



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

Reserved on: 24.03.2023

Date of decision: 02.06.2023

+ **CS(COMM) 471/2022**

MARICO LIMITED

..... Plaintiff

Through: Mr.Akhil Sibal, Sr. Adv.
& Mr.Chander M Lall,
Sr. Adv. with Mr.Ankur
Sangal, Ms.Pragya
Mishra, Mr.Raghu
Vinayak Sinha &
Ms.Asavari Jain, Advs.

versus

DABUR INDIA LIMITED

..... Defendant

Through: Mr.Rajiv Nayar, Sr. Adv.
with Mr.R. Jawahar Lal,
Mr.Siddharth Bawa,
Mr.Anuj Garg,
Mr.Anirudh Bakhru &
Mr.Mohit Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

I.As. 10716/2022, 11057/2022, & 12154/2022

1. I.A. No. 10716/2022 has been filed by the plaintiff *inter alia* praying for the grant of an *ad interim* injunction restraining the defendant, its directors, principals proprietor, partners, officers, employees, agents, distributors, shopkeepers, franchisees, licensees, representatives and assigns from communicating to public or otherwise sharing, forwarding the defendant's WhatsApp



Advertisement or the defendant's Print Advertisement or any part thereof or any other advertisement of a similar nature in any language or in any manner disparaging the goodwill and reputation of the plaintiff's product 'Nihar Natural Shanti Badam Amla Hair Oil' and the registered Nihar trade marks.

2. On the other hand, I.A. No. 11057/2022 has been filed by the defendant seeking vacation of the *ad-interim* order of injunction granted in favour of the plaintiff vide order dated 13.07.2022.

3. At the outset, it is important to note that the operation of the *ad interim* order dated 13.07.2022 was suspended vide order dated 19.07.2022. The plaintiff has thereafter filed I.A. No. 12154/2022 praying that strict action be taken against the defendant for making a false statement and for the revival of the *ad interim* injunction on the impugned Print Advertisement granted on 13.07.2022.

4. As the three applications raise similar issues, they are being addendum and disposed of by this common order.

5. The impugned WhatsApp Advertisement is reproduced herein below:

दोपेका पादुकोण Dabur Amla Hair Oil
“MEGA FRONT PAGE PRINT AD”
कल आ रहा है (12 July 2022)

दैनिक भास्कर में
PRINT AD की कॉपी हर दूकान में दिखाए और
ज्यादा बेचे Dabur Amla Hair Oil

पर शेयर करे

अब निहार शांति आंवला से जंग जीतेगे हम



6. The impugned Print Advertisement is reproduced herein below:

II. FACTUAL BACKGROUND

i) Case of the plaintiff

7. It is the case of the plaintiff that the plaintiff is one of the leading players in the Fast Moving Consumer Goods (in short 'FMCG') market in India and manufactures as well as markets *inter alia* packaged coconut oil, hair oil, personal care product(s) and food products under its portfolio of various well-known and established



household brands such as “Nihar”, “Parachute”, “Saffola”, “Livon”, “Hair & Care”, “Silk-N-Shine”, among others.

8. The plaintiff-company states that its product(s) and brands have built up and enjoy a wide, immense, and enviable reputation and goodwill under its aforesaid brands.

9. The plaintiff states that its mark ‘NIHAR’ was originally owned by Tata Oil Mills Company Ltd., which was manufacturing and marketing Filter Coconut Oil under the brand “TATA NIHAR”. In 1994, the trade mark ‘NIHAR’ was acquired by Hindustan Lever Limited, the predecessor-in-title of the plaintiff. Subsequently, by virtue of an assignment deed between the plaintiff and its predecessor-in-interest dated 17.02.2006, the plaintiff-company became the owner of the trade mark ‘NIHAR’.

10. It is asserted by the plaintiff that the plaintiff is the market leader by volume in the Amla Hair Oil segment in the country, and currently has a market share by volume of 42.3% for MAT in May 2022. It is further asserted that the plaintiff has gained substantial goodwill and reputation for its Amla Hair Oil product.

11. The plaintiff states that the plaintiff’s product ‘NIHAR’ had an annual net revenue of Rs. 52,613.22 Lakhs in the financial year 2021-22. The plaintiff also states that it has expended advertisement and sales promotional expenses of Rs.4,164.08 Lakhs for the financial year 2021-22 for the said product.

