it without affording the other party a fair opportunity of being heard. That includes serving the other party with a copy of the complaint. Without statutory backing, its decisions are not binding unless the party in question submits to them. The ASCI is at liberty to entertain any complaint brought to it, but subject to its procedures and methods complying with the requirements of law, including those set out in Mr.Justice Kathawalla's order referred to above, and in the foregoing paragraphs.”

9. Before appreciating the merits of the applicant's submissions, the claim of the respondents that this Court has got no jurisdiction to entertain the suit and there is no cause of action assume much significance. The first respondent ASCI is situated at Mumbai and the second respondent is also based at Mumbai. Neither the first respondent nor the second respondent lives at Chennai.



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10. According to the respondents, no cause of action has arisen in Chennai so as to enable the applicant to file the suit in this Court. The applicant himself has filed various proceedings against the first respondent before the Courts at Delhi. However, he had chosen to file the present suit before the High Court of Chennai. It is claimed by the applicant that the disputed advertisement is viewed all over India including those in Chennai and hence there is no bar to file a suit in the High Court of Chennai, as part of the cause of action arises in Chennai.

11. As the case has taken on file, for the purpose of appreciating the scope for an interim order, the points on jurisdiction and cause of action can be gone into along with the aspects showing balance of convenience for a limited purpose of these applications.

12. The first respondent is a self-regulatory body and it has no statutory origin. Hence the orders passed by the first defendant restraining the plaintiff to stop the advertisement by finding that it is wrongful has got



no enforceability. As rightly stated by the first respondent it is up to the applicant either to obey the order or not.

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13. The first defendant has got a detailed complaint procedure and any advertiser aggrieved due to any order, has to seek recourse by approaching the Consumer Complaints Counsel. So far as the complaints sent through Fast Track Complaint Panel, that will be decided only through an informal procedure. It is a self-regulatory mechanism devised by its members themselves in order to address their complaints in a Fast Track manner without undergoing a hectic process of filing suits. Hence, the applicant cannot claim that he has not given with any elaborate opportunity similar to the one given by a statutory forum. It is obviously because the orders of the first respondent is not a binding order but only a recommendation.

14. However, there is a review procedure and an aggrieved can make a written application in a prescribed form along with the required fee within 10 business days of receipt of the recommendations of the Consumer Complaint's Council / Fast Track Complaints Panel for Review. But the applicant has not chosen to file any review.



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15. In fact, the powers and functions vested on the first respondent is due to the understanding between its members. It is within the knowledge of the applicant that the first respondent is nothing but a voluntary, collective, self-regulatory body of its members. However, the applicant had alleged that the first respondent did not abide by the principles of natural justice while dealing with the complaint given by the second respondent through Fast Track Complaint Process mechanism.

16. If the orders of the first respondent is not obeyed, the first respondent can only recommend the fact to the Government machineries like Regulatory Authorities and thereafter the matter would be dealt by those authorities, who would either choose or not to initiate any action against the advertiser. The first respondent has not sent its recommendation to any Government Regulatory Authorities and no authority has passed any order against the applicant so far. The applicant has filed this suit in anticipation of any action that might be taken by the authorities, if the first respondent happens to inform their recommendations.



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17. According to the submission of Mr.M.S.Bharath, the learned counsel for the second respondent/ second defendant plaintiff can not approach the court to avert any action taken against him by the regulatory/statutory authorities. Reliance was placed on the judgement of the Bombay High Court held in the matter of ***Lotus Herbal Pvt. Ltd. Vs. Union of India and another [W.P.(L)No.2845 of 2015]***, wherein it is held that the applicants whose advertisements are found to be faulty and who had got a recommendatory note from the council, can still have all rights to defend their action before the Authorities concerned, if the authorities choose to act up on the recommendation and initiate action and hence there can not be any prejudice caused to him. Extracting the relevant portion of the above judgement as below would add more clarity.

