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

\+ CS(OS) 107/2015

HAVELLS INDIA LTD & ANR ..... Plaintiffs

Through Mr. Chander Mohan Lall with Mr. Sudeep Chatterjee, Mr. Jaya Mandelia, Mr. Karan Bajaj, Ms. Rukma George and Ms. Nancy Roy, Advocates

versus

AMRITANSHU KHAITAN & ORS ..... Defendants

Through Mr. Rajiv Nayar, Senior Advocate with Mr. Saurabh Seth and Mr. Ankur Sehghal, Advocates

Reserved on : 25th February, 2015

% Date of Decision : 17th March, 2015

**CORAM:**
**HON'BLE MR. JUSTICE MANMOHAN**

**J U D G M E N T**

**MANMOHAN, J:**

**I.A. 850/2015 [U/o. 39 Rules 1 & 2 CPC]**

1. Present suit has been filed for permanent injunction restraining misleading and disparaging advertising, slander of the plaintiffs' product, dilution, damages/ rendition of accounts, delivery up, etc.

2. Plaintiffs in the present suit have impugned the promotional campaign / advertising of the defendants wherein they have compared their product i.e. 'Eveready LED Bulb' with the plaintiffs' product i.e. 'Havells LED Bulb' as according to the plaintiffs the same has resulted in disparagement and misrepresentation besides misleading the consumers. The advertisement that is impugned is reproduced hereinbelow:-


EVEREADY
GIVE ME RED
LED
LIGHTS
SWITCH TO THE
BRIGHTEST*
LEDs
EVEREADY
100 LUMENS PER WATT
15 YEARS** LIFE
50% ENERGY SAVING
Available in 3W, 5W, 7W, 9W, 12W and 14W
Range - Cool Day Light, Pearl White, Golden Yellow
*Highest lumens means brightest light
**At 3.5 hours per day
Check lumens and price before you buy
LED Bulb 7W | lm/Watt | Lumens* | MRP per pc. (U)**
Eveready | 100 | 700 | 449
Philips | 86 | 600 | 599
Syska | 93 | 650 | 599
Bajaj | 86 | 600 | 485
Halonix | 86 | 600 | 550
Surya | 80 | 560 | 400
Havells | 74 | 520 | 600
*As per details available on specific brand packaging
**MRP (incl. of all taxes)
Available at all popular retail stores:
Also available at:
spencer's
VISHAL
YOU & METRO
Reliance MARKET
easyday
more. MEGASTORE
Best Price
Available online at:
snapdeal
flipkart
amazon.in
paytm
For quality products from EVEREADY visit: www.evereadyindustries.com
e-mail: lighting@evereadyindustries.co.in
/EvereadyIndia
@EvereadyIndia
/EvereadyIndia
Rediffusion-Y&R/Kol/ECIL/0132

3. Mr. C.M. Lall, learned counsel for plaintiffs stated that the statement in the impugned advertisement that *"check lumens and price before you buy"* was an invitation to consumers to compare only two attributes of a Bulb, i.e. lumens and price, as if they were the only two attributes relevant for determining the value of an LED Bulb. According to him, the impugned advertisement was a comparison of two products using selective and mischievous means to compare. He asserted that as the defendants' impugned advertisement dealt with value and conveyed an impression that it offered better value for lesser price, it was obliged to compare all the relevant parameters. Mr. Lall submitted that in ***Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Ors., (1995) 5 SCC 139*** the Supreme Court has held that '*The "commercial speech" which is deceptive, unfair, misleading and untruthful would be hit by Article 19(2) of the Constitution and can be regulated/prohibited by the State.'*

4. According to Mr. Lall, the impugned advertisement was no different than inviting a consumer to check only the size of a diamond in terms of carats and its price to determine its value when in fact the value of a diamond depends on 4Cs namely, cut, colour, clarity and carat weight. Hence, such a half truth could induce consumers to purchase a diamond of higher carats for a lower price and be misled into believing that they had got a good bargain.

