

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 690 OF 2017

IN

SUIT (L) NO. 204 OF 2017.

Hindustan Unilever Limited)
a Company incorporated under the Companies Act,1913,)
having its Registered office at Unilever House, B.D. Sawant)
Marg, Chakala, Andheri (East), Mumbai-400 099)...Applicant
(Orig. Plaintiff)

In the matter between:

Hindustan Unilever Limited)
a Company incorporated under the Companies Act,1913,)
having its Registered office at Unilever House, B.D. Sawant)
Marg, Chakala, Andheri (East), Mumbai-400 099)...Plaintiff

vs.

1. Gujarat Co-operative Milk Marketing Federation)
Ltd., a co-operative society registered under the)
Gujarat Co-operative Society Act, 1961, having its)
Registered Office at Amul Dairy Road, Anand-388001)
and having its Zonal Office and carrying on business)
at Rampart House, 4th floor, 22A-26A, K. Dubhash)
Marg, Fort, Mumbai-400 023)

2. FCB Ulka Advertising Pvt. Ltd.)
a Company incorporated under the Companies Act,)
1956 and having its office /place of business at)
4th floor, Nirmal Building, Barrister Rajni Patel Marg,)
Nariman Point, Mumbai-400 021)
3. Vadilal Industries Ltd.)
a Company incorporated under the Companies Act,)
1956 and having its office/place of business at)
Vadilal House, Near Navrangpura Rly. Crossing,)
Navrangpura, Ahmedabad-9, Gujarat)
4. Vadilal Dairy International Limited,)
a Company incorporated under the Companies Act,)
1956 and having its office/place of business at)
Plot No. M-13, MIDC Industrial Area, Tarapur,)
Boisar, Maharashtra-401 506)...Defendants

Mr. Virag Tulzapurkar, Senior Advocate, along with Dr. Birendra Saraf, Mr. Nishad Nadkarni, Mr. Vivek Ayyagari, Ms. Nupur Pandit, instructed by M/s. Khaitan & Co., for the Plaintiff.

Mr. Ravi Kadam, Senior Advocate, along with Mr. Ashish Kamat, Mr. Pranit Nanavati, Mr. Vishal Maheshwari, Ms. Surabhi Singh and Mr. Bankim Gangar, instructed by M/s. Khaitan Legal Associates, for Defendant No.1.

Mr. Hiren Kamod, instructed by Mr. Ashwin V. Sakalkar, for Defendant Nos. 3 and 4.

CORAM: S.J. KATHAWALLA, J.

Judgment reserved on : 28th April, 2017

Judgment pronounced on: 16th June, 2017

JUDGMENT

1. The Plaintiff -- Hindustan Unilever Limited, is a Public Limited Company incorporated under the Companies Act, 1956. Prior to 1956, the name of the Plaintiff was Lever Brothers (India) Limited which was changed to Hindustan Lever Limited with effect from 3rd October, 1956 and subsequently to Hindustan Unilever Limited on 11th June, 2007. The Plaintiff carries on the business of manufacturing and selling Fast Moving Consumer Goods ('FMCG'), including frozen desserts and ice cream under the mark "KWALITY WALL'S".

2. Defendant No. 1 --Gujarat Co-operative Milk Marketing Federation Limited is a co-operative body of milk producers in Gujarat and is engaged in marketing of various dairy and dairy based products including ice creams under the mark "AMUL", and is a competitor of the Plaintiff. Defendant No.2 -- FCB Ulka Advertising Pvt. Ltd. is an advertising agency.

3. Defendant Nos. 3 and 4 - Vadilal Industries Ltd. and Vadilal Dairy international Limited are manufacturers of frozen dessert products/the same class of products as that of the Plaintiff which are the subject matter of the present Suit. According to the Plaintiff, Defendant Nos. 3 and 4 are joined as party Defendants to the Suit since they have a common interest with the Plaintiff, and are therefore proper parties for the purposes of the present Suit. No reliefs are claimed against Defendant Nos. 3 and 4.

4. According to the Plaintiff, they are one of India's most well-known and reputed Company in the business of FMCG with presence, inter alia, in foods

and beverages sectors and home & personal care products. The Plaintiff's products are spread across several distinct consumer categories, touching the lives of two out of three Indians. The Plaintiff's combined sales are over several crores. The products of the Plaintiff are of excellent quality, enjoy a very high reputation and are sold in over one million retail outlets.

5. According to the Plaintiff, KWALITY has been a well-known brand in India (having been in the market for over 70 years) and was acquired by the Plaintiff before foraying into the business of ice creams and desserts in India. The said brand KWALITY has been used along with the Plaintiff's own global brand WALL'S as KWALITY WALL'S. Being the first ever brand of ice creams to be introduced in the Indian market on a large commercial scale, KWALITY enjoys, down to this day, a special status in the eyes of the purchasing public being a very popular trade mark. The Plaintiff has been manufacturing and selling the KWALITY WALL'S products in India since at least 1998. The KWALITY WALL'S products manufactured and sold by the Plaintiff command impeccable reputation and goodwill and are well known for their quality, taste and texture. According to the Plaintiff, majority of the KWALITY WALL'S products sold in India are classified as frozen desserts under the Food and Safety Standards Act, 2006 ('FSSA') and the Regulations framed thereunder. The Plaintiff is the market leader amongst the organized players in the frozen desserts category with about 51.3% market share. The Plaintiff's products, including its frozen desserts, scrupulously meet, satisfy and comply with all requirements of the law, rules, regulations including food safety requirements. The Plaintiff's frozen desserts are safe, healthy, hygienic and fit for human consumption. The Plaintiff has made extensive sales of its KWALITY WALL'S products all across India.

6. The present Suit is filed by the Plaintiff to restrain Defendant Nos.1 and 2 from *inter alia* (i) telecasting or broadcasting or otherwise howsoever

communicating to the public or publishing two Television Commercials (hereinafter, the 'Impugned TVCs') or any part thereof, or any other advertisement of a similar nature in any language, or in any manner causing the Impugned TVCs or any part thereof or any other advertisement of a similar nature to be telecast or broadcast or communicated to the public or published in any manner and (ii) disparaging or denigrating the Plaintiff's KWALITY WALL'S products (including frozen desserts manufactured and/ or sold under the said brand and sub-brands thereof), or the Plaintiff's business in any manner whatsoever.

7. On 29th March 2017, the Plaintiff made an application for urgent ad-interim reliefs when this Court granted time to Defendant No.1 to file its Affidavit-in-Reply on or before 3rd April 2017, along with its compilation of documents. The Defendant No. 1 filed its Affidavit-in-Reply dated 3rd April, 2017, along with its compilation of documents. The Plaintiff filed its Affidavit-in-Rejoinder dated 5th April, 2017 along with its compilation of documents. The Defendant No. 1 raised two preliminary objections viz. (i) issue of territorial jurisdiction (paragraph 4.9 of the Affidavit-in-Reply) and (ii) maintainability and jurisdiction on the basis of non-issuance of a Notice under Section 167 of the Gujarat Co-operative Societies Act, 1961 (paragraph 4.10 of the Affidavit-in-Reply). However, the Learned Senior Advocate appearing for the Defendant No.1, upon instructions of Defendant No.1 on 7th April, 2017, waived both the preliminary objections for the purposes of not only the above Notice of Motion but also the Suit. In view thereof, the Notice of Motion was taken up for final hearing.

8. The present Suit is in the nature of an action for generic disparagement/slander of goods of the product category of Dairy Based Desserts referred to as "Frozen Desserts". Plaintiff is the market leader

amongst the organised players for frozen desserts, and as stated above owns 51.3 % of the market share. It is submitted by the Plaintiff that the Defendant No.1, through the two impugned TVCs seeks to spread false information about frozen desserts as a whole by generalizing the entire class of frozen category goods, and more particularly that of the Plaintiff which is the market leader in respect of the said product category. According to the Plaintiff, though in the impugned TVCs no reference/mention is made about the frozen dessert products of the Plaintiff, the reference to the frozen dessert and the comparison made in the impugned TVCs is obviously and unmistakably directed to the KWALITY WALL'S products of the Plaintiff, and it directly affects the Plaintiff's products considering the fact that they are the market leaders in that category of products. In view thereof before discussing the contents of the two impugned TVCs, at the outset it is necessary to examine as to when disparagement of a product can be said to have taken place, and the entitlement of a manufacturer of a product to sue for disparagement of its product when an entire class of products is disparaged. The law on these issues is amongst others laid down in the following judgments:

(i) ***Reckitt & Colman of India Ltd. Vs. M.P. Ramchandran and another***¹:

In this case the plaintiff was the manufacturer of a whitener sold under the brand name Robin Blue. The defendants too manufactured a whitener and sold their product under the brand name Ujala. It was the case of the plaintiff that for the purpose of promoting the sale of Ujala, the defendants sought to project the goods of the plaintiff as inferior to that of the defendants. It was argued on behalf of defendant No. 1 that in its advertisement it had not

1 . 1999 PTC (19) 741

projected the product of the petitioner, and the defendant No. 1 has projected the entire class of blues; the question therefore of disparaging the product of the petitioner did not arise and as such the petitioner had no cause of action; the statements made in the advertisement regarding "Blue" are all correct and the same had been made to show the technological advancement of the product of the defendants.

The Learned Single Judge of the Calcutta High Court (Barin Ghosh, J.), after discussing various decisions of Courts, has at page 746 summarised the law on the subject as follows:

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

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

III) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.

*IV) He however, cannot, while saying that his goods are better than his competitors', say that **his competitors' goods are bad**. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible. (emphasis supplied)*

V) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation."

The Learned Single Judge has, after setting out the contentions raised by the defendants, rejected the contention of the defendants that since the product of the petitioner was not projected in the advertisement, and since the advertisement is projected against the entire class of 'Blues', the question of

disparaging the product of the petitioner did not arise. The relevant extracts from pages 749 and 750 of the said Judgment are reproduced hereunder:

@ Pg.749 "In sum and substance therefore the defendant No. 1 contended as follows:-

(i) In the advertisement the defendant No. 1 did not project the product of the petitioner;

(ii) In the advertisement the defendant No. 1 projected the entire class of blues;

(iii) Since the product of the petitioner was not projected in the advertisement, the question of disparaging the product of the petitioner did not arise and as such petitioner has no cause of action;

(iv) The statements made in the advertisement regarding "Blue" are all correct and the same had been made to show the technological advancement of the product of the defendants."

*@ Pg. 750 "Therefore, in a suit of this nature one has to look at whether the advertisement merely puffed the product of the advertiser or in the garb of doing the same directly or indirectly contended that the product of the other trader is inferior. There cannot be any dispute that in the concerned advertisements blue was stated to be of inferior quality. Although, for having depicted the container and the price in the advertisement together it is difficult to proceed on the basis that the Defendant No. 1 was not referring to Robin Blue, **but assuming in the advertisement insinuations are not made against Robin Blue and the same were directed to all blues as has been stated in no uncertain terms in the affidavits, can it be said that it was not made against Robin Blue? The answer is a definite "no", because Robin Blue is also a blue.***

It was sought to be contended that insinuations against all are permissible, though the same may not be permissible against one particular individual. I do not accept the same for the simple reason that while saying all are bad it was being said all and everyone is bad and anyone fitting the description of everyone is affected thereby.

It is true that one can boast about technological superiority of his product and while doing so can also compare the

advantages of his product with those which are available in the market. He can also boast about the relative advantages of his own product over the other products available in the market. He can also say that the technology of the products available in the market has become old or obsolete. He can further add that the new technology available to him is far more superior to the known technology, but he cannot say that the known technology is bad and harmful or that the product made with the known technology is bad and harmful. What he can claim is only that his product and his technology is superior. While comparing the technology and the products manufactured on the basis thereof, he can say that by reason of the new superior technology available to him, his product is much superior to others. He cannot, however, while so comparing say that the available technology and the products made in accordance therewith are bad and harmful.”(Emphasis Supplied)

The Learned Judge held at page 750 of the report that even assuming the advertisement would not have made insinuations directly against the Plaintiff’s product but the class of goods to which the Plaintiff’s goods belonged, it cannot be said that it was not made against the Plaintiff’s goods since the Plaintiff’s goods also belonged to that class of goods. The Learned Judge rejected the contention of the Defendant that insinuation against all is permissible though it may not be permissible against any one particular individual.

(ii) ***Dabur India Limited vs. Colgate Palmolive India Ltd.***².

In this case, the plaintiff manufactured and marketed its products under the brand name ‘Dabur’. The plaintiff in the course of its business also manufactured and marketed ‘Dabur Chyawanprash’. The plaintiff claims to have a market share of 63 per cent of total market of chyawanprash, which is a health tonic. The defendant was also engaged in the manufacture of various ayurvedic

2 . 2004 (29) PTC 401 (Del)

formulations including chyawanprash under the brand name Himani Sona - Chandi Chyawanprash. The defendant introduced a new product in the market namely Himani Sona-Chandi Amritprash and advertised the same on the audio-visual-media and by way of T.V. commercial. In the said advertisement, film star Sunny Deol is shown as declaring "*Garmion mein chyawanprash bhool jao, himani sona-chandi Amritprash khao*", which upon translation in English would read as follows: "*Forget chyawanprash in summers, eat Amritprash instead*". The plaintiff impugned the said commercial and contended that the same was a negative campaign of the product of the plaintiff, and that there is an effort on the part of the defendant of insinuating the product of the plaintiff. It was submitted that the clear message that is being sent by airing the said T.V. commercial was that consumption of chyawanprash is not advisable during summer season and that Amritprash is a more effective substitute of chyawanprash for the summer season. It was submitted that the said advertisement/T.V. commercial of the product of the defendant is deceptive and dubious and a malafide attempt to do negative campaign and bring in an insinuating advertisement campaign against the product of the plaintiff. It was submitted on behalf of the defendant that the said advertisement could not be said to be defamatory nor can it be said that it was a measure of negative campaigning. It was submitted that the defendant itself is manufacturing and marketing chyawanprash, which is to be used in the winter months and not in the summer months and therefore only a general statement made by the defendant through the commercial/TV advertisement cannot be objected to. It was also submitted that chyawanprash is a generic word and there is no exclusivity which could be claimed to the said word.

The Learned single Judge of the Delhi High Court (Dr. Mukundakam Sharma, J.) after considering the submissions of the parties concluded that, in his considered opinion even if there is no direct reference to the product of the plaintiff and only a reference is made to the entire class of chyawanprash in the generic sense, even in those circumstances disparagement is possible. The Learned Judge further proceeded to hold that when the defendant is propagating in the advertisement that there should be no consumption of chyawanprash during the summer months, it is also propagating that the plaintiff's chyawanprash should also not be taken during the summer months as it is not good for health and instead Amritprash, which is the defendant's product, should be taken.

Paragraphs 7, 8, 9 and 11 of the said judgment are reproduced hereunder for ready reference:

“7. In the light of the aforesaid legal position, I have to scrutinize and examine the position in the present case to come to a conclusion as to whether or not an injunction should be granted in favour of the plaintiff, as prayed for, for any disparagement or defamation or insinuation to the goods of the plaintiff in the advertisement in question. The aforesaid advertisement appears on the electronic media for a few seconds and it shows Sunny Deol saying that Chyawanprash is not to be taken in the summer months and instead Amritprash is to be taken. The message that is sought to be conveyed by the aforesaid T.V commercial is that consumption of Chyawanprash during the summer months is not advisable and Amritprash is more effective substitute for Chyawanprash in summer season.