12. It is the case of the plaintiff that on July 11, 2022, the plaintiff came to know about a WhatsApp message being circulated in the market which was defaming and denigrating the plaintiff’s product



“Nihar Naturals Shanti Badam Amla Hair Oil”, and further mentioned about a disparaging Print Advertisement of the defendant for its “Dabur Amla Hair Oil” product, which was supposed to be released on 12.07.2022.

13. The plaintiff, therefore, filed the present suit praying for a decree of permanent injunction restraining the defendants from publishing or circulating the impugned WhatsApp and Print Advertisements.

ii) Case of the defendant

14. It is the case of the defendant that the defendant-company was founded in 1884, and over the past 137 years, the defendant has established a reputation for being the premier company, manufacturing and marketing diverse range of wellness/healthcare/food products, including DABUR AMLA Hair Oil in its state-of-the-art manufacturing facilities, under the iconic trade mark “DABUR”.

15. It is asserted by the defendant that the defendant launched its product DABUR AMLA Hair Oil in the year 1940. It is asserted that ‘DABUR AMLA’ is a flagship brand of the defendant. The defendant states that the product has yielded a revenue of Rs.67,470 Lakhs for the Financial Year 2021-2022. The defendant asserts that it has expended Rs.9,020 Lakhs for the Financial Year 2021-22 towards advertisement and promotion of the said product.

16. It is the case of the defendant that the Print Advertisement is legitimate and there is nothing bad or negative intended or conveyed,



either expressly or impliedly, about the plaintiff's product. It is further asserted that the advertisement is neither false nor misleading. The defendant has issued the Print Advertisement for the purpose of promoting its product by making well-substantiated, statistically proven and truthful claims, which does not in any manner denigrate or disparage the plaintiff's product, and the same also does not amount to infringement of the trade mark of the plaintiff.

III. PREVIOUS COURT PROCEEDINGS

17. As noted herein above, this Court, vide its order dated 13.07.2022, had granted an *ex-parte ad-interim* injunction in favour of the plaintiff and against the defendant, holding that the impugned WhatsApp and Print Advertisement *prima facie* appeared to be disparaging the goods of the plaintiff.

18. The defendant, thereafter, filed I.A. 11057/2022 seeking vacation of the *ad interim* order pointing out alleged concealment and misstatements made by the plaintiff in the plaint.

19. On 19.07.2022, based on the statement of the learned senior counsel for the defendant that the defendant had neither circulated nor had been involved in the circulation of the impugned WhatsApp Advertisement/message, the learned senior counsel for the plaintiff, without prejudice to the rights and contentions of the plaintiff, prayed that the interim order dated 13.07.2022 be suspended with respect to the impugned Print Advertisement. It was ordered accordingly.

20. The plaintiff, thereafter, filed I.A. 12154/2022, contending that the WhatsApp message/Advertisement had originated from the



defendant alone and the statement made before this Court on 19.07.2022 was incorrect. The plaintiff prayed for the restoration of the ad *interim* injunction on the impugned Print Advertisement.

IV. SUBMISSIONS ON BEHALF OF THE LEARNED SENIOR COUNSEL FOR THE PLAINTIFF

21. The learned senior counsel for the plaintiff submits that the impugned advertisements are disparaging towards the product of the plaintiff due to the following factors:

a) The Print Advertisement shows a bottle similar to that of the plaintiff's product "Nihar Naturals Shanti Badam Amla Hair Oil" with a big cross in a stark red colour upon it, thereby asking the consumers to reject the plaintiff's product. Further, the WhatsApp message which was in circulation on 11 July, 2022 depicted a boxing glove knocking down the plaintiff's bottle with a caption "***Ab Nihar Shanti amla se jung jeetenge hum***", and urged the shopkeepers to circulate the same by stating "***WhatsApp par share kare***" which shows that the intention of the advertiser was to target the plaintiff and its product.

b) The Print Advertisement begins by alarming and threatening the consumers with statement "***Yaad rakhna, sasta amla, baalo ko mehnga pade ga***", implying that any affordable Amla Hair Oil in comparison to the defendant's product will cause serious harm and damage to the consumers. He submits that this is a direct reference to the plaintiff's product as the plaintiff has



been running an advertisement campaign for years showing that plaintiff's product is an affordable and beneficial product due to its lower price. He submits that the above line is not in the form of an opinion amounting to puffery of its product by the defendant, but a false declaratory representation of fact that amounts to disparagement.