5. Mr. Lall stated that even if the defendants' product was superior in lumens, yet it was inferior in power factor (0.5 vs. 0.9) and over-all-life (15 vs, 25 years). He submitted that this information of superiority in one area and inferiority in two other areas had been cleverly portrayed to give an overall impression that defendants' product was superior to the plaintiffs'. He pointed out that when it came to superiority in lumens, the advertisement made a comparison not just with plaintiffs' product but also with other third party products, but when it came to power factor, the defendants shifted the

comparison to one between its product (LED Bulb) and CFL bulb instead of the rival LED bulbs. He emphasised that 'CFL Bulb' was written in a very small font and was barely visible. He stated that price comparison was portrayed in such a manner as if the plaintiffs' product was inferior on all fronts and yet was more expensive. He stated that it was this clever portrayal, which has been impugned as it was based on falsehood and half truth.

6. Mr. Lall submitted that all attributes connected to the value of the Bulb had to be fairly disclosed and not presented in a tricky manner or misleading way. He emphasised that the impugned advertisement would lead a reasonable person in the position of a buyer to a wrong conclusion. In support of his contention, he relied upon the Advertising Standards Council of India Code (for short "ASCI Code"). The relevant portion of the ASCI Code is reproduced hereinbelow:-

> *"DECLARATION OF FUNDAMENTAL PRINCIPLES*
>
> *IV. To ensure that advertisements observe fairness in competition so that the consumer's need to be informed on choices in the market-place and the canons of generally accepted competitive behaviour in business are both served.*
>
> *CHAPTER-I*
>
> *4. Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions.....*
>
> *5. Advertisements shall not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers.*

7. Mr. Lall further submitted that Sections 29(8) and 30(1) of the Trademarks Act, 1999 (hereinafter referred to as 'Act, 1999') stipulate that commercial advertising shall be in accordance with honest practices in industrial or commercial matters and not take unfair advantage or be detrimental to the distinctive character or repute of the trademark. He stated that if the impugned advertisement was tested on those parameters, then representation could not be termed to be an honest practice in industrial or commercial matters. He reiterated that the plaintiffs had better technology in terms of providing optimal brightness along with optimal consumption of power and maximum life of the bulb. He stated that the defendants' advertisement completely destroyed the honest and bonafide claims of the plaintiffs by use of tricky and manipulative comparison.

8. Mr. Lall also submitted that the impugned advertisement fell foul of the Supreme Court's decision in ***Lakhanpal National Ltd. Vs. MRTP Commission & Anr., (1989) 3 SCC 251*** wherein it has been held as under:-

> *"7.....The object is to bring honesty and truth in the relationship between the manufacturer and the consumer. When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such a representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language....."*

9. Mr. Lall relied upon the observation of this Court in ***Glaxosmithkline Consumer Healthcare Ltd. Vs. Heinz India (P) Ltd., MIPR 2010 (3) 314***

wherein it has been held as under:-

> *"25. Heinz is no doubt right in contending that comparative price differential can be highlighted. However, while doing so, the advertisement should be fair, and nonjudgmental. The advertiser has various choices, while portraying the price differential. If his products are lower in cost, obviously, that perceived advantage would be highlighted. However, when a rival chooses to highlight this aspect, with special emphasis on the quality of his product, care has to be exercised to ensure that no commercial, or advertisement injury, occurs to the rival's product. In this case, the use of the term "cheap" in relation to the product, is in the electronic media. The line between the a permissible expression, and the pejorative or what is likely to cast a slur on another's goods, is slight, and determined by the context in which terms and expressions are used. While "cheap" may be positive, in the context of a trader proclaiming that his wares are a bargain, or good value for money, (since in the case of many products, consumers are price sensitive) "cheap" used by a rival, in an advertisement might well connate not just inexpensive, but inferior....."*

10. Mr. Lall stated that the defendants, by only highlighting two of the four features, attempted to leap frog over the plaintiffs' product by optimising only two of the four attributes and giving an impression that only two of its superior attributes are the relevant attributes. He stated that if such misleading advertisement was allowed/permitted, then its long term repercussions would be that the manufacturers and traders would not concentrate on improvement of the product by developing technologies to provide better value to consumers, rather, would spend time and energy in developing advertising strategies inviting consumers to make purchase decision by giving them limited information and by leapfrogging over technologically better value products. He emphasised that the impugned advertisement did not pass the test of being honest to trade practices. In support of his submission, Mr. Lall relied upon

