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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 156/2018

RELIANCE JIO INFOCOMM LIMITED

..... Plaintiff

Through : Dr.Abhishek Manu Singhvi and
Mr.Dayan Krishnana, Sr Advocates
with Mr.K.R.Sasriprabhu, Mr.Gaurav
Mitra, Mr.Amit Bhandari, Mr.Hiten
Sampat, Mr.Aviskhar Singhvi,
Mr.Vishnu Sharma, Mr.Sirjan Sinha,
Ms.Rashmita Roy Choudhary and
Ms.Aakshi Lodha, Advocates.

versus

BHARTI AIRTEL LIMITED

..... Defendant

Through : Mr.Rajiv Nayar, Sr Advocate with
Mr.Harsh Kaushik and Mr.Abhay
Chattopadhyay, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

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13.04.2018

IA No.4934/2018 and 4935/2018

Exemption allowed, subject to all just exceptions.

The applications stand disposed of.

CS(OS) 156/2018 & IA No.4933/2018

1. Vide this suit the plaintiff has approached for the relief of declaration, permanent injunction, mandatory injunction, and damages against the defendant.

2. The case of the plaintiff is as under:-

a) the plaintiff is a telecom service provider and has filed this suit for above reliefs being aggrieved of the false, deceptive and

misleading commercial/ advertisements (hereinafter as the "Subject Advertisements") against the defendant which are being published / aired by defendant – also a telecom service provider and competitor of the plaintiff across various media including outdoor billboards, flyers / brochures retail outlets, print media, electronic media and television, etc.

b) one of the Unique Resource Locators (URLs) of the Subject Advertisements, as uploaded by the Defendant on YouTube is <https://youtu.be/ne6qUrqxOUU>. The Subject Advertisements explicitly and falsely proclaim that the defendant (purportedly, the only one in the market) is offering "live and free" access to Twenty-Twenty ("T20") cricket coverage, and further falsely represent that a subscriber need only obtain a 4G sim from the Defendant company and download the Airtel TV app to obtain a virtual "season pass" i.e. live and free access to T20 coverage;

c) the Subject Advertisements are deliberately deceptive, misrepresenting and misleading in their content since the subscriber i.e. the individual wanting to watch T20 matches on his electronic device, will doubtless incur charges for data being consumed to download/ live stream the T20 cricket matches as per the data download charges/plan availed of by the subscriber, thus it is not free by no means. The deception and misrepresentation inherent in the Subject Advertisements is aimed at enticing and luring viewers to subscribe to the Defendant's telecom service and give preference to Defendant over other telecom service providers in the market including the Plaintiff;

- d) an ordinary individual viewing the Subject Advertisements will doubtless be misled into believing that he/she will be able to watch the T20 season free, without being made aware of the hidden costs involved in the form of data download charges. The misrepresentation contained in the Subject Advertisements will cause the unsuspecting subscriber to be unwittingly burdened by such hidden costs;
- e) the Defendant is, thus, responsible for deliberate and mala fide misrepresentation and concealment of material facts to induce another to act to his detriment. Pertinently, the Subject Advertisements have been strategically positioned at a time when the new season of the Indian Premiere League (IPL) (11th edition of the IPL i.e. IPL 2018) is being aired, which will last from 07.04.2018 till 27.05.2018;
- f) the present edition of the IPL is estimated to have an approximate viewership of 700 million subscribers and the consequences of the Subject Advertisements will be wide ranging and impact a large number of unsuspecting subscribers as well as have an unfair and undue detrimental, adverse effect on other telecom service providers operating in India, including the Plaintiff;
- g) it is also alleged the Defendant is the largest telecom service provider in India both in terms of subscriber base and revenue and the Defendant is a well entrenched player in the market with the largest network in the country;
- h) the potential of the Subject Advertisements to cause dissemination of misinformation and the consequential misleading and duping of innocent individual subscribers, is precarious. The consequences in terms of disruption to the telecommunications

market in India is also detrimental and pervasive;

i) the Plaintiff is itself offering a "Cricket Season Pack" wherein subscribers can pay a total sum of ₹ 251/- and enjoy 102 GB of 4G data for a period of 51 days with a daily limit of 2 GB. This 51-day package is deliberately offered to coincide with the 2018 IPL season from 07.04.2018 to 27.05.2018;

j) the offer from the Plaintiff is a special offer meant for the ongoing IPL season and to elaborate the minimum tariff for 2GB per day plan for 51 days would otherwise cost minimum around ₹ 360/- if any subscriber opts for any of the other tariff plans offered by the Plaintiff;