c) The Print Advertisement states "***Saste amla ke mukable, Dabur amla tel ka uttam gadhapan baalo me samae aur unhe banaye 2X tak zada mazboot***". The learned senior counsel for the plaintiff submits that the defendant in its Print Advertisement has claimed that in comparison to '***sasta amla***', the product of the defendant is more efficacious. This is a direct reference to the product of the plaintiff, with a false assertion.

d) An image of the defendant's product is reproduced with a tag next to it stating "***Asli Amla, Dabur Amla***". The said statement is also giving the reference that all other '***sasta amla***' are not original and "Dabur Amla Hair Oil", which is an expensive Amla hair oil, is the only '***Asli***' Amla Hair Oil, which is a completely misleading statement, and further disparages the category of Amla Hair Oils which are more affordable and in which category the plaintiff is the market leader.

e) The defendant in the Print Advertisement has wrongly claimed itself as the No. 1 Amla Hair Oil since the plaintiff has a higher market share and also the report which is being relied upon by the defendant in the disclaimer of the Print Advertisement is of the year 2020, which cannot be relied upon



in the current year, thereby showing that the entire intention of the defendant in the Print Advertisement is to mislead the consumers.

22. The learned senior counsel for the plaintiff submits that, while the defendant can puff its product, it is not allowed to denigrate the product of the other companies. He submits that with respect to disparagement and misleading advertisements, the overall impression of the impugned advertisements must be considered. In support of his submissions, he places reliance on the judgements of High Courts in *Gujarat Co-operative Milk Marketing Federation Limited & Ors v. Hindustan Unilever Limited*, 2018 SCC OnLine Bom 7265; *Gillette India Limited v. Reckitt Benckiser (India) Private Limited*, 2018 SCC OnLine Mad 1126; *Dabur India Limited v. Emami Limited*, 2004 (75) DRJ 356; *Pepsi Co. Inc. and Ors v. Hindustan Coca Cola Limited and Another*, 2003 SCC OnLine Del 802; *Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Limited & Ors*, 2017 SCC OnLine Bom 2572 *Dabur India Limited v. Colgate Palmolive India Ltd.*, 2004 (77) DRJ 415; *Colgate Palmolive Company & Another v. Hindustan Unilever Limited*, 2013 SCC OnLine Del 4986 and *Dabur India Ltd. v. M/s Colortek Meghalaya Pvt. Ltd. & Ors*, ILR (2010) IV DELHI 489.

23. The learned senior counsel for the plaintiff further submits that commercial speech such as the Print Advertisement in the present case, which is deceptive, unfair, misleading, and untruthful in nature would be hit by Article 19(2) of the Constitution of India and cannot be permitted. In support, he places reliance on *Tata Press Ltd. v.*



Mahanagar Telephone Nigam Limited and Others, (1995) 5 SCC 139, and *Havells India Ltd. & Anr v. Amritanshu Khaitan & Ors*, 2015 SCC OnLine Del 8115.

24. The learned senior counsel for the plaintiff submits that though the defendant has denied the fact that it has created and circulated the WhatsApp Advertisement, in view of the following facts and circumstances, it is clear that the WhatsApp Advertisement was created and circulated by the defendant:

- a) Since the WhatsApp Advertisement contained specific details of the Print Advertisement, such details, one day prior to the publication of the Print Advertisement, could have only been known to the defendant.
- b) The plaintiff, in its application, being I.A. No. 12154/2022, has asserted that it was one of the employees of the defendant who has circulated the WhatsApp Advertisement, as evidenced by the screenshot of a WhatsApp message circulated by Mr. Jeevan Gehlot, who is the Senior Sales Officer of the defendant as per his LinkedIn page. The WhatsApp message is reproduced hereinbelow:



- c) The learned senior counsel for the plaintiff also draws reference to the email sent by Mr. Akshay Agarwal, the Marketing Manager of the defendant as per his LinkedIn page, which contained the impugned WhatsApp Advertisement.
- d) It is further submitted by the learned senior counsel for the plaintiff, that the defendant, in its reply to the application has not denied the fact that Mr. Jeevan Gehlot and Mr. Akshay Agarwal are its employees or that the aforesaid circulation of the WhatsApp Advertisement was done by them.