The plaintiff is manufacturing and marketing and has a market share of 63% of the total market of Chyawanprash throughout India and, therefore, is vitally interested in seeing that Chyawanprash is sold through India during all the seasons. If, on the other hand, the said product is sold and marketed only for a few months of the year and not throughout the year the business of the plaintiff is going to be vitally and prejudicially affected. It is also brought on record that the defendant has a market share of about 12% of the total market in Chyawanprash throughout India whereas in the market of Amritprash, which is a new product being brought out by the defendant, there is no other competitor in the market. Therefore, what is sought to be done by the defendant is to forbid and exclude user of Chyawanprash during the summer months so that it can exclusively capture the Indian market during the summer months, which is sought to be done by sending a message that consumption of Chyawanprash during the summer season serves no purpose and Amritprash is more effective substitute thereof and thereby attempting to induce an unwary consumer into believing that Chyawanprash should not be taken in summer months at all and Amritprash is the substitute for it. The aforesaid effort on the part of the defendant would be definitely a disparagement of the product Chyawanprash and even in generic term the same would adversely affect the product of the plaintiff. The presence of the defendant in the market is only to the extent of 12% of the total market of Chyawanprash in India whereas the plaintiff has about 67% share/presence in the Indian market and if sale of Chyawanprash is weeded out from the

market during the summer months, the plaintiff's presence in the market for sale of Chyawanprash is adversely affected. In my considered opinion, even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of Chyawanprash in its generic sense, even in those circumstances disparagement is possible. There is insinuation against user of Chyawanprash during the summer months, in the advertisement in question, for Dabur Chyawanprash is also a Chyawanprash as against which disparagement is made. To the same effect is the judgment of the Calcutta High Court in Reckitt & Colman of India Limited v M.P. Ramchandran & Another (supra)."

8. *"Mr. Chandhiok, appearing for the defendant vehemently submitted that Chayawanprash is a generic word and the plaintiff cannot have a monopoly or sole rights of the use of the said generic word and that the impugned advertisement, at any rate, did not make a slightest reference to the product of the plaintiff and on the contrary it makes reference to its own product Sona Chandi Amritprash and, Therefore, it cannot be said that there is any disparagement of the product of the plaintiff."*

"9. In my considered opinion, when the defendant is propagating in the advertisement that there should be no consumption of Chayawanprash during the summer months, it is also propagating that the plaintiff's Chayawanprash should not also be taken

during the summer months as it is not good for health and instead Amritprash, which is the defendant's product, should be taken. Such an advertisement is clearly disparaging to the product of the plaintiff as there is an element of insinuation present in the said advertisement."

"11. The defendant could not have taken up a plea that Chayawanprash, which is a competitor to Amritprash, is bad during the summer months and since the defendant has resorted to the same, the same is disparaging and, Therefore, the case in hand calls for an action in terms of the prayer made in the injunction application....." (emphasis supplied)

(iii) *Dabur India Ltd. Vs. Colgate Palmolive*³

In this case, the plaintiff, Dabur India Limited, is the manufacturer of Dabur Lal Dant Manjan powder and the defendant Colgate Palmolive India Ltd. is the manufacturer of Colgate Tooth Powder. The impugned T.V. advertisement complained off by the plaintiff showed Cinestar Sunil Shetty stopping the purchasers of Lal Dant Manjan powder. He further informed them of the ill effects of such Lal Dant Manjan by rubbing it on the purchaser's spectacles, which leaves marks which are termed by him as being akin to sandpapering. He also endorses the defendant's Colgate Tooth Powder as being 16 times less abrasive and non-damaging to the spectacles. He also was heard telling the purchasers that it is

3 . 2004 (29) PTC 401 (Del)

easy to change spectacles but not one's teeth. It was contended on behalf of the Plaintiff that it had an 80 per cent share of the ayurvedic tooth powder trade and is directly hit by this advertisement as the principal producer, by the denigration of the generic product Lal Dant Manjan. It was submitted on behalf of the plaintiff that though the impugned advertisement made no direct reference to Dabur Dant Manjan i.e. the plaintiff's product, the visual representation in the offending advertisement leaves no manner of doubt that the product being referred to is Lal Dant Manjan manufactured and marketed by the plaintiff. On the other hand, the defendant contended that the advertisement does not identify and refer to products of the plaintiff; that it is open to the defendant while praising its own product to point out the defects/deficiencies in the rival product; the criticism is based on the studies conducted in United States of America, which found such Lal Dant Manjan tooth powder to damage tooth enamel which was affirmed by two dentists of repute; and in any case the defendant is prepared to drop the red container/bottle which according to the plaintiff identifies its product. The offer made by the defendant to drop the red container/bottle from the advertisement was rejected by the plaintiff who insisted that even otherwise they are entitled to an order and injunction against the defendant from airing the said advertisement.

The Defendant relied upon the meaning of the word disparage from Black's Law Dictionary which is set out in paragraph 3 (k) of the judgment and reproduced hereunder:

“disparage (di-spar-ij), vb. 1. Hist. To connect unequally (e.g., to marry below one's status). 2. To dishonor (something or someone) by comparison. 3. To unjustly

discredit or detract from the reputation of (another's property, product or business).

Disparagement (di-spar-ij-ment), n. A false and injurious statement that discredits or detracts from the reputation of another's property, product, or business....."

The Learned Single Judge (Mukul Mudgal, J.), after considering the submissions advanced by the plaintiff as well as the defendant proceeded to hold that the law relating to generic disparagement of a specified commodity and the entitlement of one of such unidentified manufacturer of such decried product is settled by the decisions of the Delhi High Court in *Dabur India Ltd. Vs. Colgate Palmolive Pvt. Ltd.* (supra) and ***Reckitt & Coleman vs. Kiwi T.T.K. Ltd.***⁴ and that the Learned Judge is prima facie of the view that the offending advertisement is clearly covered by the fourth principle set out in the two judgments namely - slandering of a rival product as bad is not permissible. Paragraphs 13, 19, 20 and 21 of the said judgment are relevant and are reproduced hereunder for ready reference.

"13. While Mr. Rohatgi is right in submitting that the generic disparagement was not to be found in the judgment of the learned Single Judge in Reckitt & Coleman's case (supra) which was followed in Dabur's case, yet I am of the view that the position of law about generic disparagement in Dabur's case was not only justified but also warranted. Even if the ratio of the two learned Single Judge's judgments of this Court is considered to be only in respect of an

4 . 1996 PTC (16) 393

identified product, in principle there is no reason why the manufacturer of a disparaged product, which though not identified by name, cannot complain of and seek to injunct such disparagement.” (emphasis supplied)

“19. I am further of the view that generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or general of a product within which a complaining plaintiff falls and raise a defense that the plaintiff has not been specifically identified. In this context the plaintiff has rightly rejected the offer of the defendant to drop the container from its advertisement so as to avoid the averred identification of the plaintiff's product. I must also deal with a English judgment of Willes J relied upon by the counsel for the defendant (for which no citation is indicated), the entire reasoning of which reads as under.....”

“20. The practice of undue obeisance to English jurisprudence without any thought to the merit and reasoning of such judicial wisdom should also be discouraged. When there is a judgment of Hon'ble Justice Dr. M.K. Sharma directly on the point of generic disparagement, I see no reason why one should travel westwards for seeking enlightenment. Similarly on the question of rival product disparagement the Division Bench of this Court in Pepsi Co. (supra) has also held that defamation of the product of a rival manufacturer cannot be done. Undeniably it is not the puffing up of the defendant's product i.e. the Colgate Tooth powder which can be found objectionable

but the running down of a rival product which is the situation in the present case.”

“21. The advertisement campaign on the visual media has an immediate impact on the viewers and possible purchaser's mind particularly when a well-known cinestar is endorsing it.....”

(iv) Annamalayar Agencies Vs. VVS & Sons Pvt. Ltd.

& Ors.⁵

In this case, the grievance of the plaintiff was that the first defendant company which manufactures VVD gold coconut oil issued three advertisements through TV channels and thereby disparaged the plaintiff's product namely Parachute. In the advertisement no.1, two tender coconuts, one in green colour and another in blue colour were shown and an actress wearing a green dress appears on the screen and asks a question, *Which is natural?* Thereafter she herself picks up a green coconut and says that the green coconut is natural.

In the advertisement no. 2, an actress wearing a green dress picks up one of the green coloured plastic bottles of VVD arranged on a shelf and says this is 100% pure and natural and this is what I want. Then the next shot shows an actress wearing a green dress in the foreground and the lady wearing a blue saree in the background. The lady wearing the blue saree has a blue coloured bottle in her left hand and a VVD bottle in her right hand. She looks at the blue bottle which is in her left hand and shakes her head disapprovingly and puts the bottle down. Then she looks at the VVD bottle in the

5 . 2008 (38) PTC 37 (Mad)

right hand and lifts the bottle up and says VVD Gold, this is what I want.

In advertisement no. 3, which is shown in fast forward mode, people are seen going into a supermarket where two shelves are displayed, they pick up all the green bottles in no time and empty the shelf which is once again refilled, while the other shelf with the blue bottles is shown as remaining almost untouched.

The plaintiffs therein contended that the said three advertisements are nothing but a dishonest attempt on the part of the 1st defendant to show that the plaintiff's product is not a pure and natural product. It was therefore a 100% disparaging attempt to discredit the plaintiff's product. According to the plaintiff, the blue bottle which was shown in the advertisements refers only to the plaintiff's blue bottle, as the blue bottle shown in the advertisements bears a bar code and only the plaintiff's blue bottles have a bar code.

The first defendant denied that the aim of the advertisement was to disparage the plaintiff's brand Parachute, but submitted that the aim was to drive home the message that VVD is 100% pure coconut oil. The 1st defendant also contended that their advertisements do not refer to Parachute alone and it refers to all other brands also, and most of the other brands sell their oil in blue coloured plastic bottles. They also contended that there are at least six other brands which have blue coloured bottles having bar code.

The Learned Single Judge of the Madras High Court (S. Rajeswaran, J.) has, after referring to several judgments on the issue of disparagement of products summarised the legal

principles in paragraph 29 of his Judgment which is reproduced hereunder:

“(1) A manufacturer of a disparaged product which though not identified by name can complain of and seek to injunct such disparagement.

(2) Generic disparagement of a rival product without specifically identifying or pinpointing the rival product is equally objectionable.

(3) Advertisement campaign on visual media has an immediate impact on the viewers and possible purchasers' mind particularly a well-known cinema star is endorsing it.

(4) There must be a dividing line between statements that are actionable and those which are not.

(5) When a claim of superiority over a rival product is made and until the same is proved by a panel of experts, an order of interim nature should operate against those advertisements.

(6) Advertiser has a right, to boast of its technological superiority in comparison with a product of a competitor, however while doing so, he cannot disparage the goods of the competitor.

(7) If the Defendants highlight its better future while comparing its product with that of the Plaintiff in an advertisement, no possible objection can be raised thereto.

(8) Courts will injunct an advertiser from publishing an article if the dominant purpose is to injure the reputation of the Plaintiff.

(9) The factors to be kept in mind to decide the question of disparagement are (1) intent of the commercial (2) manner of the commercial (3) story line of the commercial, and (4) the message sought to be conveyed by the commercial.

(10) The degree of disparagement must be such that it would tantamount to or almost tantamount to defamation.

(11) An advertiser can say that his product is better than that of his rival, but he cannot say that the rival's product is inferior to his product."

The Learned Judge after discussing the submissions advanced on behalf of the plaintiff as well as the defendant concluded that the impugned advertisements are certainly causing disparagement of the product of the Plaintiff.

Paragraphs 33, 34, 35, 36 and 37 are reproduced hereunder for ready reference:

"33. In so far as advertisements 2 and 3 are concerned, they definitely refer to a plain unnamed blue bottle and drives home a message that the blue bottle does not contain 100% pure and natural coconut oil whereas the 1st Defendant's product alone contain 100% pure and natural coconut oil. It is one thing to say that the 1st Defendant's product alone is 100% pure which is not actionable and it is another thing to say that the Plaintiffs product is not 100% pure which is actionable."

"34. Even though it was denied by the 1st Defendant that they did not mean to run down the product of the Plaintiff, it was admitted by them that it was aimed at all the blue bottles including that of the Plaintiff. It is also not in dispute that only the Plaintiff and the 1st Defendant are holding the majority market share in the State of Tamil Nadu and in such circumstances it cannot be said that no attempt was made by the 1st Defendant to disparage the product of the Plaintiff namely Parachute."

“35. Even in the counter affidavit, the 1st Defendant tries to compare its product with that of the product of the Plaintiff by name Parachute advanced which is not 100% pure edible grade coconut oil. But the 1st Defendant did not come forward with the relative merits of the Plaintiffs product namely. Parachute 100% pure coconut oil and its product which raises a serious doubt about the intention of making such advertisements. It is also not a case of the 1st Defendant that both coconut oils were tested by a panel of independent experts and it was proved that the 1st Defendant's product in 100% pure coconut oil and Parachute is not so. In such circumstances, advertisement Nos. 2 and 3 are certainly causing disparagement of the product of the Plaintiff.”

“36. If it is an innocuous advertisement without any intent to malign, defame and disparage the product of the Plaintiff, then there was no necessity of showing a blue bottle and comparing its purity by more than one in action.”

“37. The 3rd advertisement also goes to show that the general public not picking the blue bottles stacked in the shelf whereas the 1st Defendant's product are being grabbed with enthusiasm and swiftness. This definitely would send a wrong message to television viewers and the buyer of the coconut oil that the blue bottle products are inferior to that of green bottle products of the 1st Defendant, which is nothing but openly disparaging the product of the Plaintiff.”

(v) *Godrej Consumer Products Limited V Initiative Media Advertising*⁶

6 . 2012 (52) PTC 260 (Bom)

This is the judgment of this Court on disparagement actions. The judgment was cited by the Plaintiff to emphasise the general principles of disparagement even when the plaintiff's product is not referred to by name, and to emphasise the instant and lasting effect that a television commercial has on viewers. The facts of the case are peculiar, since though the product of the plaintiff was not named, but a label similar to that of the plaintiff was used. The message conveyed by the advertisement was, that the device of the defendant was more effective than the one already plugged in (which had a label similar to that of the plaintiff). In the facts of the case had it not been for the depiction of the plaintiff's label on the product depicted in the advertisement, the effect would have been only that of puffing and hence the relief was moulded. Paragraphs 18, 19 and 20 of the judgment of the learned Single Judge (B. R. Gavai, J.) are reproduced hereunder:

"18. It is equally settled that to decide the question of disparagement, the following factors are to be kept in mind:

(i) Intent of commercial

(ii) Manner of the commercial

(iii) Storyline of the commercial and the message sought to be conveyed by the commercial.

Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable."

"19.I am aware of the fact that the comparison that has to be done should be from

the view point of an ordinary person of average intelligence. Upon comparison of the labels used on the bottles in the advertisements and the label of the plaintiff's product, I find that the label used in the advertisements is capable of giving impression to the ordinary man of average intelligence that the bottle which is initially used in the machine is that of the plaintiff's product...."

"20. As already discussed hereinabove, an intent of commercial; the manner of commercial; storyline of commercial; and the message sought to be conveyed would be material. If the intent of the commercial is only for the purpose of promotion of the goods of the manufacturer, the same would not be actionable but if the intention of the commercial is disparaging the product of the plaintiff, then an action would lie. From the storyline and the manner of the advertisements in question, it can clearly be seen that the message that is sought to be given in the advertisements, is that even after the machine with product containing label alike plaintiff's product is put on, it has no effect and the mosquitoes go on troubling which require the person in the room to indulge in acrobatics etc. It is to be noted that the advertisement campaign or visual media has an immediate impact on the viewers and possibly purchaser's mind, particularly, when a well-known cinestar is endorsing it. It is further to be noted that the matter has to be looked from the view point of the ordinary person of average intelligence. Though the advertisements in question may show the product having a label alike that of plaintiff's product for a few seconds, the possibility of the same being registered in the mind of an average consumer and linking it with

the ineffectiveness of the product cannot be ruled out.”