“6. We have noted the rival contentions and with the assistance of the learned Senior Counsel, perused both the Cable Television Networks (Regulation) Act 1995 and the Consumer Protection Act 1986. In all fairness, Mr Tulzapurkar invites our attention to the definition of the term 'Authorised Officer' appearing in section 2(a) of the Cable Television Networks (Regulation) Act 1995. We have already been shown the definition of the term 'Cable Television Network'. Our attention has also been invited to the Rules that are framed i.e. the



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Cable Television Networks Rules 1994. There is a Programme Code enumerated in Rule 6 and there is Advertising Code formulated vide Rule 7. No person shall transmit or retransmit through cable television network any advertisement unless such advertisement is in conformity with the prescribed Advertising Code. Pertinently, the Petitioners are manufacturers of the product styled as skin cream which allegedly guarantees that the effects of ageing will be reduced by applying the cream. The person will have a young and firmer or fairer skin though he may have aged. We have no doubt that once the standards or the Code of self-regulation adopted by the Advertising Standards Council of India - Respondent No.2 regarding advertisements for public exhibition is allegedly violated, then in terms of the recommendations and on receipt thereof, the Competent Authority under the Cable Television Networks (Regulation) Act 1995 and the Cable Television Networks Rules 1994 will take necessary action and in accordance with law. We have no doubt that in the event the entire process undertaken by the Council and its recommendations are being relied upon and adversely to the interest of any advertiser, broadcaster and manufacturer like the Petitioners, it would be open to urge that the complaint be adjudicated in accordance with law independent of such recommendations and not bound by the exercise of the recommendatory power of the Council.



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Presently, we do not see any such apprehension given the nature of the functions discharged and performed by the Council.

7. Equally, in the event, the Ministry or Department of Consumer Affairs proceeds on the basis of the recommendation of the Respondent No.2 and terms the same as a complaint with regard to any unfair trade practice or restrictive trade practice adopted by the trader or service provider or a complaint with regard to the defect or deficiency in the goods or specifically about its quality, then, it has to take the requisite steps in terms of Consumer Protection Act 1986. The terms 'unfair trade practice' or 'restrictive trade practice' are defined in the said Act. Equally, the term 'complaint' and the terms 'service', 'consumer dispute and 'deficiency' so also 'manufacturer' have been defined together with the term 'trader'. In such circumstances and even if the Central Government itself can take note of these recommendations and initiate the legal process within the meaning of this Act, then at that stage also, the Petitioners being affected would be in a position to meet all the allegations against them including those contained in the adverse recommendations of the Council.

8. We have no doubt in our mind that all actions would be initiated and taken in accordance with law. Once the nature of powers and in terms of the MOU are correctly and properly



understood, then, this Wit Petition need not be entertained. It is accordingly disposed off.”

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18. The applicant attempts to strengthen his claim in respect of his product mainly relying on the opinion of an expert. He has not chosen that to challenge the order by filing any review under the due procedure contemplated under the ASCI regulations. The mechanism provided under ASCI regulations can be of better assistance in view of the presence of technical members who can appreciate the nuances of the expert opinions that might be attained by the applicant, second respondent and the ASCI itself. In a similar fashion the Regulatory Authorities also have a better expertise and assistance to deal with the product specific technical aspects of the advertisement, its relevance and fairness.

19. As rightly pointed out by the learned counsel for the second respondent, the applicant can have his cause of action only against the regulatory authorities if they choose to pass any orders for restricting the applicant by accepting the recommendations of the first respondent. No injury would be caused to the applicant even if he chooses not to accept or



abide by the recommendations of the first respondent. Until and unless any statutory action is taken and any enforceable orders are passed, it is right to state that the applicant does not get any cause of action.

20. It is submitted by both the respondents that the applicant being a member of the first respondent is bound to follow the ASCI Consumer Complaints Council Procedure (hereinafter referred to as the "CCC Procedure". The above procedure provides how an alternate and an efficacious remedy in the form of an Independent Review Process (IRP), can be availed by the applicant. In fact the Forum is chaired by a Retired Judge of the Hon'ble Court/High Court. It is a thoughtful mechanism devised by the first respondent self-regulatory body to enable the dissatisfied advertisers / complainants to seek a fresh review of the matter within 10 business days of getting the recommendations. The applicant knowingly waived the said right.