***Win Medicare Ltd. vs. Reckitt Benckiser India Limited, 2002 (24) PTC 686 (MRTP)*** wherein it has been held as under:-

> *"14.....A close look at the impugned advertisement reveals that the main message is conveyed to the readers through the medium of symbols namely, the tick-mark ( ), the cross (x) and the dash (-). At the bottom of the table, it is explained that tick-mark stands for 'successful', cross stands for 'failed' and dash for 'not tested'. There is no denying the fact that whereas the main body of the advertisement is in bold print, the footnote at the bottom of the table is in very small print. Further, it is also common knowledge that in a tabular representation, the reader generally forms his first impression by the symbols used in the table without rushing to their explanations given elsewhere. The three and the highest number of tick-marks awarded to Dettol on the face of it, show that in respect of the various parameters used to demonstrate the efficacy of the products tested, Dettol is superior to Betadine. Further, the impugned advertisement also suffers from concealment of a vital fact that Betadine is a Standardised Solution whereas Dettol is sold in concentrated form. We also cannot ignore the fact that out of the four parameters used, Betadine has been tested only for one and, therefore, truly speaking the two are incomparable till Betadine is also tested for the remaining three parameters....."*

11. Mr. Lall stated that the impugned advertisement was objectionable because it contained misleading messages, half truths, incomplete information, used tricky language and abused the trust of the consumers by exploiting their lack of experience and knowledge. Therefore, it constituted an unfair trade practice.

12. Mr. Lall pointed out that in ***Janssen Pharmaceutica Pty. Ltd. v. Pfizer Pty. Ltd., No. G 220 of 1985 dated 07th November, 1985,*** a Federal Court of Australia, New South Wales, injuncted an advertisement with regard to a medicine called Combatrin on the ground that though it claimed that it treated

three types of worms - thread worms, roundworms and hookworms which were prevalent in Australia, yet it did not treat two other worms i.e. whipworm and Strongyloides Stercoralis, which in fact were more prevalent in Australia than roundworms and hookworms. He submitted that the Court held that the defendant could not compare its product Combatrin to plaintiff's Vermox which did not treat roundworms and hookworms, but treated whipworms, which were more common in Australia. He emphasised that the Court had held that the defendants' contention that its advertising was only ambiguous, was incorrect and that *"ambiguity is not infrequently an especially effective tool of deception."*

13. On the other hand, Mr. Rajiv Nayar, learned senior counsel for the defendants stated that the representations made in the impugned advertisement were true and justified. He contended that the comparative representations made in the impugned advertisement were derived from the product packaging of all companies mentioned in the said advertisement.

14. Mr. Nayar stated that the comparison of the rival products of lumens per watt, lumens and price was justified as the packaging of all the rival products did not contain all the parameters suggested by the plaintiffs. For instance, the packaging of Halonix bulbs did not contain details about the life of the LED and as such the defendants could not compare the same. Similarly, three competitors did not mention "Power Factor" on their packaging and as such the defendants did not have the requisite data for comparison. The common features in all packaging had been mentioned in the comparative table mentioned in the advertisement. Therefore, not only was the representation made in the impugned advertisement true but the same was also justified.

15. According to Mr. Nayar, there can be no quarrel with the fact that lumens alone is the measure of brightness and the total luminous flux expressed

in terms of "Lumens" is a measure of total amount of visible light emitted by a light source. Therefore, the defendant No.2 was completely justified in making the representation of brightness on the basis of lumens. Further, he contended that brightness is the most important feature of a bulb as it is meant to dispel darkness.

16. Mr. Nayar submitted that there was no requirement in law to disclose each and every factor in comparative advertisement. According to him, as long as the relevant factors had been disclosed and compared, no action for disparagement would lie. He submitted that an advertiser was also allowed to compare the advantages of his goods over the goods of a competitor.

17. Mr. Nayar also submitted that as per the test laid down in ***Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd. & Anr., 167 (2010) DLT 278 (DB)***, glorifying one's product was permissible provided the rival's product was not denigrated. In the present case, there was no denigration of the competitors products and relevant features were compared by the defendant No.2. He emphasised that there was no negative comment with respect to the goods of the rivals.