(vi) ***Eureka Forbes Ltd. V Pentair Water India***⁷

In this case, the question before the Court was whether the advertisement in question amounts to disparaging the product of the appellant Company and whether the order of the trial Court suffered from perversity, or is capricious. The Learned Single Judge of the Karnataka High Court (V. Jagannathan, J.) held that though in the advertisement there was no mention of the product, ‘Aquaguard’ of the Appellant, yet the advertisement viewed as a whole appears to be generic in nature and is actionable.

Paragraphs 15 and 19 of the said decision are reproduced hereunder:

“15.The disparagement though not specific in the sense that there is no mention of the word ‘Aquaguard’, yet, taken on the whole, the advertisement though appears to be generic in nature, still becomes actionable and, as such, the appellant is right in contending that the said advertisement has affected its product.”

“19. Therefore, having regard to the aforesaid position in law, in the instant case, the advertisement will have to be held to be a disparaging one, even in a generic sense and hence is actionable.”

9. The above judgments not only categorically specify as to when a product can be said to have been disparaged, but have also settled the principle of law that generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally

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2007 (35) PTC 556 (Karn)

objectionable. In other words, no one can disparage a class of products within which a complaining plaintiff falls and raise a defense that the plaintiff has not been specifically identified. Even if there is no direct reference to the product of the plaintiff and only a reference is made to the entire class of products in its generic sense, even in those circumstances disparagement is possible.

10. With the above issues being answered, I now turn to the two impugned TVCs of Defendant No.1, which according to the Plaintiff disparages the entire class of frozen desserts in which category of products, the Plaintiff has a market share of 51.3 per cent and therefore the products of the Plaintiff in this category are also disparaged and affected. The two impugned TVCs are annexed and marked Exhibits-H and L to the Plaint. The story board of the impugned TVCs are reproduced hereunder:

1st TVC:

A



Shriya, a girl with a dental issue visits a dentist

B



Dentist- " Don't worry beta, kuch nahi hoga"

C



Shriya- " Pata hai, mujhe kuch nahi hoga!" The doctor and nurse are surprised to see her confidence.

D



Doctor- " Isse ice cream khilana, jaldi thik ho jaygi"

E



Shriya is visibly happy

F



VO- Shriya ki bahaduri ke innaam ko pure rakhna zaruri hai

G



VO- Usse real milk wala Amul ice cream khilayein

H



Disclaimer

VO- Vanaspati wala nahi

I



Disclaimer

VO- Unhe ice cream nahi frozen dessert kehte hain

J



Disclaimer

VO- Ice cream word ke liye pehle pack check karein

K



VO- Toh real milk real ice cream, Amul hi khao India

The Disclaimer is in very minute print and it is impossible for any viewer to read the same. However, the contents of the Disclaimer is reproduced hereunder:

"FSSAI -- the apex body of food safety and regulatory norms in India defines Ice-cream as milk based product that has not less than 10% milk fat and Frozen Dessert as Vegetable Oil based product that has not less than 10% Vegetable oils. It also prohibits any misleading practices of presenting frozen desserts as ice-creams. Vanaspati mentioned in the voice over refers to Vegetable Oil."

2ND TVC:

The story board of the second TVC is identical to the 1st TVC with regard to all the above screen shots, save and except the voice over in the third last screen shot where the word 'vanaspati tel' is used in place of 'Vanaspati' and the Disclaimer in the last three screen shots also uses the word 'vanaspati tel' in place of 'vanaspati'. However, the entire story board of the 2nd TVC is reproduced hereunder :

1



Shriya, a girl with a dental issue visits a dentist

2



Dentist- " Don't worry beta, kuch nahi hoga"

3



Shriya- " Pata hai, mujhe kuch nahi hoga!" The doctor and nurse are surprised to see her confidence.

4



Doctor- " Isse ice cream khilana, jaldi thik ho jaygi"

5



Shriya is visibly happy

6



VO- Shriya ki bahaduri ke inam ko pure rakhna zaruri hai

7



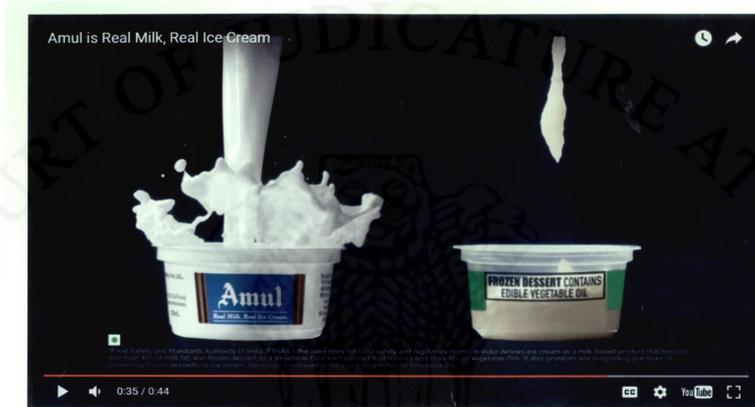
VO- Usse real milk wala Amul ice cream khilayein

8



VO- Vanaspati tel wala nahi

9



VO- Unhe ice cream nahi frozen dessert kehte hain

10



VO- Ice cream word ke liye pehle pack check karein

The above three Disclaimers are in such small minute letters that it would be humanly impossible for any person watching TVC-2 to read the same. However, the Disclaimer is reproduced hereunder:

" FSSAI - the apex body of food safety and regulatory norms in India defines Ice-cream as milk based product that has not less than 10% milk fat and Frozen Dessert as Vegetable Oil based product that has not less than 10% Vegetable oils. It also prohibits any misleading practices of presenting frozen desserts as ice-creams. Vanaspati Tel mentioned in the voice over refers to Vegetable Oil."

11. Amongst others, the main grievance of the Plaintiff with regard to the two TVCs is that the Defendant No. 1 has in the first TVC mislead the consumers of frozen desserts by stating that Amul Icecream contains pure milk, whereas frozen desserts contain Vanaspati (which in common parlance is referred to as Dalda or ghee), and which admittedly is bad for health. In the first TVC, the Defendant No. 1 has also depicted milk flowing /overflowing in the cup of Amul Icecream and Vanaspati / Ghee going into the cup of frozen dessert, and has through the said TVC maligned, belittled and discredited the entire category of frozen desserts and sought to influence the customers to refrain from buying /consuming frozen desserts, the same not being the correct choice. After the Plaintiff took up their grievance with the Defendant No. 1, they substituted the word 'Vanaspati' by 'Vanaspati tel' in the voice over and in the Disclaimer found in the Screen Shot Nos. 8, 9 and 10 in the 2nd TVC reproduced above. However Defendant No. 1, as can be seen from Screen Shot Nos. 8 and 9 of the 2nd TVC continued to show semi solid Vanaspati / ghee going into the cup of frozen dessert. The 2nd TVC is therefore nothing but the continuation of 1st TVC. According to the Plaintiff, Vanaspati which is hydrogenated vegetable oil and which is perceived to be bad for health by the

consumers, is not at all used by the Plaintiff and or Defendant Nos. 3 and 4, who are having 70% share in the Frozen Dessert Market. It is contended by the Plaintiff that despite this, Defendant No.1 by publication of the two impugned TVCs are inter alia conveying to the consumers, by a negative campaign, that all frozen desserts contain Vanaspati, and are therefore impure, unhealthy and inferior and not the correct choice. Defendant No. 1 is therefore committing the tort of slander of goods and injurious / malicious falsehood and by generic disparagement of the product 'frozen dessert' are also disparaging the goods of the Plaintiff, which will adversely affect their presence in the market for sale of frozen desserts.

12. According to Defendant No.1, it is perfectly lawful and legitimate for Defendant No. 1 to state that frozen desserts contain either vanaspati or vanaspati tel; all that is stated in the TVCs constitutes truth and the material on record satisfies the same; the two TVCs do not in any manner disparage or denigrate frozen desserts or constitute slander of goods as alleged by the Plaintiff. According to the defendant no.1 they have not even shown the cup of the plaintiff but have shown a neutral cup of frozen dessert in their Advertisements/TVC's.

13. For a better understanding of the controversy which is the subject matter of the Suit, the statutory as also the technical difference between the two rival categories of products involved in the matter namely ICE CREAMS and FROZEN DESSERT is necessary. Under the FSS Regulations, ice creams and frozen desserts are both food products classified as dairy based desserts. Ice creams are made out of milk/milk solids. In addition to milk and/or milk solids, fat is also required. This fat is either milk fat or vegetable fat, the other ingredients remaining the same. Globally, a majority of icecream manufacturing companies also use non-dairy fat and outside India these products fall within

the category of ice creams. As per Indian Regulations products which contain non dairy fat are categorised as frozen desserts. Both ice creams and frozen desserts contain milk solids but what makes them different is that in law, ice creams must contain over 10 per cent milk fat, whereas frozen desserts must contain over 10 per cent total fat (i.e. milk fat and/or edible vegetable oil). Rest of the ingredients are the same.

14. At this stage it is also necessary to understand the difference between hydrogenated fat or hydrogenated vegetable oil or Vanaspati and edible vegetable oil. The hydrogenated vegetable oil (Vanaspati) and edible vegetable oil are not the same and both are different in the process of manufacturing, composition and product properties. The law also distinguishes between edible vegetable oil and hydrogenated vegetable oil. The definitions of hydrogenation, hydrogenated vegetable oils and vegetable oils from the FSS Regulations are reproduced hereunder:

"Hydrogenation " means the process of addition of hydrogen to an edible vegetable oil using a catalyst to produce a fat with semi-solid consistency" (emphasis supplied)

"Hydrogenated vegetable oils: 1. Vanaspati means any refined edible vegetable oil or oils, subjected to a process of hydrogenation in any form. It shall be prepared by hydrogenation from groundnut oil, cottonseed oil and sesame oil or mixtures thereof or any other harmless vegetable oils allowed by the Government for the purpose. Refined sal seed fat, if used, shall not be more than 10 per cent of the total oil mix..." (emphasis supplied)

"Vegetable oils" means oils produced from oilcakes or oilseeds or oil bearing materials of plant origin and containing glycerides."

It needs to be noted here that in view of the above definitions, reference to 'vanaspati' would mean a fat with semi solid consistency, and it is not

necessary to specify/clarify whilst referring to Vanaspati that it is in thick or semi solid or solid form.

15. The distinction between hydrogenated vegetable oil/Vanaspati oil and edible vegetable oil is extremely relevant in the context of the present Suit, since Vanaspati/hydrogenated vegetable oils are perceived to be bad for health, whereas edible vegetable oils per se, are not. The difference between the nutrition profile of Vanaspati and edible vegetable oil is reproduced hereunder :

	Vegetable Oil (per 100g)	Hydrogenated vegetable oil (per 100 g)
Energy (kcal)	884	884
Protein (g)	0	0
Carbohydrate (g)	0	0
Sugars (g)	0	0
Dietary Fibre (g)	0	0
Total fat (g)	100	100
Saturated Fat (g)	49.3	93.7
Mono unsaturated (g)	37	0.26
Poly Unsaturated (g)	9.3	0
Cholesterol (mg)	0	0
Trans fat (g)		0.26
Sodium (mg)	0	6

As can be seen from the above, edible vegetable oil has lower saturated fat and does not contain any trans-fat or cholesterol, whereas Vanaspati/hydrogenated vegetable oil contains higher saturated fat and trans-fat and is perceived to be unhealthy. Extracts from the literature published, inter alia, by the National Institution of Nutrition (Dietary Guidelines for Indians, etc.) containing observations pertaining to the effects of the saturated fat and trans-fat contained in Vanaspati are annexed as Exhibit-J to the Plaint.

16. In paragraphs 6.13 and 6.14 of the Affidavit-in-Reply to the Notice of Motion, Defendant No. 1 itself has admitted that it is an undisputed position that Vanaspati is

harmful and have also mentioned that the Plaintiff itself has annexed at Exhibit-J to the Plaint, the dietary guidelines which describes what Vanaspati is, and the risk of heart disease associated with it. Defendant No. 1 in the said paragraphs further makes a reference to the Article at running page 82 annexed to the plaint which discusses the risk of coronary heart disease associated with Vanaspati.

17. Keeping in mind that Defendant No.1, as set out hereinabove, admits that the use of Vanaspati is harmful for health and the risk of heart disease associated with it, let us go back to the storyline of the first impugned TVC set out in paragraph 8 above. The same shows Shriya a young child, having a dental problem. She visits the Dentist with her father and is shown in the Clinic, demonstrating courage during her entire check-up, rare for children of her age. In the voice over to screen shots F, G, H, I and J it is, inter alia, stated that ***"Shriya ki bahaduri ke inaam ko pure rakhna zaruri hai", "Usse real milk wala Amul ice cream khilayein", "Vanaspati wala nahi", "unhe ice cream nahi frozen dessert kehte hain", "ice cream word ke liye pehle pack check kareinreal milk real ice cream Amul".*** (emphasis supplied) Screen shots H and I along with the said voice over ***"Vanaspati wala nahi", unhe ice cream nahi frozen dessert kehta hai,*** also depicts two cups side by side showing a stream of milk flowing/overflowing into the Amul product, whereas "Vanaspati" i.e. semi solid product flowing into the cup of frozen dessert. Furthermore, the product of Defendant No. 1 is shown as sparkling white, whereas the frozen dessert equivalent is depicted by a murky yellowish colour representing Vanaspati. By the above voice over and depiction, Defendant No. 1 has in no uncertain terms sought to convey the message to the consumers that Shriya needs to be given the product of the Defendant i.e. Amul ice cream, which is **pure, and she should not be given the product which contains Vanaspati and which product is called frozen dessert.** The Defendants have therefore made a false representation

to the consumers and also indulged in a negative campaign that no frozen dessert is pure, and only Amul ice cream is pure, as all frozen desserts contain Vanaspati, and are therefore inferior. The Defendant No. 1 has laid stress on 'Vanaspati' clearly with a view to suggest that therefore frozen desserts are not pure, are unhealthy and are inferior, and Amul ice cream which is made of pure milk should be consumed and not frozen desserts. Defendant No. 1 has therefore clearly made an attempt to influence the consumers not to buy frozen desserts. Additionally, as the story has a child protagonist, it leaves a scare in the minds of the viewers, who may also be parents, that Frozen Desserts are unsafe, not fit for children and hence are not the "correct choice". It certainly leaves an impression that when a child is given frozen dessert the child is consuming something which is full of Vanaspati. This is also in view of the product of Defendant No.1 being shown as sparkling white, whereas the frozen dessert is depicted with a murky yellowish colour. Though there is a Disclaimer shown in the first TVC, in very small illegible letters inter alia stating that "Vanaspati" mentioned in the voice over refers to "vegetable oil", the said representation itself is again incorrect and misleading, in view of it being explained hereinabove, that as per the law, i.e. under the FSS Regulations, Vanaspati cannot be equated with vegetable oil.

18. The entire first TVC is therefore prepared by the Defendant No.1 to disparage the entire category of frozen desserts by putting a scare in the mind of the consumers that it contains Vanaspati (which is perceived as unhealthy) and is therefore not pure, is inferior, unhealthy, not the correct choice, should not be consumed and instead the consumers should turn to the product of the Defendant No.1. From the case law discussed in paragraph 8 above, it is clear that it is settled law that the manufacturer of a product whilst advertising his product/s cannot say directly or indirectly that the product of the competitor is bad and/or harmful. If a manufacturer indulges in such negative campaigning,

the same would amount to slandering of a rival product, which is not permissible in law, and entitles any manufacturer affected by such slandering of his product to an injunction against such negative campaigning. Thus I am convinced that by the first TVC the Defendant No. 1 has indulged in negative campaigning against its rival products i.e. 'Frozen Desserts' and is therefore guilty of generic disparagement and slander of the entire category of the 'Frozen Dessert' products.