25. The learned senior counsel for the plaintiff submits that the defendant has given a wrong statement in Court and made false averments on oath, claiming that the WhatsApp Advertisement has not been circulated by it and it has no role in the creation and/or circulation of the WhatsApp Advertisement. The learned senior



counsel for the plaintiff submits that it is a settled proposition of law that a party approaching the court for vacating the *ad interim* or temporary injunction order already granted in the pending suit or proceedings, must come with clean hands, and not be unfair or inequitable in its dealings. In this regard, reliance is placed on the judgement of the Supreme Court in ***Gujarat Bottling Co. Ltd. and Others v. Coca Cola Co. and Others***, (1995) 5 SCC 545.

26. On the question of suppression and mis-representation in the plaint, the learned senior counsel for the plaintiff submits that the suit was filed in a state of emergency. The WhatsApp Advertisement/message was received by the plaintiff at approximately 8 P.M. on 11.07.2022. Immediate instructions to file the suit were given to the counsel for the plaintiff at around 9:55 P.M. The plaint was prepared overnight, however, it could not be listed on 12.07.2022. Due to such urgent filing, there were certain unintended lapses in the degree of diligence and care that ought to have been exercised while filing the suit, however, the same are not sufficient to disentitle the plaintiff to *interim* relief.

27. He further submits that there were more than one proceedings before the Advertising Standards Council of India (hereinafter referred to as 'ASCI') between the parties. In the plaint, the plaintiff incorrectly stated that the ASCI's FTCP recommendation dated 13.11.2018 in ASCI Complaint no. 1810 FTCC.13 was upheld in the Independent Review Panel (hereinafter referred to as 'IRP') order dated 21.01.2019. In fact, the IRP, while finding the advertisement of the defendant to be misleading in all other aspects, as regards the use



of the tagline “*Asli Amla, Dabur Amla*”, without getting into the merits of the same being misleading or not, held that on trade mark issues, ASCI does not interfere. He submits that the advertisement in issue in those proceedings, however, reflected the use of the tagline materially different from its use in the impugned advertisement. He submits that in fact, there was a previous IRP order dated 05.04.2018 whereby the use of the said tagline was found to be misleading. Though both the IRP orders were filed along with the plaint, however, the plaint only refers to one of such orders in which the finding of the misleading use of tagline was not upheld, while failing to refer to the other IRP order. He submits that this itself shows that the plaintiff referred to an order which was, in fact, against the plaintiff, and this occurred only because of the haste in which the plaint was filed.

28. On the question of the concealment of the relevant orders passed by the High Court of Bombay, the learned senior counsel for the plaintiff submits that all pleadings and relevant orders of the said proceedings had been filed along with the plaint. The High Court of Bombay decision was based on a different advertisement, which cannot act as a precedent in the present case, as each advertisement is to be considered separately. However, the learned senior counsel for the plaintiff regrets not fully conveying the import of the Bombay High Court decision in the plaint. He again attributes this omission to the haste in which the plaint was filed.

29. The learned senior counsel for the plaintiff submits that the plaintiff has already suffered due to the suspension of the *ad interim* order passed by this Court and, therefore, the application of the



plaintiff should be considered on merits. He submits that even public interest would demand that the application of the plaintiff is considered on merit rather than being dismissed only on account of a *bona fide* mistake.

V. SUBMISSIONS ON BEHALF OF THE LEARNED SENIOR COUNSEL FOR THE DEFENDANT

30. The learned senior counsel for the defendant, on the other hand, submits that the plaint suffers from grave misstatements and concealments in relation to the proceedings before the High Court of Bombay and before the ASCI. He submits that this itself is a sufficient ground to reject the prayer for *interim* relief filed by the plaintiff. In support of his submission, the learned senior counsel for the defendant has placed reliance on the following judgements:

- i. *M/s Seemax Construction (P) Ltd v. State Bank of India and another*, 1991 SCC OnLine Del 668;
- ii. *K. Jayaram & Ors v. Bangalore Development Authority & Ors*, 2021 SCC OnLine SC 1194;
- iii. *Reckitt Benckiser (India) Ltd. v. Naga Ltd and Ors.*, 2003 (68) DRJ 441;
- iv. *Charanjit Thukral and Anr v. Deepak Thukral and Anr*, 2010 SCC OnLine Del 2517
- v. *Warner Bros. Entertainment Inc. & Anr v. Harinder Kohli & Ors*, ILR (2009) I Delhi 722;
- vi. *Yashoda (Alias Sodhan) v. Sukhwinder Singh and Ors*, 2022 SCC OnLine SC 1208.