18. Mr. Nayar pointed out that no case of special damage had been set up by the plaintiffs. He submitted that in order to maintain an action for disparagement, the plaintiffs would not only have to plead, but also prove a case of special damage caused as a result of the offending publication/representation. In the present case, there was no such averment with regard to the special damage caused to the plaintiffs.

19. In support of his submission, Mr. Nayar relied upon ***Philips India Pvt. Ltd. vs. Shree Sant Kripa Appliances Pvt. Ltd. CS(OS) No.1913/2014*** wherein it has been held as under:-

> *"7.3 For an action of malicious falsehood to succeed, the plaintiff*

*is required to plead and prove the following:*

*xxx* *xxx* *xxx*

*(iii) Lastly, the plaintiff has suffered special damage by virtue of the impugned statement/representation. In common law, pleading and proving special damages is essential for institution of an action of malicious falsehood. There are, however, some jurisdictions where, by statute it is not necessary to allege or prove special damage in certain cases.....*

*xxx* *xxx* *xxx*

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

20. Mr. Nayar lastly submitted that plaintiffs had not approached the Court with clean hands. He stated that while accusing the defendants of making a lopsided and misleading representation (by highlighting only the brightness in a blub/LED), the plaintiffs had not disclosed their own representation in print and television commercials where they highlighted the attributes of their CFL Bulbs only by its brightness. He submitted that it was a cardinal principle of law that he who seeks equitable relief from the Court must come with clean hands. In support of his submission, he relied upon the Supreme Court's judgment in ***Gujarat Bottling Co. vs. Coca Cola Company & Ors., AIR 1995 SC 2372*** wherein it has been held as under:-

*"Under Order 39 of the Code of civil procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being*

*approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the CPC, but also in respect of the party approaching the Court for vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings."*

## *COURT'S REASONING*

WHAT IS ADVERTISING?

21. Having heard learned counsel for the parties, this Court is of the opinion that it is first essential to define advertising. Article 2(1) of the Advertising Directive of EEC defines Advertising to mean, *"the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services."* ASCI Code defines advertising as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Consequently, any communication which in the normal course would be recognised as advertising by the general public would be included in this definition even if it is carried free-of-charge for any reason.

22. Further, advertising is a facet of commercial speech which is protected by Article 19(1)(a) of the Constitution of India (for short 'Constitution'). The same can be restricted only in accordance with law enacted under Article 19(2) of the Constitution.

23. Plaintiff's reliance on ***Tata Press*** (supra) is contrary to facts as though in that case the Supreme Court had held publication of list of telephone subscribers is violative of telephonic rules, yet it had allowed publication of paid advertisement from businessmen. Consequently, observations in ***Tata Press*** (supra) with regard to Government's power to regulate, prohibit commercial speech under Article 19(2) of the Constitution, which is deceptive, unfair, misleading and untruthful, are not apposite to the facts of the present case.

ADVERTISEMENTS ARE NOT TO BE READ AS A TESTAMENTARY PROVISION IN A WILL

24. In ***Mc Donalds Hamburgers Ltd. vs. Burgerking (UK) Ld. [1987] F.S.R. 112*** followed in ***Glaxosmithkline Consumer Healthcare Ltd. Vs. Heinz India*** (supra), it has been held that advertisements are not to be read as if they are some testamentary provision in a Will or a clause in some agreement with every word being carefully considered and the words as a whole being compared. In ***Marico Ltd. vs. Adani Wilmar Ltd. CS(OS) No.246/2013*** it has been held that in determining the meaning of an advertisement, the Court has to take into account the fact that public expects a certain amount of hyperbole in advertising and the test to be applied is whether a reasonable man would take the claim being made as one made seriously.