19. A revisit to the second TVC which is reproduced in paragraph 8 above, makes it clear that **the only change** that the Defendant No. 1 made to the first impugned TVC, was that it replaced the word "Vanaspati" with "Vanaspati oil/tel" and commenced publication of the same on various digital media. Save and except the above change, all the other visual and oral features of the first impugned TVC were kept as it is in the second impugned TVC. What is most important is the fact that no change has been made in the visual representation of the second impugned TVC which shows Vanaspati falling into the cup along with the voice over stating '*Vanaspati Tel Wala Nahi' 'unhe ice cream nahi frozen dessert kehte hai'*' thereby once again attempting to influence the consumers of Frozen Dessert, not to consume the same on the ground that Frozen Desserts are not pure, are unhealthy, inferior, and therefore not the correct choice. This dominant effect is not taken away by the use of the word 'tel' in the voice over. The addition of the word "tel" therefore does not make any difference to the intent, manner and storyline of the advertisement taken as a whole. The Disclaimer in letters which are illegible also makes no difference. The second TVC is therefore nothing but a continuation of the first TVC. In this regard the decision of the Delhi High Court in the case of *Karamchand Appliances Pvt. Ltd. vs. Shri Adhikari Brothers and others*⁸,

8 . 2005 (31) PTC 1 Del.

wherein the Court inter alia accepted the submission of the plaintiff that the change in the modified advertisement was so insignificant that the viewers of the commercial would not notice the same and the viewers who had seen the original advertisement were bound to recall the same in their memory. In its said decision the Court has also observed that since there is no cut and dry formula to decide whether or not the goods of a trader or manufacturer are disparaged or not and would depend on the facts and circumstances of each case, all that the Court need to be conscious of is that while disparagements may be direct, clear and brazen, they may also be subtle, clever and covert. Paragraphs 19, 21, 26, 27, 28, 29, 30 and 32 of the said decision are relevant and reproduced hereunder:

“19. Two propositions clearly emerge from the above pronouncements, namely,

(1) that a manufacturer or a tradesman is entitled to boast that his goods are the best in the world, even if such a claim is factually incorrect, and

(2) that while a claim that the goods of a manufacturer or the tradesman are the best may not provide a cause of action to any other trader or manufacturer of similar goods, the moment the rival manufacturer or trader disparages or defames the goods of another manufacturer or trader, the aggrieved trader would be entitled to seek reliefs including redress by way of a prohibitory injunction. Question No. 1 is accordingly answered in the negative.”

“21. Whether or not the goods of a trader or manufacturer are disparaged would depend upon the facts and circumstances of each case. There is no cut and dried formula, for general application. All that the Court need to be conscious of is that while disparagements may be direct, clear and brazen, they may also be subtle, clever or covert. What is the statement made by the rival trader and how it belittles, discredits or detracts from the reputation of another's property, product or business is the ultimate object of the judicial scrutiny in such cases. Before I examine the rival submissions in the instant

case, I may refer to a few of cases where the Courts found the statements to be disparaging, hence actionable.”

... ..

“26. Coming then to the facts of the present case, the defendant’s commercial, which provoked the filing of the suit, showed the pluggy device of the plaintiff and dubbed the same as an obsolete 15 years old method of chasing away mosquitoes. On a comparison with its own product the defendant’s advertisement claimed that it was the latest machine available in the market which chased away the mosquitoes at twice the speed. This Court’s order found that advertisement to be disparaging and restrained its telecast. In appeal the Division Bench made a modification to the extent that the advertisement can go on but without disparaging the plaintiff’s product. The defendant’s case now is that it has modified the advertisement and instead of showing the pluggy device which resembled the plaintiff’s machine, it has shown a different device which has a different design and colour combination. The plaintiff cannot, Therefore, complain of any disparagement in the modified commercial which simply puffs up the plaintiff’s product - something that the defendant in law is entitled to do.”

“27. On behalf of the plaintiff Mr. Jaitley argued that the change in the shape of the device, was so insignificant that the viewers of the commercial would not even notice the same. He relied upon the power of recall of the viewers and submitted that the viewers having seen the original advertisement were bound to recall the same in their memory and ... (illegible) the plugg now being shown with the plaintiff’s machine....”

“28. The pluggy device which was shown in the first version of the defendants commercial no longer appears in the modified version in as much as the shape and the colour combination of the device is marginally altered. The defendant’s version is that what is shown in the modified version is a device, the design whereof is registered in its name. In other words, the commercial does not any more show

the plaintiff's device or any device deceptively similar to it. Two aspects need to be examined in that backdrop. The first is whether the altered design of the pluggy device makes any material difference in the matter of conveying the message which the commercial intends to convey to the viewers. The second aspect is whether a disparagement of a general concept is actionable in law, if such disparagement is otherwise unsustainable on the touchstone of any technological advantage, which the defendant's product may be enjoying over the product, that is, disparaged."

"29. There is considerable merit in the submission made by Mr. Jaitley that the original advertisement, against which the plaintiff had complained, showed a pluggy device deceptively similar to the defendant's device, if not the very device which the defendant manufactures and markets. The message contained in the advertisement was that pluggy devices used as mosquito repellents in which the defendant is the market leader are old, obsolete and outdated method of chasing the mosquitoes and deserve to be discarded as the lady model in the commercial actually does so. Re-run of the same commercial, with a slightly modified design of the device or colour scheme, does not materially alter either the message or the basis on which the same is being sent across. The viewers will, in all likelihood, view the modified version also in the light of the first version that appeared on the television networks before it was restrained by the Court."

"30. ...A disparagement even if generic would remain a disparagement and can be restrained at the instance of a party, who manufactures or trades in that class of goods regardless whether the technology used is modern or obsolete. The defendant is indeed entitled to boast that its product is the latest in the market and even the best but it cannot describe either the technology or the concept used by any other manufacturer or trader in the manufacture or sale of his products as obsolete or worthless. Comparative advertisement is permissible, so long as such comparison does not disparage or denigrate the trademark or the products of a competitor. Comparison of different features of two products showing the

advantages, which one product enjoy over the other is also permissible provided such comparison stops short of discrediting or denigrating the other product. Viewed thus the defendant's commercial, which shows the model in the same taking out the pluggy device by describing it as 15 years old and obsolete method is a clear case of disparagement of devices like that of the plaintiff's that are based on that concept or technology and would therefore, be impermissible."

"32. I am, Therefore, of the view that the telecast of the modified commercial is liable to be restrained not only because the commercial disparages the product manufactured and marketed by the plaintiff but also because the claim made by the defendant about any technological advantage justifying the disparagement are not substantiated."

20. Therefore all the observations made hereinabove qua the 1st TVC, are also applicable to the 2nd TVC. From the content, intent, manner and storyline of both the TVCs it is clear that Defendant No. 1 seeks to take undue advantage of the perception of the public that Vanaspati is bad for health and creates a false impression that all Frozen Desserts are made using Vanaspati and are consequently not pure, inferior, bad for health and not the correct choice, i.e. should not be consumed by the public who should instead have the product of the Defendant No.1, i.e. ice cream. Therefore, as explained above, addition of the words 'Vanaspati tel' instead of 'Vanaspati' in the 2nd TVC makes no difference. The justification given by Defendant No.1 for using the words 'vanaspati tel' in the voice over and disclaimer in the 2nd TVC cannot be accepted and is dealt with in detail in paragraph 33 hereinafter. It also needs to be clarified that only on the basis of the words Vanaspati and Vanaspati tel used in the TVCs, it cannot be said that the TVCs are disparaging the category of Frozen Desserts, but since the content, intent, manner and storyline of the impugned TVCs seen as a whole, convey a false, untruthful, malicious and negative message, this Court is of the view that the two impugned TVCs

disparages the entire category of products known as Frozen Desserts of which the Plaintiff is a market leader, thereby also disparaging the products manufactured and sold by the Plaintiff and adversely affecting the business of the Plaintiff. As held in the judgments set out/quoted in paragraph 8 above, the Plaintiff is therefore entitled to impugn the two TVCs despite the same not making any direct reference therein to the Plaintiff or the product manufactured by the Plaintiff. Therefore, the submission of the Defendant No.1 that they are not showing the cup of the Plaintiff in its TVC's/advertisement but are showing a neutral cup also does not assist the Defendant No.1 in any manner whatsoever.

21. In defence of its claim that the impugned TVCs do not in any manner defame, denigrate or slander either Frozen Desserts or the Plaintiff's products, the Defendant No. 1 has laid emphasis on the fact that the manufacturers of Frozen Desserts, despite the introduction of Regulation 2.1.7 in the year 2011 by the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, separately classifying ice creams and Frozen Desserts under the larger head - "Dairy based deserts/confections", continued to describe the product as ice creams thereby violating Section 53 of the FSSA, 2006. In order to educate the members of the public, Defendant No. 1 commenced an advertisement campaign explaining the distinction between ice creams and Frozen Desserts and the impugned TVCs are nothing but an extension of the said campaign.

22. Defendant No. 1 have sought to contend that since for the first time in 2011--12 the FSS Regulations brought about the distinction between ice creams and frozen desserts, they commenced advertisement campaigns from the year 2012. This contention is incorrect. As pointed out by the Plaintiff, the true fact is that the distinction between frozen desserts and ice creams existed even prior to 2011-12. The distinction was first introduced on 7th June, 2005 by an

amendment to the Regulations framed under the Prevention of Food Adulteration Act, 1954, the relevant extract of which was tendered in Court by the Advocate for the Plaintiff. Entry A.11.02.07.02 pertains to frozen dessert/frozen confection and is identical to the present provision under the FSS Regulations. However, in the years 2012-2013, Defendant No. 1 did start a campaign by distribution of pamphlets setting out the difference between Frozen Desserts and ice creams. However, it is important to note that Defendant No.1 in their Hindi as well as English pamphlets distributed from 2012-2013 onwards always used the words "vegetable oil" and not "Vanaspati" or "Vanaspati tel". The said pamphlets are reproduced hereunder:

DO YOU KNOW THE DIFFERENCE BETWEEN ICE CREAM AND FROZEN DESSERT?

<p>✓ Ice Cream</p>  <p>Ice Creams are made from real fresh milk.</p> <ul style="list-style-type: none"> • Ice creams are rich in protein, calcium dairy cream and vitamins. • Ice creams are a complete food, easy to digest and full of energy. 	<p>✗ Frozen Dessert</p>  <p>Frozen Desserts are generally made from vegetable oils/fats.</p> <ul style="list-style-type: none"> • Frozen desserts look like ice creams but are unable to give smooth taste and flavours that only ice creams made from fresh milk can give.
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Consumers pay attention: Many ice cream brands are offering frozen desserts, particularly in the various schemes offered by them.

LOOK FOR THE WORD 'ICE CREAM' BEFORE PURCHASING. ENJOY AMUL ICE CREAM MADE FROM REAL FRESH MILK.

Issued in public interest by

Amul



Gujarat Co-operative Milk Marketing Federation Limited, Anand 388 001, e-mail: icecream@amul.coop website: www.amulicecream.in

**DO YOU KNOW
THE DIFFERENCE BETWEEN
ICE CREAM AND FROZEN DESSERT?**

✓ Ice Cream



**Ice Creams
are made from milk components only.**

- Ice Creams have rich creamy flavour imparted by genuine milk fat.

✗ Frozen Dessert



**Frozen Desserts are made
from cheaper vegetable oils/fats.**

- Frozen Desserts look like ice creams but are unable to give natural creamy taste and flavours that only ice cream made from fresh milk can give.

**LOOK FOR THE WORD 'ICE CREAM' BEFORE PURCHASING.
ENJOY AMUL ICE CREAM MADE FROM REAL FRESH MILK.**

Consumers pay attention: Many ice cream brands are offering frozen desserts, particularly in the various schemes offered by them.

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Real Milk. Real Ice Cream.

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**क्या आपको मालूम है
कि आइसक्रीम और फ्रोज़न डेज़र्ट में
क्या फ़र्क है?**

✓ आइसक्रीम



**आइसक्रीम केवल दूध व दूध की
बनी चीज़ों से बनती है.**

- आइसक्रीम में दूध का असली मलाईदार स्वाद होता है.

✗ फ्रोज़न डेज़र्ट



**फ्रोज़न डेज़र्ट्स ज्यादातर वेजिटेबल
ऑयल्स/फैट्स से बनाए जाते हैं.**

- फ्रोज़न डेज़र्ट्स में डेरी क्रीम की जगह वेजिटेबल ऑयल/फैट का इस्तेमाल होता है इसलिए उसमें ताज़ा दूध से बने आइसक्रीम का वह मलाईदार स्वाद, खुशबू और मज़ा कैसे मिल सकता है!

**खरीदने से पहले, पैक पर 'आइसक्रीम' शब्द अवश्य देख लीजिए.
असली दूध से बनी अमूल आइसक्रीम ही खाइए.**

ग्राहक ध्यान दें : कई आइसक्रीम ब्रांड, फ्रोज़न डेज़र्ट्स की बिक्री करते हैं,
खास कर उनके द्वारा पेश की गई विविध स्कीम्स में.

जनहित में जारी:

Amul
Real Milk. Real Ice Cream.

गुजरात को-ऑपरेटिव मिल्क मार्केटिंग फेडरेशन लिमिटेड, आनंद - 388 001. ई-मेल : icecream@amul.coop वेबसाइट : www.amulicecream.in

It is further important to note that Defendant No.1 has in the said pamphlets not only not used the words vanaspati or vanaspati tel but even the reference to vegetable oil is also not in relation to all Frozen Desserts generally as a category, but to most of them ('JYADATAR'). It is only in the TVCs which are introduced in March, 2017 by Defendant No. 1, that Defendant No. 1 started use of the words Vanaspati and Vanaspati tel. The pictorial depiction of Vanaspati falling into the cup of Frozen Dessert, also arose for the first time in the TVCs which are introduced in March, 2017. It is obvious that this is so since Defendant No.1 was well aware that Vanaspati being perceived as a health hazard, its mention as an ingredient in the Frozen Dessert would scare the consumers from having Frozen Desserts, who would then turn to the product of Defendant No. 1 i.e. ice cream.

23. Any campaign to educate the members of the public by placing before them the true and correct facts/ingredients used in a product should always be welcomed. However, no manufacturer can place misleading information before the consumers qua the product of his rivals and thereby disparage/discredit/belittle such product including influencing the consumer not to buy the same in the garb of educating and/or bringing the correct facts before the members of the public, as is done in the present case by Defendant No.1. Apart from educating the consumers qua the difference in products by mentioning the correct facts and following the legal route, action can also be taken against the manufacturers of products, if they are found violating Section 53 of the FSSA, 2006 as alleged by the Defendant No.1. The aforesaid excuse /reason given by Defendant No.1 therefore lacks justification and is rejected.

24. Defendant No. 1 has contended that on a true and correct viewing of the TVCs, the following position emerges:

- (i) As reward for Shreya's confidence and valour displayed through her dental treatment, the doctor suggests the parent to give Shreya an ice cream;
- (ii) Since there is purity in Shreya's courage, the advertisement suggests the parent to give Shreya an ice cream;
- (iii) What is made out of Vanaspati and Vanaspati Tel is not ice cream but frozen dessert. Hence the consumer ought to check the packaging of the product to identify, whether it is ice cream or frozen dessert.
- (iv) Lastly TVCs recommend Amul Ice cream to the consumer.

Defendant No. 1 has contended that the Plaintiff's suggestion that frozen dessert is shown in murky yellowish colour; is depicted as unhealthy or inferior; or shown as lacking in purity is equally incorrect. The suit TVCs only show frozen dessert for what they are as containing 'Vegetable Tel' which they do. The legend on the packaging of the generic frozen dessert is magnified to show that frozen dessert contains vegetable oil. Hence there is no falsehood, slander or defamation.

25. In my view this is an over simplification of the TVCs. The intent, storyline, manner of depiction, effect and impact of the TVCs of Defendant No. 1 is certainly not what is stated by Defendant No. 1. The TVCs are not innocuous as asserted by Defendant No. 1. The storyline, manner of depiction, effect and impact of the TVCs has been dealt with hereinabove.