k) thus subscribers who wish to avail of telecom services to watch the T20 matches will have the benefit to choose to pay ₹ 251/- for the Plaintiff's package, thereby knowing the total and maximum cost upfront; whereas the Defendant's claim of 'NIL' charges for its services per Subject Advertisements is outrageously false and misleading;

l) the unsuspecting subscriber once he avails of the Defendant's services will realise that the hidden cost of watching such matches on his mobile device is the data download charges which are being levied as per the data plan he has subscribed to, only after the said data is consumed. Thus, if a subscriber has subscribed to a data package of 20GB per month at ₹ 399/- on the Defendant's network, his watching of the IPL will result in consumption of the aforesaid 20 GB for which he is paying data usage charges. The subscriber, if in the course of watching the IPL matches goes beyond the 20 GB usage

as per his data plan, will be charged for the extra consumption of data; and

m) it is alleged the subscriber in the course of watching IPL matches is paying both for the data consumption as per his monthly data rental package as well as any extra data consumption over and above what his usual package provides. This is stated to be in contradiction to the Defendant's claim that watching such matches are live and free on its network. If the subscriber were aware of such charges, it would be an easy choice to opt for the Plaintiff's service which has a fixed charge of ₹ 251/- for 102 GB of 4G data valid during the entire duration of the 2018 IPL season. It would be noteworthy that the Plaintiff had not termed its offer as 'free'.

3. The learned senior counsels for the plaintiff relied upon *Dabur India Limited vs Colortek Mehgalya Pvt Ltd* MANU/DE/0225/2010 wherein this Court notes:-

“17. In our opinion, it is also important to keep in mind the medium of the advertisement. An advertisement in the electronic media would have a far greater impact than an advertisement in the print media. In D.N. Prasad v. Principal Secretary, 2005 Cri LJ 1901 the Andhra Pradesh High Court observed that a telecast reaches persons of all categories, irrespective of age, literacy and their capacity to understand or withstand. The Court noted that the impact of a telecast on the society is phenomenal. Similarly, it was observed in Pepsi Co. that a vast majority of viewers of commercial advertisements on the electronic media are influenced by visual advertisements “as these have a far reaching influence on the psyche of the people ...” Therefore, an advertiser has to virtually walk on a tight rope while telecasting a commercial and repeatedly ask himself the questions: Can the commercial be understood to mean a denigration of the rival product or not? What impact would the commercial have on the mind of a viewer? No clear-cut answer can be given to these questions and it is for this reason that this Court has taken a view that each case has to be decided on its own facts. (See Reckitt Benckiser (India) Ltd. v. Cavinkare Pvt. Ltd., ILR (2007) II Delhi 368, paragraph 17). Consequently, this Court has been called upon to decide the same issue time and time

again resulting in the same and very large number of decisions being cited.

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23. Finally, we may mention that *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.*, 1999 (19) PTC 741 was referred to for the following propositions relating to comparative advertising:

(a) to (c) xxx xxx

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

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

4. In *Hindustan Unilever Limited vs Reckitt Benckiser India Limited* 207 (2014) DLT 713 the Court notes:-

"48. The first question here is as to the manner in which such advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged. On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view to catch an 'infringement'....."

5. It is the case of the plaintiff that the advertisement of the defendant is deceptive, misleading and misrepresentative in as much as to have the complete information of the advertisement one has not only to go to the advertisement as is given at page No.81 of the documents of the plaintiff, but also to visit on other sites, mentioned at pages No.72,73 and 76 of the documents and that the inscription to *further refer to sites* is in dim font itself is deception.

6. The learned senior counsel appearing on behalf of the defendant on advance notice argued the plaintiff is jealous competitor

and what is meant by 'free subscription' is free subscription of HOTSTAR network and whereas the advertisement specifically provides if one intends to watch the game one has to use data as per the plan taken by him/her. However, during the course of the arguments, the learned senior counsel for the defendant, under instructions, agreed the defendant would include the following in its advertisement in bold letters:-

- a) the subscription of HOTSTAR shall only be free; and
- b) the data charges will be as per subscriber's tariff plan.

7. Needless to say this shall be without prejudice to the respective rights and contentions of both the parties. The changes shall be carried out by the defendant immediately in their ongoing subject advertisements.

8. Since the learned counsel for the defendant has accepted notice so the written statement/reply be filed within two weeks from today with an advance copy thereof to the learned counsel for the plaintiff. Replication/rejoinder thereof, if any, be also filed within one week thereafter.

9. List for completion of the pleadings before the learned Joint Registrar on 08.05.2018. Order dasti to both the parties.

YOGESH KHANNA, J

APRIL 13, 2018

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