DEFINITION OF COMPARATIVE ADVERTISING

25. Though comparative advertising has not been defined in the ASCI Code, yet Article 2(2a) of the Advertising Directive of EEC defines comparative advertising as *"any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor."*

COMPARATIVE ADVERTISING IS LEGAL AND PERMISSIBLE UPON CERTAIN CONDITIONS

26. In the opinion of this Court, Comparative advertising is legal and permissible as it is in the interest of vigorous competition and public enlightenment. In fact, Chapter IV of the ASCI Code, relied upon by the plaintiffs, itself specifically deals with Comparative Advertising. The relevant portion of the ASCI Code reads as under:-

> *"CHAPTER IV*
>
> *To ensure that Advertisements observe fairness in competition such that the Consumer's need to be informed on choice in the Market-Place and the Canons of generally accepted competitive behaviour in Business are both served.*
>
> *1. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interest of vigorous competition and public enlightenment provided:*
>
> *(a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.*
>
> *(b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case*
>
> *(c) The comparison are factual, accurate and capable of substantiation.*
>
> *(d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which is compared.*
>
> *(e) The advertisement does not unfairly denigrate, attack or*

*discredit other products, advertisers or advertisements directly or by implication."*

27. In ***O2 Holdings Ltd.& Anr. v. Hutchison 3G UK Ltd,*** Court of Justice of the European Communities ***[2009] Bus. L.R. 339***, has held that the use in advertising of a sign similar to a competitor's trade mark is one of the ways of identifying that competitor or that competitor's goods or services, at least by implication, within the meaning of Article 2(2a) of European Union, Council Directive 84/450. It has further been held that where the proprietor of a trade mark seeks to contest the use in comparative advertising of a sign similar to that trade mark, he must base his own claim on the breach of one of the conditions laid down in Article 3a of Directive 84/450. Article 3a(1) of Directive 84/450 [as inserted by Article 1(4) of Directive 97/55] reads as under:-

*"Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met (a) it is not misleading according to articles 2(2), 3 and 7(1), (b) it compares goods or services meeting the same needs or intended for the same purpose, (c) it objectively compares one or more material, relevant verifiable and representative features of those goods and services, which may include price, (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor, (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor, (f) for products with designation of origin, it relates in each case to products with the same designation, "344 (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products, (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name."*

28. However, comparative advertising can be resorted to only with regard to like products. After all one cannot compare apples and oranges. In the opinion of this Court, comparative advertising is permitted when the following conditions are met:-

(i) goods or services meeting the same needs or intended for the same purpose;

(ii) one or more material, relevant, verifiable and representative features (which may include price); and

(iii) products with the same designation of origin (where applicable).

29. It is pertinent to mention that in ***Win Medicare Ltd. vs. Reckitt Benckiser India Ltd***. (supra), the comparative advertising was stayed as it compared two incomparable products namely, Betadine sold in standardised solution and Dettol sold in concentrated form. Further, it compared the petitioner's Betadine product without testing it for all the specific parameters mentioned in the chart. Consequently, the judgment in ***Win Medicare Ltd. vs. Reckitt Benckiser India Ltd***. (supra) offers no assistance to the plaintiffs.

OBJECTIVE OF SECTIONS 29(8) AND 30(1) OF THE ACT, 1999, IS TO ALLOW HONEST COMPARATIVE ADVERTISING

30. The primary objective of Sections 29(8) and 30(1) of the Act, 1999, is to allow comparative advertising as long as the use of a competitor's mark is honest. The test of honest use is an objective test which depends on whether the use is considered honest by members of a reasonable audience.

31. The words "industrial or commercial matters" in the aforesaid Sections do not mean that the court should look at statutory or industry-agreed codes of conduct. Further, the nature of the products or services no doubt would affect the degree of hyperbole acceptable. Honesty has to be gauged against what is reasonably expected by the relevant public of advertisements for the goods or services in issue. After all what is tolerable in advertisements for second-hand cars may well not be thought honest if used to encourage the use of powerful medicines. The nature of the goods or services may therefore affect the reasonable perception of what advertising is honest.

32. Consequently, the test applied in ***Janssen Pharmaceutica Pty. Ltd. v. Pfizer Pty. Ltd.*** (supra) is inapplicable to the present case. Further, in ***Janssen Pharmaceutica Pty. Ltd. v. Pfizer Pty. Ltd.*** (supra) the Court after recording the entire evidence concluded that the claim in the said advertisement was false.