26. Defendant No. 1 has contended that the terms "Vanspati" or "Vanaspati Tel" per se are not defamatory words. It is not even the Plaintiff's case, that they are defamatory in a secondary sense. On the contrary, both "Vanaspati" and "Vanaspati Tel" are recognized food ingredients. In fact, any milk based frozen dessert or confection containing either Vanaspati or Vanaspati Tel in law would be termed as frozen dessert.

As set out hereinabove, it is the case of Defendant No. 1 itself in its reply that Vanaspati is harmful to health. The Plaintiff has also pleaded that. The substitution of the word Vanaspati with Vanaspati Tel in the second TVC makes no difference as dealt with in paragraph nos. 19, 20 and 33 of this order. Further, the words cannot be considered in isolation but the TVCs have to be considered in its entirety including the visuals. This contention of Defendant No. 1 is devoid of merits.

27. The Defendant No. 1 has also laid emphasis on the statement made by the Plaintiff in the plaint that, "*In fact, a majority of the manufacturers of ice-creams with non-dairy fat i.e. frozen desserts i.e. 70 % of manufacturers of ice-creams with non-dairy fat (which constitutes the Plaintiff, Defendant No. 3 and 4) do not use hydrogenated fat or hydrogenated vegetable oil ordinarily known as vanaspati*" and have contended that the Plaintiff has therefore admitted that 30 per cent of the manufacturers of Frozen Dessert are using Vanaspati in the manufacture of Frozen Dessert. Apart from the fact that Defendant No. 1 by its impugned TVCs have given an incorrect impression to the consumers that 100 per cent manufacturers of Frozen Dessert use Vanaspati/hydrogenated fat/hydrogenated vegetable oil, by no stretch of imagination, it can be concluded /held from the above statement in the plaint that the Plaintiff has admitted that 30 per cent of the manufacturers of Frozen Dessert use hydrogenated fat or hydrogenated vegetable oil, ordinarily known as Vanaspati. The Plaintiff has approached this Court with a case that the Defendant No. 1 is guilty of generic disparagement of the product known as Frozen Dessert by, inter alia, through the TVCs, wrongly informing the consumers that all Frozen Desserts contain Vanaspati, despite the fact that the Plaintiff (who is a market leader qua Frozen Desserts along with Defendant Nos. 3 and 4 have 70 per cent share in the Frozen Desserts market, and do not use Vanaspati in Frozen Desserts. The Plaintiff has only conveyed this and no further. The question

therefore of the Plaintiff having admitted that 30% or any per cent of the manufacturers of Frozen Desserts are using Vanaspati or hydrogenated vegetable oil in the manufacture of Frozen Desserts does not arise. Since the Defendant No. 1 in their Affidavit-in-Reply incorrectly interpreted the aforesaid statement of the Plaintiff, the Plaintiff was constrained to explain in their Rejoinder that their statement in the plaint only meant that the Plaintiff and the Defendant Nos. 3 and 4 constituting 70 per cent of the manufacturers of Frozen Desserts do not use Vanaspati. The said clarification therefore cannot be construed as the Plaintiff having changed its stand in its Rejoinder. In my view, even if 30 per cent of the manufacturers of Frozen Desserts use Vanaspati, Defendant No. 1 is not entitled to convey by way of any statement or depiction that the entire category of Frozen Dessert manufacturers, or in any event a majority of them, are using Vanaspati in the manufacture of Frozen Dessert.

28. The Defendant No. 1 in support of its contention that the manufacturers are using Vanaspati in their product has produced photographs of two products viz. 'LAZZA' and 'HERITAGE'. The photograph of the third party product 'LAZZA' does not show Vanaspati/hydrogenated vegetable oil as an ingredient. The only product that Defendant No. 1 has sought to portray which uses edible hydrogenated vegetable fat is at page 267 of the Defendant's compilation. Defendant No. 1 has not provided any details as to what is the market share of the said product allegedly sold under the mark "Heritage". In any event as the saying goes 'one swallow does not a summer make', a single product cannot justify the depiction of the entire category of Frozen Desserts as having Vanaspati. The Defendant ought to have discharged the burden of demonstrating that the entire class of products known as Frozen Desserts contain Vanaspati, failing which the Impugned TVCs are not only false but also disparaging. In my view, the Plaintiff is correct in its submission that where the

contention of Defendant No. 1 is that all Frozen Dessert (or at least 30%) manufacturers are using Vanaspati and Defendant No. 1 seeks to rely upon such an assertion to contend that as the truth and as a defence to the present action, the *principles analogous* to those laid down in *Pidilite Industries Ltd. v S.M. Associates and Ors.*⁹ would be applicable and Defendant No. 1 should then demonstrate with sufficient material that its assertion is in fact true. It is not sufficient to show only one packaging of one manufacturer alone, without showing any other material like the extent of sale, market share, availability of product throughout India etc. Paragraphs 52, 53, 54, 57 and 58 of the said Judgment are reproduced hereunder for ready reference:

“52. As far as use of the word "Seal" as a suffix is concerned, Dr. Shivade was actually pressing into service the series theory. According to him, as various traders use the word "Seal" as a suffix just as the Plaintiff does, there would be no likelihood of confusion or deception. According to him, traders and the public have gained such knowledge of the common element or characteristics of the series "that when they meet another mark having the same characteristic they will immediately associate the later mark with the "series" of marks with which they are already familiar." The principle on which the series theory is based is that the consumer being aware of the fact that there are several marks with the common element will pay attention to the other features, thereby negating the possibility of any doubt/confusion.”

53. “It is important to note at the outset that other than annexing cartons bearing the aforesaid marks with the suffix "seal", there is no evidence produced as to its actual use much less the extent of its use. In paragraphs 26, 27 and 28 of the affidavit in rejoinder, the Plaintiff has categorically denied the existence of the said brands “A-

Seal” “Inn-Seal” “Jam-Seal” “Max-Seal”. The Plaintiff has further stated that the brands are not in use much less in continuous or extensive use. It is further denied that the colour scheme is used by most of the manufacturers. An affidavit in sur-rejoinder has been filed. Significantly, the first Defendant has even in the sur-rejoinder not furnished any evidence of actual use or the extent of such use.”

54. *“ The Supreme Court in Corn Products v. Shangrila Food Products, AIR 1960 Supreme Court 142 dealt with this question. In that case, it was contended that there were various trade marks with a prefix or suffix “Gluco” or “Vita” and that made it impossible to say that the common features “Gluco” or “Vita” were associated only with the Appellants products. The submission was based on a passage from Kerly on Trade Marks, (7th Edition, page 624) to the effect that where there are a series of marks registered or unregistered having a common feature or a common syllable if the marks in the series are owned by different persons, this tends to assist the Applicant for a mark containing the common feature.....”*

57. *I am unable to accept the submission that the ratio consisted of accepting the submission on behalf of the Defendant that the judgment of the Supreme Court in Corn Products would only be applicable to a matter decided at the final hearing after evidence is led. The above extract itself indicates that the learned Judge accepted as sufficient at the interim stage, the evidence produced before him to establish prima-facie that several marks with the suffix “Sprin” were in fact in use. It is difficult to read the judgment as having held that though at the trial proof of extensive use of the series of marks is required at the interim stage it is not.”*

58. *“The fallacy of this submission lies in the misconception that the issue to be proved is different at different stages of legal proceedings. Whatever the stage*

of the proceedings, the issue to be proved or the content of the proof remains the same. It is the level of proof that varies depending on whether the order sought is at the interim stage or at the final hearing.

The judgment in Corn Products requires the Defendant to prove that the marks must be not merely in use but in "extensive use". Thus, even in interim proceedings, it is not sufficient merely for the Defendant to show prima-facie that there is some user of the marks. There must be prima facie evidence to show extensive use. At the final hearing of the suit the level of proof required is higher - the matter requiring to be proved viz. "extensive or substantial use" remaining the same.

For instance, in a given case, a Defendant may well establish conclusively in interlocutory proceedings that there was actual use of the marks in the market. He would thus have fulfilled the first requirement viz. actual use. He may however candidly admit that the extent of use is minimal. The Defendant could not in such circumstances resist an injunction on the series argument contending that at the interim stage the extent of use is not material."

29. The Defendant No.1 has contended that the aforesaid Judgment cannot be relied upon in the present context since the same relates to an action for infringement /passing off of trade marks. This submission of Defendant No.1 cannot be accepted. Defendant No.1 has sought to generalize Frozen Desserts and has sought to contend that all Frozen Desserts contain Vanaspati. In support of this, Defendant No.1 has sought to rely upon one isolated box of one isolated manufacturer. The Judgment is sought to be relied upon to show that in circumstances where a party seeks to contend that a certain state of affairs is general and applicable to large number of players in the field, it should substantiate the same with material to show that such manufacturers are actually in the market and the extent of sales of such manufacturers. Relying on

some stray solitary box, it is not open to a party to generalize a certain state of affairs to all others in that field of activity. I am therefore in agreement with the submission on behalf of the Plaintiff that the Judgment and the principles analogous to those set out therein are apt and applicable to the present case.

30. It is also contended on behalf of Defendant No. 1 that it is for the Plaintiff to point out that all manufacturers of Frozen Desserts are not using Vanaspati/hydrogenated vegetable oil as an ingredient in any of the Frozen Desserts. I am not in agreement with the submission since the present Suit is in the nature of an action for generic disparagement /slander of goods for the category of dairy based products referred to as Frozen Desserts. The grievance of the Plaintiff is that by conveying to the consumers by way of the impugned TVCs that all Frozen Desserts contain Vanaspati/hydrogenated vegetable oil Defendant No. 1 is disparaging the entire category of Frozen Desserts which affects the Plaintiff's products considering the fact that they are the market leaders in that category of products. It is therefore enough for the Plaintiff and its supporting Defendants to show that they do not use Vanaspati in their Frozen Desserts and they cannot be called upon to prove/establish as to who are the manufacturers of Frozen Desserts who are using Vanaspati/hydrogenated vegetable oil.

31. Defendant No.1 has in support of its contention that it has not disparaged the category of Frozen Desserts in any manner also laid emphasis on the fact that the modified advertisement (Second Impugned TVC) uses "Vanaspati TEL" in the voice over which is the term used to define "vegetable oil" in the Hindi version of FSS Regulations. It is submitted that the Oxford Dictionary also shows the translation of Vanaspati TEL as Vegetable Oil. Accordingly, the advertisement being in Hindi, the use of the term is justified and the impugned TVCs reflect the truth.

32. At the cost of repetition I once again clarify that it is not only because of the words 'Vanaspati' and 'Vanaspati tel' being used in the impugned TVCs, that this Court has come to the conclusion that Defendant No. 1 is guilty of disparaging the entire category of Frozen desserts which includes the products manufactured by the Plaintiff under the said category, but the Court has reached the said conclusion after considering the content, intent, manner and storyline of the impugned TVCs, which seen as a whole convey a false, untruthful, malicious and negative message that frozen desserts contain vanaspati (which is perceived as unhealthy) are not pure, are inferior to ice creams, not meant to be given to children, is not the right choice and should not be purchased.

33. As stated earlier, Defendant No. 1 in all its past communications and even in its Hindi Pamphlets, has referred to Frozen Dessert products as having "vegetable oil" and not 'vanaspati tel'. The Defendant's own compilation at page 248 demonstrates this. The word "Vanaspati" or "Vanaspati Tel" has never been used earlier in the context of vegetable oils and is for the first time used in the Impugned TVCs. This demonstrates that to the knowledge of the Defendant No.1, vegetable oil is normally referred to as "vegetable oil" and not as 'vanaspati' or 'vanaspati tel' and the consumers also do not refer to vegetable oil as Vanaspati or Vanaspati Tel. The authoritative text of the FSS Regulations is admittedly in English. However, Defendant No. 1 in March, 2017, chose to use the Hindi version of the FSS Regulations. As correctly stated by the Plaintiff, if Defendant No. 1 was so insistent on using Hindi terms in the advertisement, Defendant No. 1 would have described frozen dessert as "Shitit Misthan" which would be the Hindi equivalent of Frozen Dessert. The intent of Defendant No. 1 was to disparage and also get an unjustified advantage by associating the ill effects of Vanaspati with all Frozen Desserts generally and to mislead and scare the consumers. The Defendant No. 1 first used the word

Vanaspati instead of vegetable oil in the first impugned TVC with a misleading disclaimer, and thereafter when objected to by the Plaintiff changed the word Vanaspati to Vanaspati tel in an attempt to confuse the public and to also create a scare in them qua the Frozen Dessert product by retaining the word 'Vanaspati' and continuing with the depiction of vanaspati flowing into the cup of frozen dessert. It is necessary to go back to the Screen Shots G & H of the first impugned TVC and Screen Shots 7 and 8 of the second impugned TVC with the voice over, " *Usse real **milk** wala Amul ice cream khilayein*" "***Vanaspati** tel wala nahi*" and note that Defendant No. 1 in both the TVCs whilst comparing the ingredient 'milk' in ice creams with 'vegetable oil' in Frozen Desserts, is using the English word "milk" and not "doodh" in Hindi for its ice cream, but is going out of its way to use the Hindi terms Vanaspati/Vanaspati tel instead of the word vegetable oil as an ingredient of Frozen Dessert. This shows to what extent Defendant No. 1 is straining its every nerve to use the term 'vanaspati' in the garb of informing /educating the consumers about the difference between the two products, only so that by the word 'Vanaspati' itself, the consumer will get scared and stay away from Frozen Desserts. Therefore, as correctly submitted by the Plaintiff, the substitution of the word "Vanaspati" with "Vanaspati tel", would not in any manner alter the situation. The second TVC is a continuation of the first TVC. The mind of the public having been fixed from the first TVC that Frozen Desserts contain Vanaspati, the addition of the word "tel", is in any event inconsequential and does not alter the situation. Further, in any event, the addition of the word "tel" is meaningless when the visual representation which is the prominent and the most effective part in both the TVCs, does not show edible vegetable oil which is not in solid form, going into the cup of frozen dessert, and instead shows a thick (semisolid) Vanaspati going into the cup of the Plaintiff. This is a complete giveaway of the fact that the addition of "tel" and the reliance on the translations is not a sustainable defence. The Plaintiff is

therefore correct in contending that the impugned TVCs do not reflect the truth as alleged by the Defendant No.1 and the decisions relied upon by the Plaintiff in this regard viz. *Lakhanpal National Limited vs. M.R.T.P. Commission and another*¹⁰ and *Gorbatschow Vodka K.G. vs. John Distilleries Limited*¹¹ support the contention of the Plaintiff.

34. Defendant No. 1 has next submitted that the Plaintiff has suppressed the following material facts in the plaint:

- (i) The true facts, in relation to the ASCI Complaint/s, the fact that the Plaintiff's complaints were not upheld, and that the Suit TVCs raise the same issues and make out the same distinction between ice creams and Frozen Desserts;
- (ii) That the Plaintiff, Defendant Nos. 3 and 4 and other manufacturers of Frozen Desserts (who constitute a class) are indulging in false and misleading advertisements and attempting to project Frozen Desserts as ice cream;
- (iii) That the 2011 Regulations (Hindi version) statutorily term 'vegetable oil' as Vanaspati Tel. Equally, the Plaintiff has failed to state that even in common parlance, the dictionary meaning of 'vegetable oil' is 'Vanaspati Tel'. This non-disclosure is material, since it is the main thrust of the Plaintiff's case that the use of the word 'Vanaspati' disparages and denigrates Frozen Desserts (as a class).
- (iv) That the pre-suit correspondence is not disclosed. A perusal of the same would show that the Plaintiff had no issue with the visual depiction of the TVCs and it found only the use of the word 'Vanaspati', objectionable.