21. Even though the applicant has chosen to file similar such proceedings at some other relevant point of time before the Courts at Delhi, he claims that the applicant's advertisement is relayed in several languages



including Tamil and hence part of cause of action has arisen in Chennai. But the dispute is not in respect of limiting or delimiting the places where the advertisement can be relayed. So, inviting a cause of action from any viewer base, in my opinion is extraneous to the issues involved in this suit. All that is involved in this case is only an action taken by the first respondent on a complaint given by the second respondent. The action taken by the first respondent has resulted in the impugned recommendations. Both the actions had been taken place at Mumbai and not at Chennai. Even those proceedings which has been filed by the applicant before the Delhi High Court was rejected on the point of jurisdiction, by holding that the cause of action has arisen elsewhere. In fact the High Court of Delhi came down heavily on the applicant who was the plaintiff in that proceedings in FAO(OS)No.11 of 2017 and observed that the applicant has opted to do forum shopping by filing proceedings before the High Court of Delhi without invoking the jurisdictional courts at Bombay. Now also the applicant has not chosen to file the proceedings before the jurisdictional courts at Bombay, but at Chennai. The attitude of the applicant choosing Chennai, next to Delhi would only add reasons to the submissions of the respondents that the applicant/plaintiff is in the habit of



doing forum shopping.

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22. Ms.Avni Singh, the learned counsel for the first respondent submitted that the applicant by way of the impugned advertisement is resorting to deceptive, misleading practices and he misguides the gullible consumers that the applicant product is the most powerful and it is the India's fastest and effective formula than the other vaporisers, especially the second respondent, who is the Leading Brand Refill and who has about 56% Market share.

23. It is further submitted that the suit itself has become infructuous, because the applicant had withdrawn the advertisement and to that effect the applicant has also filed an affidavit on 19.08.2023. It is further submitted that the applicant had removed the impugned advertisement and had launched a new advertisement. In support of the above contention the learned counsel for the second respondent has cited the judgment of the Hon'ble Supreme Court held in **J.M.Biswas Vs. N.K.Bhattacharjee and Others** reported in (2002) 4 SCC 68. In the said case it is held as under:-



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"10. From the narration of facts and the contentions raised on behalf of the parties, it is clear that the dispute raised in the case has lost its relevance due to passage of time and subsequent events which have taken place during the pendency of the litigation. As noted earlier, the dispute in the case relates to election of the South-Eastern Railway Men's Union. The Dispute arise at a point of time when both the appellant and respondent were members of the said Union. Now both have ceased to be members of the Union. Further, successive elections have been held to elect office - bearers of the Union and office bearers so elected have been recognized by the management. In the circumstances, continuing this litigation will be like flogging a death horse. Such litigation, irrespective of the result, will neither benefit the parties in the litigation nor will serve the interest of the Union. Accepting the contentions raised on behalf of the Respondent 1 that the Successive election held in the meantime were invalid because he was not permitted to participate.

11. In the result, the appeal is allowed. The judgment/order dated 27.01.2001 in CO.No.2264 of 1999 which is under challenge in the appeal is set aside. Miscellaneous Appeal No.179 of 1999 pending before the Additional District Judge, IIIrd Court, Alipore, or any other court to which it might have been sent on transfer, will be dismissed as infructuous. Title Suit No.105 of 1998 on the file of the VIth Civil Judge (Senior



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Division) Alipore, South Calcutta will be heard and disposed of expeditiously as far as possible within three months of receipt of intimation of this order. The interim orders passed by the Courts below in the suit and the appeal are vacated. Parties to bear their own costs.”

24. By canvassing the same point another judgment of the Hon'ble Supreme Court held in *Shipping Corporation of India Limited Vs. Machado Brother and Others* reported in (2004) 11 SCC 168 was also relied. In the said case the enforceability of the interim order at a stage where the suit itself has become infructuous was a matter of discussion. But the consistent submission of the applicant is that he has not withdrawn the advertisement as stated by the respondents but it is being relayed with a slight modification.