FAILURE TO POINT OUT A COMPETITOR'S ADVANTAGES IS NOT NECESSARILY DISHONEST

33. Failure to point out a competitor's advantages is not necessarily dishonest. However, care must be taken in ensuring that statements of comparison with the competitors' products are not defamatory or libelous or confusing or misleading. In a recent decision of ***R (Sainsbury's Supermarkets Limited) v. The Independent Reviewer of Advertising Standards Authority Adjudications v. Advertising Standards Authority Limited, Tesco Stores Limited, CO/17656/2013***, the High Court of Justice Queens Division Bench Division Administrative Court of the UK upheld the decisions of Independent Reviewer of Advertising Standards Authority Adjudications (IR) and of the Council of the Advertising Standards Authority (ASA) and held there was no

flaw in the advertising campaign involving price comparison carried on by Tesco Stores. In the complaint before the ASA, one of the contentions advanced by Sainsbury was that non-price elements, relating to product quality, corporate responsibility, sustainability and other ethical matters, had not been factored in by Tesco in their product comparison and that Tesco had failed properly to weigh the non-price elements. Sainsbury also contended that higher cost of the product was worth paying as its products were certifiably superior in the aforementioned categories. Sainsbury's argument before all three forums was that considering these non-price elements would render the "sufficiently interchangeable" test as not satisfied and thus, Tesco could not have compared the products. The ASA had concluded,

> *"The Code allowed advertisers to objectively compare one or more material, relevant, verifiable and representative feature of products which could include price. We considered that Tesco had objectively compared price and the ad made clear that Tesco were comparing their own prices against brands, own labels, and fresh produce prices at "Sainsbury's, Asda, and Morrisons and that some products would be excluded from the comparison. While we noted Sainsbury's concerns, in the context of an ad which explained clearly the basis of Tesco's pricing comparison we concluded the claim "You won't lose out on big brands, own label or fresh food" had been substantiated and was not misleading. In addition, we concluded the basis of the comparison was clear and did not breach the Code."*

34. The Court, analysing the appeal preferred to the IR held that the conclusion arrived at in the appeal was that the essential feature or the key element being compared in the impugned advertisement was price and not quality, provenance or ethical treatment. The Court upheld the decisions of the two authorities and held that the Claimants (Sainsbury) were calling for an *"inflexible application of the 'sufficiently interchangeable' rule by asserting*

*that provided the non-price factors were capable of being objectively established and were material factors or considerations for a reasonable proportion of customers, then the 'sufficiently interchangeable' test could not be found by the ASA to have been satisfied."* The Court held that there was no such hard-edged rule and thus, there was no irrationality in the decisions of the ASA and the IR.

35. In Indian law similarly, there is no rule which requires that all the features of a product have to be necessarily compared in an advertisement. To be fair, learned counsel for the plaintiffs during the course of arguments had conceded that comparative advertising with regard to the similar products could be confined to one relevant and verifiable feature. His only submission was that as prices of similar products had been compared, the defendants were bound to mention all other relevant parameters/features in the advertisement. However, no statutory provision or precedent was shown in support of said submission.

IN COMPARATIVE ADVERTISING, A CERTAIN AMOUNT OF DISPARAGEMENT IS IMPLICIT

36. A comparison, which is unfavourable to a competitor, does not necessarily mean that it is dishonest or unduly detrimental. A Division Bench of this Court in ***Colgate Palmolive Company & Anr. vs. Hindustan Unilever Ltd., 2014 (57) PTC 47 [Del](DB)*** has held that in comparative advertising, a certain amount of disparagement is implicit and as long as the advertisement is limited only to puffing, there can be no actionable claim against the same. The relevant portion of said judgment reads as under:-

> *"27. The law relating to disparaging advertisements is now well settled. While, it is open for a person to exaggerate the claims relating to his goods and indulge in puffery, it is not open for a*

*person to denigrate or disparage the goods of another person. In case of comparative advertisement, a certain amount of disparagement is implicit. If a person compares its goods and claims that the same are better than that of its competitors, it is implicit that the goods of his competitor's are inferior in comparison.*

*To this limited extent, puffery in the context of comparative advertisement does involve showing the competitor's goods in a bad light. However, as long as the advertisement is limited only to puffing, there can be no actionable claim against the same.....*

37. The judgment of ***Glaxosmithkline Consumer Healthcare Ltd.*** (supra) relied upon by learned counsel for plaintiffs is clearly distinguishable as in that case the plaintiff's product had been called 'cheap' by the defendant, which expression was held to denigrate and disparage plaintiff's product. It is settled law that an advertiser can call his product the best, but at the same time, cannot rubbish the products of a competitor.