It is therefore submitted on behalf of the Defendant No.1 that the Plaintiff being guilty of concealment of material facts, ought to be denied relief by the

10 (1989) 3 SCC 251

11 2011 (47) PTC 100 (Bom)

Court. In support of its submission, Defendant No. 1 has relied on the decisions of the Hon'ble Supreme Court in *Dalip Singh vs. State of Uttar Pradesh*¹² and *Oswal Fats and Oils Limited vs. Additional Commissioner (Administration) Bareilly Division, Bareilly & Ors.*¹³

35. As regards the allegation of suppression qua the ASCI complaints, it is submitted on behalf of the Plaintiff that in view of what is inter alia stated by them in paragraph 16 of the plaint, it cannot be said that they have suppressed any facts pertaining to the issues before the ASCI. It is further submitted that the impugned TVCs are independent and distinct and give rise to a separate, distinct, independent cause of action; the impugned advertisements were never the subject of any ASCI proceedings and have no connection whatsoever to any of the previous ASCI proceedings; no ASCI Complaint has been filed in respect of the impugned TVCs and there is no ruling in relation to the impugned TVCs by the ASCI; the impugned TVCs therefore have to be considered on their own.

35.1 I have considered the submissions of the parties qua the ASCI complaints and the documents relied upon by them. It is true that complaints and counter complaints were earlier filed by the Plaintiff and Defendant No. 1 before the ASCI. On certain issues ASCI upheld the correctness of the objections raised by the Plaintiff, and on some issues it did not. Where the ASCI has asked the Plaintiff to correct itself, the Plaintiff has done so. In fact ASCI in response to a complaint from the Plaintiff, had earlier also directed Defendant No. 1 not to claim in its advertisements that, "*Ice creams are a complete food easy to digest and full of energy*". The Plaintiff has in paragraph

12 . (2010) 2 SCC 114 (Paras 4 to 7)

13 . (2010) 4 SCC 728 (paras 20 to 26)

16 of the Complaint made a mention of the complaints/counter complaints and has also craved leave to refer to and rely upon the proceedings before the ASCI, if necessary, inter alia, **“with a view to avoid any allegations of suppression”**.

35.2 In any event, as can be seen from the Pamphlets reproduced at pages 46 and 47 of this Order that Defendant No. 1 in the past has never used the words 'Vanaspati'/'Vanaspati Tel' in its advertisement but has always referred to the same as vegetable oil even in Hindi. Furthermore, reference to 'vegetable oil' was also not in relation to all Frozen Desserts generally as a category but to most of them -- '*gyadatar*'. The Plaintiff is therefore correct in its submission that the use of the word 'Vanaspati' and the pictorial depiction of Vanaspati falling into the cup of Frozen Desserts has arisen for the first time in the impugned TVC aired in March, 2017; that Defendant No.1 has in its TVCs for the first time sought to convey through the voice over a negative message to the consumers not to purchase Frozen Desserts by referring to Vanaspati along with the visual of Vanaspati falling in the cup of Frozen Dessert; that the Impugned TVCs are independent and distinct and give rise to a separate, distinct and independent cause of action; the impugned advertisements were never the subject of any ASCI proceedings and have no connection whatsoever to any of the previous ASCI proceedings; no ASCI complaint has been filed in respect of the Impugned TVCs and there is no ASCI ruling in relation to the Impugned TVCs; the Impugned TVCs are different and distinct from the earlier advertisements; the words Vanaspati/Vanaspati Tel as well as the visual representations complained of, have been used for the first time by Defendant No.1; the Impugned TVCs therefore have to be considered on their own.

35.3 It is therefore clear that it cannot be said that the Plaintiff has in the complaint suppressed relevant facts qua the ASCI complaints. It will also not be out of place to mention here that the Defendant No. 1 who in its Affidavit-in-Reply

is now trying to give utmost importance to ASCI, its proceedings and its rulings, has as late as on 9th September, 2016, through its Chief Operating Officer whilst confirming that they have long back modified the leaflet (trade pamphlet) complained of by the Plaintiff, inter alia, recorded that, ***“we wish to reiterate that we are not living in a banana republic where Kangaroo Courts conducted by Companies like ASCI Ltd. can give motivated rulings without understanding the subject and overlooking the interest of the consumers.”*** The Defendant No. 1 is therefore blowing hot and cold as per its convenience.

36. As regards the allegation that the plaint does not disclose that the Plaintiff, Defendant Nos. 3 and 4 and other manufacturers of Frozen Desserts are indulging in false and misleading advertisements and are attempting to project Frozen Desserts as ice cream, the same is vehemently denied by the Plaintiff. However, as stated earlier, even if the above allegations made by Defendant No. 1 are true, the Defendant No. 1 in the garb of educating/informing the public qua the ingredients of Frozen Desserts is not entitled to mislead the consumers by directly or indirectly conveying to them that all Frozen Desserts contain Vanaspati. This is done by Defendant No. 1 by expressly using the term Vanaspati in its first TVC, along with the visual of Vanaspati being poured into the cup containing Frozen Dessert and changing the word Vanaspati to Vanaspati tel in the second TVC but continuing to show the visual of Vanaspati being poured into the cup of Frozen Dessert coupled with the negative message not to purchase Frozen Dessert by saying, ***“...Vanaspati wala nahi unhe frozen dessert kehtey hain”***. Again, as stated earlier, if the Plaintiff or any of the manufacturers of Frozen Desserts are indeed indulging in false representations, the Defendant No. 1 can in addition to portraying the correct facts in its advertisements, also proceed to take action

against them for violation of Section 53 of FSSA, 2006. The allegation of suppression therefore cannot be accepted.

37. As regards the allegation that the Plaintiff has not mentioned in the plaint that the 2011 Regulations (Hindi version) statutorily term 'vegetable oil' as 'vegetable tel' and the dictionary meaning of 'vegetable oil' is 'vanaspati tel', it is pertinent to mention here that the Plaintiff has not approached this Court only with a grievance that the Defendant No. 1 has used the words 'Vanaspati/Vanaspati tel' in its TVCs. The Plaintiff has moved this Court contending that the content, intent, manner and story line of the Impugned TVCs seen as a whole convey a false, untruthful, malicious and negative message and it is wrongful and deceiving to suggest to the consumers that a product which is compliant with the food laws of the country, is a wrong choice, and that only Amul's product is the right choice. The Plaintiff has correctly contended that the cumulative effect of the visual depiction as well as the spoken words, disparages the category of products known as Frozen Desserts to the effect that they are not pure, not meant to be given to children, contain only Vanaspati (which is perceived as unhealthy), should not be purchased, etc., which specifically disparages and denigrates the entire category of products known as Frozen Desserts – of which the Plaintiff is a market leader, therefore the same directly affects, disparages and denigrates the Frozen Dessert products of the Plaintiff, causing special damage to the Plaintiff. The change in the second TVC from the word 'vanaspati' to 'vanaspati tel' does not make difference and is a continuation of the first TVC and that both the TVCs are disparaging the product frozen dessert is explained/set out in paragraph nos. 19, 20 and 33 of this order. Again a person watching a television commercial is not expected to sit with a dictionary. The allegation of suppression is therefore untenable.

38. The submission of Defendant No. 1 that the Plaintiff has not disclosed the pre-suit correspondence in the Plaintiff which would have shown that the Plaintiff had no issue with the visual depiction of the TVCs and it found only the use of the word 'Vanaspati' objectionable cannot be accepted and I am in agreement with the Plaintiff that the submission of the Defendant No.1 is untenable, unfair and clutches at straws. The email issued by the Plaintiff to the Defendant No.1 prior to the filing of the Suit on 5 March 2017 protested against the First Impugned TVC. Vanaspati was mentioned in the advertisement as well as shown in the visual. The email dated 5 March 2017 cannot be treated as a protest only against the word used in the voice over. The correspondence was not in the nature of a correspondence between lawyers, but between top level management personnel of the respective parties. It was an email request made by the Plaintiff's Executive Director to Defendant No. 1's Managing Director. These emails are not in the nature of legal notices. The email cannot by any means be read as an acceptance by the Plaintiff of the depiction of Vanaspati in the visual. Again, the pre-suit emails between the top level management personnel of the Plaintiff and Defendant No.1 cannot be read as any estoppel or waiver by the Plaintiff of any grievance made by them in the present Suit. In fact, the Managing Director of the Defendant No. 1 has, in his correspondence with the Executive Director of the Plaintiff tried to draw support for using the word 'Vanaspati Tel' by relying on the Google dictionary. The Managing Director has not made any mention about the Hindi version of the FSSA Regulations or to the Oxford Dictionary wherein the meaning ascribed to the word 'vegetable oil' is 'vanaspati tel'. However, it would be ridiculous to contend or to hold that since in the correspondence the Managing Director of Defendant No. 1 has not made any mention to the Hindi version of FSSA Regulations, 2011 and/or to the Oxford Dictionary, the same cannot now be relied upon by Defendant No. 1 for the first time in its Affidavit-in-Reply. I am

therefore in agreement with the submission of the Plaintiff that the Defendant No. 1, by such submissions, is only trying to clutch at straws.

39. I am therefore of the view that the Plaintiff cannot be held guilty of suppression of any facts or documents as alleged by the Defendant No.1. The decisions relied upon by Defendant No. 1 in support of its case that the Plaintiff has suppressed material facts and documents therefore does not lend any assistance to Defendant No.1.

40. Defendant No.1 has submitted that the Suit is essentially a class action and the same is apparent from the Plaintiff's averments in paragraphs 2, 19, 21, 24, 25, 26, 28 to 30 and 33 of the Plaint; It is the Plaintiff's consistent case that Defendant No.1 is through the Suit TVCs disparaging the entire class of products viz. the Plaintiff is the market leader (for Frozen Desserts) and as such its reputation is also being injured; It is only since the Suit is a class action that the Plaintiff has joined Defendant Nos. 3 and 4 as parties having common interest - being manufacturers of Frozen Desserts /same class of products. On this basis Defendant No. 1 has contended that the requisite pleadings necessary to sustain class action are missing in the plaint. It is also contended that this being a class action, the plaintiff is required to bear the burden of all the members of the class and since there are members of the class who use Vanaspati and the members of the class are indulging in misleading advertisement, the action must fail.

The Plaintiff has disputed that the present Suit filed by the Plaintiff is a class action and has submitted that this submission on behalf of the Defendant No. 1 is based on a complete misreading and misunderstanding of the complaint filed by the Plaintiff and the nature of action initiated in the present proceedings. I am in agreement with the Plaintiff that the Plaintiff has nowhere contended that this is a class action filed by the Plaintiff in its representative capacity

representing the entire class of manufacturers of Frozen Desserts. The case of the Plaintiff is that the impugned TVCs disparage the entire class of Frozen Desserts to which the Plaintiff belongs and as a result of generic disparagement of Frozen Desserts, the Plaintiff being market leader, is also disparaged and the business of the Plaintiff is affected. The action is one based on a generic disparagement of a class and cannot be confused with the class action in a representative capacity. Since the Defendant No. 1 in its TVCs has inter alia sought to convey to the consumers that all Frozen Desserts contain Vanaspati, the Plaintiff joined two more players in the field to the Suit only for the purpose of pointing out that the Plaintiff along with Defendant Nos. 3 and 4 has a 70 per cent share in the market of Frozen Desserts and they do not use Vanaspati and for no other reason.

41. It is also submitted by the Defendant No. 1 that the plaintiff repeatedly avers that Frozen Desserts contain vegetable oil and as such are healthier than ice creams. In view of this averment, a Suit filed on the ground of alleged disparagement of Frozen Desserts ought to be dismissed.

As stated earlier, the Plaintiff has come to this Court with a grievance that the content, intent, manner and story line of the Impugned TVCs seen as a whole, convey a false, untruthful, malicious and a negative message (that for the manufacture of Frozen Desserts, Vanaspati is used and therefore they are not pure, not meant to be given to children and should not be purchased, etc.), which disparages and denigrates the entire category of products known as Frozen Desserts, of which Plaintiff is the market leader. In order to show that the said TVCs convey a false, untruthful, malicious and negative message, the Plaintiff has in Exhibit-M to the plaint set out the nutritional information of the Plaintiff's KWALITY WALLS product with that of the first Defendant's Amul Ice cream, to point out that the product of the Plaintiff is not only at par with Defendant No.1's ice cream products in all aspects of nutrition, but it is in fact

healthier to the extent that it has no trans fat whatsoever and has less content of saturated fat than found in the product of Defendant No.1, and therefore the attempts of Defendant No. 1 to disparage the Frozen Dessert category of products and create a scare in the minds of the consumers is false and malicious. The Plaintiff is justified in making these submissions, and the submission on the part of Defendant No. 1 that in view of the Plaintiff having made the aforesaid averment, it cannot be heard to say that its products have been disparaged, cannot be accepted and is rejected.

42. The Defendant No. 1 has next contended that it is settled law that (i) pleadings in a defamation case are liable to be strictly construed; (ii) the entire charge including *innuendos* are required to be expressly and explicitly pleaded; and (iii) if the plaint does not contain any facet of the defamatory charge, the same is not liable to be considered for the purposes of grant of any reliefs. In support of this submission, Defendant No. 1 has relied on the decisions of the Hon'ble Supreme Court in *M. Zakharia Sait vs. T.M. Mohammed and others*¹⁴, the decision of the Calcutta High Court in *W. Hay and others vs. Aswini Kumar Samanta*¹⁵ and the decision of this Court in *Essel Infraprojects Ltd. vs. Devendra Prakash Mishra and others*¹⁶. It was extensively argued on behalf of Defendant No. 1 that the present action being in the nature of defamation, it is mandatory for the Plaintiff to plead and prove that on viewing the impugned TVCs the public would relate to the Plaintiff.

43. It has rightly been pointed out by the Plaintiff that the legal requirements of a personal defamation case and that of malicious falsehood and

14 . (1990) 3 SCC 396 (paras 30 to 37)

15 . AIR 1958 Cal 269

16 . 2015 (1) Bom CR 340

slander of goods are distinct and different. An action for slander of goods will lie where the defendant falsely and maliciously publishes words concerning the plaintiff's goods and where the publication causes the plaintiff to suffer special damages. Paragraphs 274, 275, 277 at pages 137, 138 and 140 respectively of Halsbury's Laws of England (Fourth Edition) Volume 28 are in this regard relevant and reproduced hereunder:

"Page 137 Para274 "Malicious or Injurious falsehood. At common law an action will lie for written or oral falsehoods which are published maliciously and are calculated in the ordinary course of things to produce, and do produce, actual damage. Such an action is not one of libel or of slander, but an action for damage wilfully and intentionally done without lawful occasion or excuse. At common law special damage is always necessary, but this rule has been modified by statute.

Page138 para 275 "Comparison with Defamation - Actions for malicious falsehood are in a category of their own and are quite distinct from actions for defamation. These actions are not concerned with injury to reputation. In an action for defamation, to establish cause of action, the plaintiff must prove that the words referred to him and bore a meaning defamatory of him. To establish his action in an action for slander of title or slander of goods or other malicious falsehood, the plaintiff must prove that the words were false, that they were published maliciously and unless covered by the statutory exceptions, that they caused special damage." (emphasis supplied)

Page 140 para 277 - "Slander of goods - An action for slander of goods will lie where the defendant falsely and maliciously publishes words of and concerning the plaintiff's goods and where the publication causes the plaintiff to suffer special damages."

44. The entire contention of Defendant No. 1 that the present action is in the nature of defamation and as such it is mandatory for the Plaintiff to plead and prove that on viewing the Impugned TVCs the public would relate the same to

the Plaintiff, is based on a complete misunderstanding of the nature of proceedings filed by the Plaintiff. The Judgments relied upon by Defendant No. 1 are those relating to personal defamation of an individual or entity and not relating to slander of goods or malicious falsehood. The above extract from Halsbury's Law of England cited hereinabove clearly brings out this distinction. This has in fact been emphasised in another Judgment relied upon by Defendant No.1 that is *Reckitt Benckiser (India) Limited vs. Naga Limited & Ors.*¹⁷ wherein it has been observed as under:

“Clerk & Lindsell on Torts draws a distinction between malicious prosecution and defamation, in that “defamation protects the Plaintiff’s reputation, while malicious falsehood protects the Plaintiff’s interest in his property or trade”. In its chapter on Libel and Slander, American Jurisprudence, Second Edition Volume 50 declares that – “Generally, publication of any false and malicious statement which tends to disparage the quality, condition, or value of the property of another, and which causes him special injury or damage, is actionable...”