25. On facts, the applicant has placed the following statements about each of the claim and attempted to prove that the recommendation of the first respondent is not fair.

Claim 1

26. The first Respondent is not a privy to the report generated by the Applicant in support of which he bases his claim and the claim made by



Applicant were without any scientific basis especially when they compared it with the second Respondent's vaporiser by referring to it as "*leading liquid vaporizer*".

26.1. The applicant relied on two of their following test reports given by Ross Life science Limited:

“**a.** Report No. 029HA0G7581/RO dated 25.08.2022 restricted to a single species of Mosquitoes namely Culex quinquefasciatus, and

b. Report No. 029HAOG2823 dated 26.09.2022 restricted to two species of Mosquitoes namely Culex quinquefasciatus and Anopheles Stephensi.”

26.2. But the first respondent is not convinced with the Test reports for the reason that it is not done for all vaporizers and all species of mosquitoes, though in the impugned advertisement it is claimed that the Applicant Product has India's fastest, powerful formula and 2X powerful and further the claims are false and contrary to the results of the laboratory tests conducted by the first Respondent and hence the claim of the Applicant is false and misleading, and the disclaimers are not sufficient to



adequately inform naive consumers who may not understand that there are several species / variants of Mosquitoes, and that the Applicant's product has only been tested against one or two such species of Mosquitoes.

Claim 2

27. The Applicant compares his product with "LEADING BRAND REFILL", and it obviously refers to the second Respondent's GOOD KNIGHT GOLD FLASH, which has nearly 56% of the market share in Liquid Refill / Vaporizers. Further, the second Respondent's product also provides 100% protection for two hours even after their machine is switched off. So the above feature is not exclusive to the applicant.

27.1. So far as the second claim in the advertisement of the applicant is concerned the FTC panel has noted that the advertiser has agreed to withdraw this visual from the advertisement. In compliance thereof, the comparative screenshot with a "*Leading brand Refill*" in the advertisement has been removed and hence it is not going to be a problem any more.

Claim 3



MORE SMARTER & SAFE:

28. The Applicant's "MORTEIN PLUS" product packaging on the Back Label carries the declaration within a toxicity triangle in blue colour and a declaration stating "Danger and 'Keep out of reach of children".

28.1. Rule 19(8) of the Insecticide Rules, 1971 specifically prohibits use of the unwarranted claim of safety of such products or its ingredients and specifically prohibits the use of the term "*SAFE*" on the label. The product is classified as 'moderately toxic' in terms of the Insecticide Rules and contains statutory declaration such as 'DANGER' & 'Keep out of reach of children'. The Object of Rule 19(8) of the Insecticide Rules, 1971 is that a Liquid Vaporizer which is an insecticide can never be safe as it contains toxic and poisonous elements. Therefore, any claim of the product to be safe is barred under law, as per Rule 19(8) of the Insecticide Rules, 1971.

29. It is submitted by the second respondent that the applicant has printed at the back side of the packaging of the said product and cautioned the consumers as Poisonous, hazardous and to keep the product away from children. It is further submitted that the product such as insecticide should



not be perceived as safe by the consumer and the news articles of various incidents that had resulted in loss of life and therefore, the term "*SAFE*" should be strictly prohibited to be used in the product with an intention to promote the same. So it is claimed that such misleading statements are untrue and contradictory and hence the recommendation of the first respondent is justified.

30. However, the applicant submitted that it is only a creative *tagline* and hence it can not be a substantive claim. It is further submitted that the insecticides have become an indispensable part of human life. The applicant illustrates that a mosquito insecticides contain a small percentage of insecticide which is dissolved in deodorized kerosene (and perfume is added to neutralise the odour) for easy dispersal and when the wick is heated (using electricity), it emits the deodorized kerosene with the household insecticide (within permissible limits as prescribed in the Insecticide Act, 1968), in the air and it is safe for humans, but kills/repels mosquitoes and that the applicant's *Mortein Smart + Liquid Vaporiser* is even more efficient than competitor products, as it releases less quantity of insecticide, to give the same effect.