COMPETITORS CAN CERTAINLY COMPARE BUT CANNOT MISLEAD

38. In the opinion of this Court, the purpose of the provisions in the Act, 1999 and the ASCI Code which lists the conditions under which comparative advertising is permitted is to stimulate competition between suppliers of goods and services to the consumer's advantage, by allowing competitors to highlight objectively the merits of the various comparative products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice.

39. This Court is of the view that it is duty bound to interpret the Act, 1999 and the ASCI Code in a sense favourable to comparative advertising while at the same time always ensuring consumers are protected from possibly

misleading advertising.

MISLEADING ADVERTISING

40. Misleading advertising has been defined in Article 2(2) of the European Union Council Directive 84/450 as *"any advertising which is in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."*

41. This Court is also of the view that for any advertisement to be considered misleading, two essential elements must be satisfied. First, misleading advertising must deceive the persons to whom it is addressed or at least, must have the potential to deceive them. Secondly, as a consequence of its deceptive nature, misleading advertising must be likely to affect the economic behaviour of the public to whom it is addressed, or harm a competitor of the advertiser. (See ***Lidi SNC v Vierzon Distribution SA [2011] E.T.M.R. 6].***

42. However, the same has to be harmonized with competitive interests. In the present case, the features being compared are not misleading and the said issue has to be seen not from a hyper sensitive viewpoint, but from the eyes of an average consumer who is used to certain hyperbole and rhetoric.

IMPUGNED ADVERTISEMENT COMPARES A MATERIAL, RELEVANT, VERIFIABLE AND REPRESENTATIVE FEATURE OF THE GOODS AND SERVICES IN QUESTION. NOT OBLIGED TO COMPARE ALL PARAMETERS

43. On a perusal of the impugned advertisement, this Court finds that the representation made therein is that defendants' LED Bulbs are the brightest. The tagline in the impugned advertisement is *"Switch to the brightest LEDs"*

and not to the *"best LED"*.

44. The plaintiffs have also stated in the plaint that the defendants have mentioned a lower price in the impugned advertisement than the actual price at which the product is being sold in the market. In support of their contention, the counsel for the plaintiffs had produced bills documenting the higher purchase price of the defendants' bulbs. The defendants on the other hand had stated that the higher price is the old price and produced new packaging with the lower price as shown in the impugned advertisement. In the opinion of this Court, the price issue is a disputed question of fact which cannot be decided at this juncture.

45. The counsel for the plaintiffs has also challenged the comparison of the LED bulb with CFL bulb when it came to power factor and also the size of the font where 'CFL bulb' was mentioned. This Court is of the view that there is no bar in law prohibiting the comparison between CFL and LED bulbs. The font size, however, has to be in compliance with ASCI's standards. No material has been placed on record to show that the font size is not in accordance with the above mentioned ASCI's standards.

46. Further, the defendants in the impugned advertisement has compared the features which relate to brightness i.e. lumens and price. Admittedly, lumens is a measure of brightness and one of the essential functions of a bulb is to dispel darkness. No one can deny that some of the old and aged consumers may buy an LED bulb only on account of its brightness as it is common knowledge that old people due to cataract complications prefer bulbs which give maximum light. For these consumers, the power factor and over all life may not be material or decisive factor. Consequently, the advertisement deals with one of the important characteristics/functions of an LED light. It is also not possible to lay down an exhaustive list of features which should be

mentioned in a comparative advertising as such features differ from proprietor/manufacturer to proprietor/manufacturer and also from consumer to consumer.

47. In ***Barclays Bank Plc v. RBS Advanta [1996] R.P.C. 307,*** an application for interlocutory injunction to restrain the defendant from distributing advertising literature which included a brochure carrying a comparative table of fees and interest rates for various credit cards was dismissed. It was argued in the said case that the failure of the defendant to point out the advantages of the plaintiff bank services was misleading and not honest. The English Court after referring to Section 10(6) of the English Trademark Act of 1994 which is almost identical to Sections 29(8) and 30(1) of the Act, 1999 has held as under:-