45. The decision in the case of *De Beers Abrasive Products Ltd. and Others v International General Electric Co. of New York Ltd. and Another*¹⁸ differentiates between an action for defamation and slander of goods as follows :

“I shall now briefly notice the cases that have been cited to me on this point in chronological order, noting, however, before I do so, that, in so far as any of them refer to or may have depended upon the absence of a claim in respect of special damage, this, since section 3 of the Defamation Act 1952, is now wholly irrelevant; no such averment is now necessary in a claim for slander of goods or injurious falsehood or whatever label one chooses to place upon this particular tort.

17 ILR 2003 1 Del 325

18 1975 WLR (ChD) 972 (@ Pg 979)

The first case cited to me was Evans v. Harlow (1844) 5 Q.B. 624. That case is, I think, a difficult case, but I think it is a difficult case solely because the pleadings were in some considerable muddle, and it is a little difficult to get out of them and the judgments what the real point at issue was; but, as I understand that case, the real point was that the plaintiff was suing for a libel – that is to say, an ordinary libel upon him personally – and, in order to prove that libel, the only matter to which he could point was statements made about the goods which he was selling. Undoubtedly, one of the statements made about the goods that he was selling was the rather specific one that “... the tallow is wasted instead of being effectually employed as professed” (see p. 627). But what the court decided there, in contradistinction to what the House of Lords decided in a later case which I shall consider later, Linotype Co. Ltd. v. British Empire Type-Setting Machine Co. Ltd. (1899) 81 L.T. 331, was that the allegation that the plaintiff was selling ineffective machines was not a personal libel upon him; and it was on that ground that the court said that there was no case to answer. However, one of the judges, Patteson J., did go on to consider the position under what we would now call slander of goods. He says, at the conclusion of his judgment, 5 Q.B. 624, 633:

“This is not, in effect, a caution against the plaintiff as a tradesman in the habit of selling goods which he knows to be bad; if it were, it would be a libel upon him personally: but it is a caution against the goods, suggesting that the articles which the plaintiff sells do not answer their purpose; which is not actionable unless it were shown that the plaintiff, by reason of the publication, was prevented from selling his goods to a particular person;”

that is to say, unless special damage was shown.

So that, although at first blush that case would make one think, if read hastily, that it was perfectly all right for the

defendant to have said that “the tallow was wasted instead of being effectually employed as professed,” once the true explanation of that case is appreciated it in fact really does not assist us in the present case at all. That my explanation of that case is not merely my own appears quite clearly from the judgment of Cozens-Hardy M.R. in Griffiths v. Benn (1911) 27 T.L.R. 346, where he adopts precisely the same sort of approach to it.”

46. It has been contended on behalf of Defendant No. 1 that (i) pleadings in a defamation case are liable to be construed strictly (ii) the entire charge including innuendos are required to be expressly and explicitly pleaded; and (iii) if the plaint does not contain any facet of the defamatory charge, the same is not liable to be considered for the grant of any relief. The Defendant No. 1 has submitted that the details and particulars of the defamatory material and its effect are not set out in the plaint. As pointed out by the Plaintiff, each of the contentions of the Plaintiff have been particularised in the plaint with precision as under :

(i) The impugned TVCs are annexed and marked as Exhibits-H at page 256, Exhibit-L at page 87 of the plaint, Exhibit-G at page 55 and Exhibit-K at page 86 of the plaint. The story board of the first Impugned TVC is annexed and marked as Exhibit-H at page 56 of the plaint and story board of the second TVC is annexed and marked as Exhibit-L at page 87 onwards of the plaint.

(ii) Amongst other paragraphs, paragraphs 19, 20, 21, 22, 24 to 32 point out how the Impugned TVCs are maliciously disparaging the entire category of Frozen Desserts, thereby also disparaging the products of the Plaintiff falling in the category of Frozen desserts.

(iii) In Paragraph 19 of the Plaint, it is averred that the first Impugned TVC treats all Frozen Desserts as containing Vanaspati and also depicts the same by showing Vanaspati going into the cup containing Frozen Desserts.

(iv) In Paragraph 20 of the plaint, it is interalia contended that the first Impugned TVC makes a false assertion and portrays a false message in a malicious manner viz. *"All frozen desserts contain only vanaspati." "Ice-creams use whole milk whereas all frozen desserts necessarily use only vanaspati." "Consumers should not eat frozen desserts since they contain vanaspati and are not ice creams and should check label for "ice-cream" word before purchasing; Frozen desserts are unhealthy since they contain vanaspati"*.

(v) In Clause (b) of paragraph 21 of the Plaint, it is averred that the visual and oral representation in the first Impugned TVC that Vanaspati is used by all manufacturers in their frozen desserts is false and incorrect.

(vi) In Clause (e) of paragraph 21 of the Plaint, it is averred that the Disclaimer in the first TVC seeks to confuse the term Vanaspati with edible vegetable oil and seeks to give a false impression that Frozen Desserts are not permitted to and/or do not use milk fat.

(vii) In paragraph 22 it is averred that the only change that Defendant No. 1 made to the First Impugned TVC is that it replaced the word "vanaspati" with "vanaspati oil" and commenced publication of the same on various digital media. The said change is completely inconsequential and does not in any manner change the false message conveyed by the First impugned TVC.

(viii) In Paragraph 24 of the Plaint, it is averred that the imputations made in the Impugned TVCs are directed not only at the entire category of products classified by law as "Frozen Desserts " but also towards the KWALITY WALL'S products of the Plaintiff and, in any event, can safely be treated as directed at the products/ Frozen Desserts of the Plaintiffs having regard to the fact that they control more than 50% of the market share thereof."

(ix) In Paragraph 25 of the Plaint, it is alleged that Defendant Nos. 1 and 2 are attempting to and continue to mislead the consumers by the claims and visuals as set out above whereby they are led to believe that all Frozen Desserts are made only out of 'Vanaspati' whereas in fact that is absolutely incorrect.

(x) In paragraph 28 of the Plaintiff, it is averred that the impugned TVCs are patently designed by the Defendant Nos. 1 and 2 to mislead the public into believing that entire class of products being frozen desserts of which the Plaintiff is a market leader with its KWALITY WALL'S products, are of poor quality and unhealthy/unfit for consumption.

(xi) In paragraph 32 of the Plaintiff, it is averred that the impugned TVCs have the effect of seriously debasing and tarnishing the entire class of product (frozen dessert) of which the Plaintiff is the market leader and owns over 50% market share and is a malicious attempt to erode the equity and goodwill and reputation of such products. Use of the impugned TVCs by Defendant No. 1 is wrongful, illegal, fraudulent, reckless and malicious and results in tarnishing and disparaging the product category as a whole and in particular the KWALITY WALL'S product of the Plaintiff.

(xii) In Paragraph 33 of the Plaintiff, it is averred that the impugned TVCs make false statements/representation/suggestions as a fact, that all Frozen Desserts contain Vanaspati, are unhealthy, impure and should not be consumed.

(xiii) In Paragraph 37 of the Plaintiff, it is averred that by reason of the aforesaid wrongful and illegal acts and misconduct of the Defendant Nos. 1 and 2 in telecasting and/or broadcasting and/or publishing the impugned TVCs, the Plaintiff has also suffered special damages. Further there is every likelihood that the Plaintiff has suffered or is likely to suffer loss of sales of its said product.

47. However, the Defendant No.1 has submitted that the Plaintiff has not made a mention of the following in the Plaintiff, but has mentioned the same in the Rejoinder thereby completely shifting and expanding its case in rejoinder :

(i) that the Defendant No.1 has falsely sought to portray in the first Impugned TVC that all Frozen Desserts products are made using only Vanaspati which is solid in form/nature as opposed to edible vegetable oil which is not solid in form or nature.

The above contention of Defendant No. 1 cannot be accepted. The Plaintiff as set out hereinabove, has repeatedly averred in the plaint that the Defendant No.1 has falsely sought to portray in the Impugned TVCs that all Frozen Dessert products are made using only Vanaspati. From the definition of hydrogenated vegetable oil/Vanaspati and vegetable oil reproduced in paragraph 13 above, it is clear that Vanaspati is in semi solid form. Therefore elaboration of the same by the Plaintiff in its Rejoinder by stating that the Defendant No. 1 has falsely portrayed that the Frozen Dessert products are using Vanaspati which is solid in form/nature as opposed to edible vegetable oil which is not solid in form or nature, cannot be treated as the Plaintiff having completely shifted or expanded its case in the Rejoinder.

(ii) That the Plaintiff in the Rejoinder has sought to clarify that its statement in the plaint does not mean that the remaining 30 per cent of the manufacturers necessarily use Vanaspati, but only means that the Plaintiff is not aware of the product composition of the balance 30 per cent of the manufacturers who may also not be using Vanaspati at all.

The Plaintiff has only sought to clarify a misreading of the plaint by Defendant No. 1. This contention of the Defendant No. 1 is already dealt with in paragraph nos. 27 to 29 of this Order and need not be repeated.

(iii) That by the Suit TVCs, Defendant No. 1 in its depiction has sought to falsely show and suggest that the Plaintiff's products contain Vanaspati and do not contain milk at all.

As set out hereinabove, the Plaintiff has in the plaint stated [paragraphs 20, 25 (viii)] that the Defendant No. 1 has falsely sought to portray that the Frozen Desserts contain **only** Vanaspati. It is thereby obviously implied that Defendant No. 1 has sought to portray that frozen desserts does not contain anything except vanaspati. In view thereof, the statement of the Plaintiff in the rejoinder that Defendant No.1 has falsely sought to suggest that the Plaintiff's products contain vanaspati and do not contain milk at all cannot be termed as

the Plaintiff having completely shifted and/or expanded its case in the Rejoinder.

(iv) That the reference to Vanaspati Tel from the 2011 Regulations (Hindi) is merely an afterthought/cover up.

Since the Managing Director of the Defendant No. 1 had, whilst dealing with the reference to Vanaspati Tel relied on the Google Dictionary and had not made any reference to the 2011 Regulations (Hindi) with regard to the use of the words Vanaspati Tel in the second TVC which Defendant No. 1 has mentioned in its reply, the Plaintiff has in the Rejoinder contended that the same is merely an afterthought/cover up. This cannot be treated as the Defendant shifting or expanding its case in the Rejoinder.

(v) That despite the use of the word Vegetable Oil, the Suit TVCs convey a false message that Frozen Dessert contain Vanaspati and no milk. Defendant No. 1 in its reply laid stress on the words 'Vegetable Oil/Vanaspati Tel'. In the rejoinder, the Plaintiff has referred to the depiction in the snap shots in the first TVC and the second TVC which shows thick/semi solid Vanaspati going into the cup of Frozen Dessert and have therefore submitted that a false message is conveyed that Frozen Desserts contain Vanaspati and no milk. This action cannot be termed as the Plaintiffs having completely shifted or expanded its case in the Rejoinder.

(vi) That the Disclaimer contents are false, since Frozen Desserts are not defined as 'vegetable oil based products'.

As regards the Disclaimers, this Court has taken cognizance of the fact that the Disclaimers are in such small prints that none watching the TV can read the Disclaimers with the naked eye and further, in the first TVC though the voice over clearly suggests that all the Frozen Desserts contain Vanaspati, in the Disclaimer which is illegible, it is sought to be stated that Vanaspati means vegetable oil, which statement is incorrect to the knowledge of the Defendant

No. 1, in view of the definitions set out in paragraph 8 above, pertaining to hydrogenated/vanaspati and vegetable oil.

I am therefore, of the view that all the required averments are found in the Plaintiff and it cannot be said that the Plaintiff have tried to shift or expand their case in the Rejoinder as alleged.

48. Relying on the decisions in: (i) *Procter & Gamble Home Products Pvt. Ltd. vs. Hindustan Unilever Ltd.*¹⁹; (ii) *Phillips India Pvt. Ltd. vs. Shree Sant Kripa Appliances Pvt. Ltd.*²⁰ (iii) *Reckitt Benckiser (India) Ltd. vs. Naga Limited & Ors.*²¹; (iv) *Godrej Sara Lee Ltd. vs. Reckitt Benckiser (I) Ltd.*²²; (v) *Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd.*²³; (vi) *Marico Limited vs. Adani Wilmar Ltd.*²⁴; (vii) *Phillips India Pvt. Ltd. vs. Shree Sant Kripa Appliances Pvt. Ltd. (supra)*; (viii) *Havells India Ltd. vs. Amritanshu Khaitan and Ors.*²⁵; (ix) *Procter & Gamble Home Products Pvt. Ltd. vs. Hindustan Unilever Ltd.*²⁶, and *Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd.*²⁷, it is submitted on behalf of the Defendant No.1 as follows:

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- 19 . 2017 (69) PTC 528 (Del) (paragraph 33, page 541)
- 20 . Delhi High Court judgment dated 30th October, 2014 (paragraphs 7.3 to 7.5)
- 21 . ILR (2003) 1 Delhi 325 (paras 1, 5 and 7)
- 22 . 2006 (32) PTC 307 (Del) (paras 3 to 5, 9, 13, 15, 16, 21 to 27, 30 to 34 and 37)
- 23 . (2010) 167 DLT 278 (DB) Paras 12 to 224.
- 24 . (2013) 199 DLT 663 (paras 3, 12 to 15, 18, 19, 21 to 24)
- 25 . 2015 (62) PTC 64 (Del) (paras 2, 24 to 28, 33, 35, 48 to 52)
- 26 . 2017 (69) PTC 528 (Del). (Paras 2 to 4, 7, 30, 36 to 38, 39 to 41, 42 to 50 and 52)
- 27 . (2010) 167 DLT 278 (DB) (Paras 12 to 24)

- (i) Advertisement and/or commercial speech is a part of the fundamental right guaranteed under Article 19 (1) (a) of the Constitution of India;
 - (ii) It is open for an advertiser to puff (even incorrectly) its own products and also to compare only a select or a particular attribute, feature or characteristics of the product with that of its competitor. It is in law not necessary for the advertiser to either depict all the other factors or characteristics of the product, or to show any advantages of the competitors product;
 - (iii) Whilst considering television advertisements, a frame by frame and/or over elaborate analysis of the advertisement is to be avoided. Advertisements (more particularly, competitive ones) are to be seen from the perspective of an aware and 'alert consumer of goods;
 - (iv) If the purpose of the advertisement is to make the consumer aware of his mistaken impression, or correct a wrongful impression then the Plaintiff cannot be heard to complain of such an action.
 - (v) In cases of comparative advertising, it is permissible to term one's own products as better than one of its competitor. Equally, the right to protect one's own reputation, is not to be misunderstood as a right not to be spoken against or a right to be criticized for one's own shortcomings. In such cases, the Court has to bear in mind that the consumer is vigilant, aware of his rights, and in cases of comparative advertisement is likely to be more analytical in analyzing the comparison thoughtfully and having a piecemeal review of the product attributes;
 - (vi) For a Plaintiff to establish a case of generic disparagement, it has to be in a position to demonstrate that either the class or the product reflected in the impugned advertisement is that of the Plaintiff or that the Plaintiff's product is synonymous or associated with the class, that any reference to a product in that class would evoke only the Plaintiff's product in the mind of the consumers;
- and

(vii) As long as the advertisement is by and large truthful, the advertiser must be given enough latitude and room to play around in the grey areas of advertisement and the plaintiff ought not to be hypersensitive.