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31. The Central Insecticide Board (CIB) is the nodal central agency under the Insecticide Act and it regulates the registration, manufacture, distribution & sale of insecticide in India. The CIB approves registration of an insecticide after a thorough enquiry and testing on the safety aspects of the product like Mosquito insecticides. Under Sec. 9 of this Act, only those insecticides which pass the test of *"efficacy of the insecticide and its safety to human beings and animals"* are registered. In case any insecticide is considered against *"public safety"*, the statutory authorities under Section 27 of the Act can prohibit the manufacture, sale, distribution etc. of such insecticides on the reasons of " public safety".

32. It is submitted by the applicant that depending upon its toxicity, regulations (Insecticide Act, 1968 and Rules made there under) require manufacturers to print safety triangles on the label through colour coding - Red, Blue and Green. Insecticides having Red triangle on their pack, are extremely toxic and 'Dangerous' and most agricultural insecticides fall in this category; mosquito insecticides are less dangerous and blue triangle is for Transfluthrin and Metofluthrin based products; the applicant



has printed blue triangle on *Mortein Smart + Liquid Vaporiser* pack, while Godrej has printed Green triangle, in contravention to the Insecticide Act. It is further submitted that the Insecticide regulations only prohibit the use of expression such as *safe* etc. on the label of the product; the purpose of printing warning on the label is to indicate the intended user not to misuse or abuse the insecticide insecticide like any other chemical compound/product is required to be used, only in a manner specified; hence there is no restriction to declare "*safe*" on advertisement of household insecticides including mosquito insecticides, under the Insecticide Act or Rules made thereunder.

33. The applicant has further submitted that under Rule 19(8) of the Insecticides Rules only imposes a restriction on usage of the word '*safe*' on the label of the product, to ensure that the product user takes proper precautions during usage as directed on pack and does not assume that the insecticide is *safe*, per se. The restriction under Rule 19 of the Insecticide Rules, is limited to 'labelling requirement' as is evident from the referenced Rule 2(h):



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"label" means any written, printed or graphic matter on the immediate package and on every other covering in which the package is placed or packed and includes any written, printed or graphic matter accompanying the insecticide"

34. It is stated that a conjoint reading of Section 3(h) and Rule 19(8) conveys that the restriction contained in Rule 19(8) on the usage of the word '*SAFE*', etc. is limited to the labelling of the product and does not extend to the communications/ advertisements for a product. Rule 19(8) does not imply that the product is 'unsafe' by any means, especially considering the fact that no registration can be given under Section 9(3) of the insecticides act, without the Registration Committee being satisfied as to the safety of the product to humans and animals. Hence it is claimed that ASCI's decision is based on an incorrect understanding of the product category.

35. It is submitted that the applicant has created the tagline "*MORE SMART AND SAFE*" to denote that when *Mortein Smart + Liquid Vaporiser* is used, in the manner specified (for which a leaflet, in compliance with the Insecticide Act/Rules is placed on the packet), are more



smart because it kills more mosquitoes as the insecticide used by the applicant is Metofluthrin 0.32% w/w and the other product Transfluthrin 1.6% w/w is used by all other manufacturers of mosquito insecticides including the second respondent. It is stated by the applicant that he has used less quantity of insecticide and to denote that permissible use of Metofluthrin 0.32% w/w is *safe* and hence he used the tagline "*MORE SMART AND SAFE*".

36. It is claimed that the applicant has not declared any of the Television Channels or anywhere that abuse/misuse of *Mortein Smart + Liquid Vaporiser* is also safe. Mosquito insecticides are extensively used in India and consumers are aware of the fact that Mosquito insecticides are to be used in the manner prescribed, and it is absurd for ASCI to assume that merely because the Plaintiff uses the tagline, *MORE SMART AND SAFE* in its advertisement, consumers would be misled to misuse/abuse *Mortein Smart + Liquid Vaporiser*. In any case, the Plaintiff's tagline is "*More Smart and Safe*" i.e in comparison to other mosquito insecticide, *Mortein Smart + Liquid Vaporiser* is "more safe" for the reasons stated above.