> *"The nub of the plaintiff's complaint is that the contents of the leaflet are not honest. As Mr. Young explained it, the leaflet indicated the 15 `bullet points' which were being put forward by the defendant as showing that its credit card was better than the plaintiff's. He accepted that the plaintiff could not complain if the defendant merely said that its credit card was better. However he said that in this case the defendant had descended to detail - to be precise, 15 details - and these were not accurate since they did not compare like with like. In particular he relied on paragraph 15 of the affidavit of Mr. Macfarlane sworn on behalf of the plaintiff which complains that the defendant's literature makes no mention of other ancillary benefits which the plaintiff offers its cardholders and which the defendant does not have, such as a 24 hour service relating to emergencies on the road and an overseas emergency service.....*
>
> *xxxx xxxx xxxx xxxx*
>
> *In my view the plaintiff's case on this issue is very weak. It has the onus of showing that the defendant's use of the BARCLAYCARD mark in its advertising is not honest. It appears to me that it is most unlikely that any reasonable reader would*

> *take that view. On the contrary, read fairly, the advertisements convey the message that the package of 15 features,* taken as a whole*, is believed by the defendant to offer the customer a better deal. It seems most unlikely that a reasonable reader, and particularly one to whom this advertisement is being directed - that is to say one who is being tempted to change from an existing VISA card - would be mislead into thinking that the 15 features in the defendant's leaflet are, individually, only available to users of the defendant's credit card. For example it is a matter of common knowledge that all VISA cards are accepted wherever a VISA sign is displayed and can be used to draw cash from VISA ATM machines. Furthermore the advertisement does not say, and I think it is unlikely that a reasonable reader would take it to mean, that there are no features of the plaintiff's service which are better than the defendant's. The advertisement merely picks out the features taken together which are being promoted as making the defendant's product a good package."*

48. In the opinion of this Court, it is open to an advertiser to highlight a special feature/characteristic of his product which sets it apart from its competitors and to make a comparison as long as it is true. For instance, if a chocolate biscuit manufacturer issues a comparative advertising highlighting that his product has the highest chocolate content and the lowest price, then in the opinion of this Court the rival manufacturer cannot seek an injunction on the ground that fibre content or calorific value or protein content had not been compared.

49. In other words, it is open to an advertiser to objectively compare one or more material, relevant, verifiable and representative feature of the goods and services in question which may include price. There is no requirement in law to disclose each and every factor/characteristic in comparative advertisement. No reasonable observer would expect one trader to point to all the advantages of its competitor's business and failure to do so does not per se take the

advertising outside what reasonable people would regard as 'honest'.

50. It is also pertinent to mention that it is the defendants' case that the impugned adverting campaign compared all the common features mentioned in all competitors packaging.

51. Further, tomorrow, if plaintiffs in response to defendant's advertising campaign, launch a comparative advertising highlighting its alleged salient features like power factor, life of bulb, it cannot be injuncted on the ground that the factor of brightness/lumens has not been mentioned.

52. In fact, mere trade puffery, even if uncomfortable to the registered proprietor, does not bring the advertising within the scope of trade mark infringement. Much advertising copy is recognised by the public as hyperbole. The Act, 1999 does not impose on the courts an obligation to try to enforce, through the back door of trade mark legislation, a more puritanical standard.

## CONCLUSION

53. From the aforesaid discussion, it is apparent that the impugned advertising campaign is not misleading and there is no denigration or disparagement of plaintiffs' mark. Further, the factors compared are material, relevant, verifiable and representative features. Consequently, present application is dismissed, but with no order as to costs.

**I.A. 1893/2015 [U/o. 39 Rule 2A CPC]**

On 22nd January, 2015 it was orally agreed by the counsel for the defendants that the defendants would not extend the impugned comparative advertising campaign to the electronic media.

During the course of hearing, the advertising campaign launched by the defendants on the television channels was shown to this Court. The advertising

campaign launched by the defendants on the television is not comparative advertising inasmuch as it does not mention the name of any of the rivals in the trade, including that of the plaintiffs.

Consequently, present application, being bereft of merits is dismissed.

**CS(OS) 107/2015**

The defendant are directed to file written statement within four weeks.

Replication, if any, be filed before the next date of hearing.

List before the Joint Registrar on 30th June, 2015 for admission / denial of documents.

**MANMOHAN, J**

**MARCH 17, 2015**
js/rn