49. It cannot be disputed that advertisements and/or commercial speech is a part of the fundamental right guaranteed under Article 19 (1) (a) of the Constitution of India. However, it cannot be that the fundamental right so guaranteed under the Constitution can be abused by any individual and/or manufacturer of a product by maligning, discrediting and/or belittling the product of another manufacturer by way of negative campaign as is done in the present case. It is also correct that it is open for an advertiser to puff up its own products and also to compare only a select or a particular attribute, feature or characteristic of the product with that of its competitor. However, the instant case is not that of a mere puff up of its product by the Defendant No.1. As set out hereinabove, Defendant No. 1 has knowingly denigrated the entire category of Frozen Desserts thereby also affecting the Plaintiff who is a market leader of the products falling under the category of Frozen Desserts. The present case is also not in the nature of permissible comparative advertisements in the true, proper and fair sense. This is because Defendant No. 1 shows an ingredient going into Frozen Desserts, which ingredient most Frozen Desserts do not contain at all i.e. vanaspati. In particular, the Plaintiff's Frozen Dessert does not contain any Vanaspati. This cannot be comparative at all. Also, even in a permitted comparative advertisement the same corresponding feature of the product must be compared and not a totally different feature, as is done in the present case i.e. milk is compared with Vanaspati/Vanaspati Tel, instead of comparing the 'fat' used in both the products.

50. It cannot be said that in the instant case the Plaintiff is analysing the Impugned TVCs frame by frame. The Impugned TVCs have to be viewed as television commercials and not print advertisements. The plaintiff even before

the commencement of arguments placed the TVCs for viewing by the Court. It is essential to see/view the whole Impugned TVCs and consider what they convey. The impugned TVCs, seen as a whole, convey to the public clearly by content, intent, manner and meaning that Vanaspati in large quantity goes into Frozen Desserts. This is shown by the Vanaspati falling into the cup in the visual in both the impugned TVCs seen together with the voice overs. In fact, it is Defendant No. 1 who wants this Court to ignore the visual impact and consider only the evidently insignificant addition of the word "Tel". Defendant No.1 seeks to dissect the advertisement, its visual portions and its voice over by trying to explain only the addition of the word Tel whilst not dealing with the visual and its impact at all. In fact, no justification is given by the Defendant No. 1 as to why they originally showed Vanaspati and use the term Vanaspati in the TVC. It is only after the effect and impact of the visual and the voice over is considered that this Court has come to the conclusion that both the TVCs are disparaging in nature. As already held hereinabove, it is clear beyond any doubt that if the purpose of the advertisement is not to make the consumer aware of his mistaken impression, or correct a wrongful impression and therefore the Plaintiff can certainly be heard to complain of such an action. The TVCs of Defendant No. 1 cannot be said to be truthful and therefore giving any latitude and room to play around in the grey areas of advertisement to the Defendant No. 1 does not arise nor can it be said that the Plaintiff ought not to be hypersensitive.

51. The Defendant No. 1 has contended that the consumer is informed, analytical and an alert consumer. This is more so, in case of comparative advertising. It is wholly misconceived to contend that the depiction in the TVCs would make the consumer believe that frozen dessert contains only Vanaspati or Vanaspati Tel. The ingredients are written on the pack and the

consumer has eaten both ice cream and frozen dessert and knows what he wants.

The effect and impact of the TVCs have been dealt with hereinabove. On viewing the TVCs and considering them in their entirety, I do not think that even an alert average consumer of dairy based desserts would consider the TVCs in the manner stated by Defendant No. 1. The TVCs surely convey a message which has been dealt with hereinabove and result in disparagement of frozen desserts.

52. The Judgments cited on behalf of the Defendant therefore do not in any manner show any change in the law. The legal principles continue to be the same and that Defendant No. 1 is not entitled to denigrate the products of another is clearly borne out by each of the Judgments cited on behalf of Defendant No.1 on disparagement. The Judgment in the case of Procter & Gamble vs. Hindustan Unilever Ltd. (supra) does not take into consideration some of the principles set out in the earlier Judgments, and in particular does not take into consideration the difference between disparagement/ malicious falsehood/ slander of goods/ and defamation, and therefore with utmost respect I do not intend to follow the same.

53. The Plaintiff has correctly distinguished the Judgments relied upon by the Defendant No. 1 and set out in paragraph 47 above, as summarised hereunder:

(i) ***Reckitt Benckiser (India) Ltd. vs Naga Limited & ²⁸Ors***

The present case is not one where Defendant No. 1 is seeking to correct a mistaken impression of the consumer as set out in para 7 of the Judgment. Defendant No. 1 has not produced any material to show that the consumer has a mistaken impression. In fact it is Defendant No. 1 that is seeking to give the

28 .ILR 2003 I Delhi 325

consumer a mistaken and misleading impression that all Frozen Desserts contain Vanaspati, and this is impermissible.

The reliance placed on the orders of ASCI referred to in paragraph 8 of the said Judgment is baseless. In the said case, the ASCI order pertained to the same commercial and not in the context of some other commercial. In any case, as set out hereinabove in the present case the ASCI's proceedings were expressly mentioned in the plaint. The said Judgment does not in any manner alter the well settled legal position. In fact the Judgments relied upon by the Plaintiff have been followed. Whether there is in fact disparagement or not in a given fact situation is a matter depending on the facts of each case.

(ii) Godrej Sara Lee Ltd vs Reckitt Benkiser (I) Ltd²⁹

This Judgment, in fact, supports the case of the Plaintiff. Para 5(c) shows that the advertisement in question only projected that the product of the defendant had both the qualities in one product. Paragraph 13 clearly provides: *“he can declare that his goods are better than that of his competitor. However, while doing so, he cannot disparage the goods of a competitor. ... But while doing so, he is not permitted to project that his competitors goods are bad.”* So also, paragraphs 15, 16 and 17 also contain observations which affirm the general principles in favour of the Plaintiff and set out the principal that intent, manner and storyline of an advertisement have to be borne in mind; the fact that in the electronic media the disparaging message is conveyed to the viewer by repeatedly showing the commercial everyday thereby leaving an indelible impression in their mind etc. is also to be kept in mind by the court. The only reason an injunction was not granted in the said case was that there was in fact no denigration in the facts of that case. This is dependent on the facts of each case.

29 2006 (32) PTC 307 (Del)

(iii) **Marico Limited vs Adani Wilmar Ltd.**³⁰

The Judgment is of no assistance to the Defendant No. 1 since the message conveyed by the Impugned TVCs in the present Suit is not the truth. In fact, the entire message conveyed by the Impugned TVCs in the present case is false, as demonstrated hereinabove. The emphasis on the portion in paragraph 15 to say that the public expects a certain amount of hyperbole in advertisement and that the tests to be applied is whether a reasonable man would take the claim being made as one made seriously or will have to take it with a pinch of salt, is not at all applicable to the present case. The present case is not one of mere hyperbole but placing incorrect facts before the public. In any case, the hyperbole may be to puff up one's product but in so doing cannot disparage somebody else's product. The hyperbole cannot be used in a negative connotation for the product of the rival. An example was placed during arguments on behalf of the Plaintiff that if a sugar free product were to be compared with one containing very little sugar, the sugar free manufacturer cannot show a whole sack full of sugar as an ingredient of the rival product. Such a hyperbole in the negative sense is nothing but disparagement and malicious falsehood.

(iv) **Phillips India Pvt. Ltd. vs Shree Sant Kripa Appliances Pvt. Ltd.**³¹

30 2013 SCC Online Del 1513

31 (Delhi HC Unreported dated 19.01.2015)

The case was about the fact that LED bulbs are better than CFL bulbs, which was an admitted fact and hence there was no finding of disparagement on facts. (para 3.3 and para 4 of the Judgment). The facts of the case were entirely different from the facts of the present case.

There is otherwise no change in the principle enunciated on the law of disparagement. This Judgment is of no assistance to the Defendant No. 1. The observations in paragraph 7.4 of the Judgment that disparagement is difficult to establish at an interlocutory stage unless an entity against whom disparagement is directed is the only rival in the trade is contrary to the findings in all other Judgments relating to generic disparagement and the settled law and is therefore per incuriam and not binding. This finding is also contrary to the findings of the Bombay High Court in the case of Godrej vs Jyothi Laboratories (supra) and is therefore not binding on this Court. This Judgement is of no assistance to Defendant No. 1. In the present case, disparagement of a class is established beyond doubt and there is no "difficulty".

(v) ***Havells India Limited & Anr. vs Amritanshu Khaitan & Ors*** ³²

This Judgment was cited for the proposition that the defendant was entitled to pick and choose the feature that it wished to compare and it was not necessary to compare all product features of competing products. In the case in question the same feature in the competing products was compared. This is not so in the present case. In the present case, the milk content of AMUL is compared with the FAT content of Frozen Dessert which is obviously not the same feature in both the products i.e. it is not fat vs fat comparison - but a comparison made on distinct and unfair parameters (paragraph 24 page 19 of the plaint). Further, in this case it was not the case of the Plaintiff that the chart put up is false. Secondly, the Judgement in para 38 to 42 assist the Plaintiff. The

32 . 2015 (62) PTC 64 (Del)

advertisement must not be misleading – in the present case they are misleading. The features compared must not be misleading – in the present case they are misleading. Accordingly, the question of the Plaintiff being ‘hypersensitive’ cannot and does not arise in the present case.

(vi) Procter & Gamble vs Hindustan Unilever Limited³³

This Judgment proceeds on a wrong footing and equates an action for malicious prosecution / slander of goods with an action for defamation. This is contrary to established principles of law, set out above. This Judgment however, also recognises, that comparative advertising is permissible so long as the rival’s product is not derogated, discredited, disgraced. The fact that the intent, manner and storyline of the advertisement are relevant has also been accepted. The “hyperbole” referred to in the Judgment is only in the context of puffing up one’s own product but cannot be applied to the showing down of another’s product. In the present case, there is no element of permissible puffing up of the AMUL product. The Defendant No. 1 is seeking to gain an unfair advantage by showing an unfair comparison of the products by depicting incorrect statements in respect of Frozen Dessert products. In the present case, showing a cup full of “Vanaspati” or “Vanaspati TEL” is not permissible especially having regard to the negative connotation that the term Vanaspati has, coupled with the negative message not to purchase, by saying, “*Vanaspati wala nahi unhe frozen dessert kehtey hain*” along with the visual. The ‘search attributes’ and ‘experience qualities’ tests can have no application to the present case since shampoos are utility products, whereas ice-creams / Frozen Desserts are not.

(vii) Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd.(supra)

This judgment also lends no assistance to the Defendant No. 1. In the said Judgment, the Division Bench of the Delhi High Court has reiterated the

33 2017(69) PTC 528 (Del)

guiding principles set out by the Hon'ble Supreme Court in its decision in *Colgate Palmolive (India) Ltd. vs. Hindustan Lever Ltd.*³⁴ including the principle that an advertisement must not be false, misleading, unfair or deceptive and has further clarified that though an advertisement is commercial speech and is protected by Article 19 (1) (a) of the Constitution; if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection. Again, in the said judgment the Division Bench of the Delhi High Court has also followed its decision in *Pepsi Co. Inc. and others vs. Hindustan Coca Cola Ltd. and another*³⁵ wherein it was held that though boasting about one's product is permissible, disparaging a rival product is not, whilst glorifying its product, an advertiser may not denigrate or disparage a rival product. Paragraph 278 of the Halsbury's Laws of England (Fourth Edition Reissue Volume 28) is also referred to which provides that "[It] is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product". The finding in the decision of the Delhi High Court in *Dabur India Ltd. vs. Wipro Limited, Bangalore*³⁶ is also referred to namely that "[It] is one thing to say that the defendant's product is better than that of the Plaintiff and it is another thing to say that the Plaintiff's product is inferior to that of the defendant". In the instant case, as pointed out hereinabove, the Defendant No. 1 is clearly guilty of disparaging the rival product i.e. frozen desserts by making untrue statements of fact with regard to the same and also asking the consumers not to have frozen desserts but instead have the product of Defendant No.1 i.e. Amul ice cream.

34 (1999) 7 SCC 1

35 2003 (27) PTC 305 (Del.) (DB)

36 2006 (32) PTC 677 (Del)

54. I have therefore considered the content, intent of commercial, the manner of the commercial, the storyline of the commercial; and the message sought to be conveyed by the Impugned TVCs in totality and it has become crystal clear that the same are shown with the sole intention of disparaging the entire category of Frozen Desserts. From the storyline and the manner of the impugned advertisements, it can clearly be seen that the message that is sought to be given in the impugned advertisements, is that all Frozen Desserts contain Vanaspati/ hydrogenated vegetable oil and that all Frozen Desserts are necessarily unhealthy / harmful and should not be purchased / consumed. The fact that the advertisement campaign or visual media has an immediate impact on the viewers and purchaser's mind, I see substance in the submission of the Plaintiff that irreversible damage is caused to the Plaintiff. The impugned advertisements are being telecast repeatedly, thus confusing the consumers and disseminating incorrect information. The Plaintiffs are therefore entitled to interim relief against the Defendant No.1.

55. The learned Senior Advocate appearing for the Plaintiff has rightly also drawn my attention to the decision of the Division Bench of this Court in **R.R. Oomerbhoy Pvt. Ltd. vs Court Receiver, High Court &Ors** ³⁷, the relevant portions of which are reproduced hereunder:

“In a matter such as the present, therefore, it would be most inappropriate for this Court to permit the Appellant to use the mark POSTIANO with a modification of the colour scheme, get-up or trade dress. Equally, it would be inappropriate for this Court to suggest such modifications. That the use of the mark by the Appellant was not honest or bona fide is also clear, as noted earlier

37 . 2003 (27) PTC 580 Bom

from the advertisement of the Appellant containing a postcard with a postal stamp and a postman in the background. An assumption of good faith which underlies the request for a modification cannot be made in this case, in view of the conduct of the appellant. A similar situation arose before the Court of Appeal in England in Wright, Layman & Umney Ltd. v. Wright, 1949 (46) RPC 149. The Master of the Rolls, Lord Greene speaking for the Court of Appeal, put it succinctly thus:

"It has been said many times that it is no part of the function of this Court to examine imaginary cases of what the defendant could or could not do under this form of injunction. The best guide, if he is an honest man, is his own conscience; and it is certainly not the business of this Court to give him instructions or hints as to how near the wind he can sail. Honest men do not attempt to sail near the wind."

We, therefore, reject this submission." (emphasis supplied).

However the disparaging manner in which the impugned TVC's are made/prepared it is in any event not possible to direct/order/suggest any modification/s to the same.

56. In the circumstances, I proceed to pass the following Order:

The Notice of Motion is allowed and the Defendant Nos.1 and 2 are restrained from *inter alia* (i) telecasting or broadcasting or otherwise howsoever communicating to the public or publishing two Television Commercials (hereinafter, the Impugned TVCs) or any part thereof or any other advertisement of a similar nature in any language or in any manner causing the Impugned TVCs or any part thereof or any other advertisement of a similar nature to be telecast or broadcast or communicated to the public or published in any manner and (ii) disparaging or denigrating the Plaintiff's KWALITY

WALL'S products (including Frozen Desserts manufactured and/ or sold under the said brand and sub-brands thereof) or the Plaintiff's business in any manner whatsoever.

Accordingly the Notice of Motion is disposed of with costs.

(S.J. KATHAWALLA, J.)

After the above Judgment is pronounced the Learned Advocate appearing for the Defendant No.1 has requested that the order passed against Defendant No.1 be stayed. This court having come to the conclusion that Defendant No.1 is guilty of disparaging the rival product i.e. Frozen desserts by making false statements of facts with regard to the same and also indulging in a negative campaign and also asking the consumers not to have frozen desserts but instead have the product of Defendant No.1 i.e. Amul ice-cream, which is not permissible in law, the question of granting any stay on the order does not arise. The application for stay is therefore rejected.

(S.J. KATHAWALLA, J.)