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37. It is further claimed that the product has gone through a rigorous approval process by the Central Insecticides Board Registration Committee (CIBRC) which takes more than 2-3 years and it is found to be 'safe', by the Registration Committee under the Insecticides Act, 1968. Section 9(3) of the Insecticides Act clearly states that the Registration committee grants registration to an insecticide "after satisfying itself as to the efficacy of the insecticide and its safety to human beings and animals". Proviso to Section 9(3) further states that if the Registration Committee is of the opinion that use of the insecticide involves risk to human beings or animals it would "refuse to register the insecticide". So it is submitted that the every product registered by the Registration Committee, including the Plaintiff's product, is *safe*.

38. In support of the applicant's claim that his Advertisements are protected under his freedom of speech, the learned counsel for the applicant cited the judgment of the Hon'ble Supreme Court held in *Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited [AIR 1995 SC 2438]*. On the same line of submission the judgment of the High Court of Delhi held in *Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. (ILR (2010) IV Delhi 489)* by following the



judgment of the Hon'ble Supreme Court held in *Colgate Palmolive (India) Ltd.*

Vs. Hindustan Lever Ltd. (1999) 7 SCC 1 has also been cited.

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39. In substance it is claimed that the Impugned Order issued by ASCI, impinges upon the Plaintiff's fundamental right i.e., freedom of speech and trade and it had directed the Plaintiff to withdraw its claims across all media, including YouTube, Print, TVC, digital media, etc. The applicant has not taken any proceedings for right violation by invoking writ jurisdiction obviously because ASCI is not a statutory authority and it is only a self-regulatory body.

40. However, it has been already made clear that the order of the ASCI is only recommendatory in nature and its non-compliance will not result in any executory action. In the event of non-compliance, ASCI would only inform the Regulatory Authority and it is up to the Regulatory Authority to pass orders directing the applicant either to withdraw its advertisement by finding that it is misleading or allow him to continue the same by getting the rightful opinion from experts including their test results. The plaintiff can not try to achieve indirectly what he ought to achieve



directly. Instead of raising all the above contention on the quality of his product and the nature of its content before the specialised bodies constituted under the Special Statutes in the event of any of their action against the applicant, the applicant has taken the short cut method of getting orders for injuncting the first respondent from executing its functions, which would indirectly stop the action by the statutory authorities also. If the first respondent is restricted from taking any action on the complaints in accordance with the well established procedure and restricted from doing so as against this applicant, it will open flood gates to so many other member bodies of ASCI to file similar such suits and seek similar such reliefs.

41. The rightful course open to the affected parties is to file Review in accordance with the procedure established under ASCI regulation or to challenge the orders of Regulatory Authority in case they pass any orders against the applicant. The applicant can not evade to seek remedy without subjecting himself under due procedure. This suit has been filed without any cause of action and the jurisdiction and hence the applicant is not eligible to get any interim orders for injunction as claimed by him. As



the applicant has failed to establish the essential grounds to get the relief sought by him, these applications are liable to be dismissed.

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In the result, the applications in **O.A.Nos.563 and 564 of 2023 are dismissed with cost.** In view of the reasons stated for dismissing these applications, the questions on the fairness of the findings and recommendations of the first respondent are left open to be dealt during the Independent Review Process, if the applicant chooses to participate in the same, by way of filing appropriate proceedings within a period of ten (10) days from the date of receipt of a copy of this order. It is also open to the respondents to file applications for rejecting the plaint on the grounds that this Court has got no jurisdiction to entertain the suit or that the suit has been filed without any cause of action.

16.11.2023

Speaking order

Index : Yes

Neutral Citation : Yes

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O.A.Nos.563 & 564 of 2023
in C.S.No.110 of 2023



R.N.MANJULA, J.

sri

Pre-Delivery Common Order made in
O.A.Nos.563 & 564 of 2023
in C.S.No.110 of 2023

16.11.2023

57/57