31. In relation to the proceedings before the High Court of Bombay, he submits that an advertisement similar to the one challenged in the present Suit, was challenged by the plaintiff before the High Court of Bombay. With prejudice to the rights of the defendant, the defendant offered to and later changed the shape of the bottle depicted in the advertisement impugned before the High Court of Bombay. Thereafter, the High Court of Bombay held that the advertisement was not disparaging in nature of the plaintiff's product. He draws my attention to the orders dated 04.12.2019 and 14.02.2020 passed in those proceedings. He submits that in spite of the above orders, the plaintiff falsely sought to convey an impression in the plaint that the application for *interim* injunction was only 'disposed of' by the High Court of Bombay, without fully disclosing the orders. He submits that mere filing of the orders in a bunch of documents filed alongwith the plaint, especially when the Suit was listed on being mentioned for urgent hearing, cannot absolve the plaintiff of such concealment and misstatement.

32. He submits that similar misstatement has been made by the plaintiff with respect to the proceedings before the ASCI, wherein no order of injunction was passed with respect to the tag line of the defendant- "***Asli Amla, Dabur Amla***", finding the same to be a registered trade mark of the defendant. He submits that, in fact, the plaintiff has intentionally concealed from this Court that the tag line is a registered trade mark of the defendant.

33. The learned senior counsel for the defendant submits that the ASCI, vide its recommendation dated 10.01.2018 passed in Complaint



no. 1801-FTCC.15, had rejected a challenge to an advertisement similar to the one impugned in the present Suit. The IRP, vide order dated 05.04.2018, rejected the challenge to the order on the use of the word '*sasta*' in the advertisement, while injuncting the defendant from using "*to koi bhi sasta tel nahi, sirf Dabur amla. Asli Amla, Dabur amla.*". He submits that in the plaint, however, only selective disclosure has been made by the plaintiff regarding these proceedings.

34. The learned senior counsel for the defendant makes a similar complaint of concealment and misstatement as far as the facts in relation to Complaint no. 1911-FTCC.10 and ASCI order dated 05.12.2019 are concerned. The learned senior counsel for the defendant submits that the effect and repercussion of the above concealments/misstatements cannot be washed away by the plaintiff by blaming them on the urgency in filing of the Suit.

35. He submits that the plaintiff is, in fact, indulging in *forum shopping*. He submits that no reason has been given by the plaintiff for not filing the present Suit before the High Court of Bombay, where its challenge to an earlier similar advertisement is pending adjudication. In this regard the learned senior counsel for the defendant has placed reliance on the judgements of the Supreme Court in *UoI & Ors v. Cipla Ltd & Anr*, (2017) 5 SCC 262; and *India Household & Healthcare Ltd. V. LG Household & Healthcare Ltd*, (2007) 5 SCC 510; and the judgement of this Court in *Allied Blenders & Distillers Pvt. Ltd. & Ors v. Amit Dahanukar & Anr*, (2019) 261 DLT 692.



36. On merits, the learned senior counsel for the defendant submits that the impugned Print Advertisement is neither disparaging the plaintiff's product nor is it misleading. He submits that the advertisement does not refer to the plaintiff's product at all. He submits that '*sasta*' refers not merely to the price, but also to the quality. There is, therefore, no disparagement of a class as a whole, as contended by the plaintiff.

37. On the WhatsApp message/Advertisement, placing reliance on *Puro Wellness Pvt. Ltd. v. Tata Chemicals Ltd.*, 2019 SCC OnLine Del 10766, he states that each impugned material is to be considered/judged independently on its own merit and not jointly. He submits that the defendant denies that the WhatsApp message was created by the defendant. He submits that on the other hand, the defendant has placed on record the email correspondence to its advertising agency advising that no comparison with plaintiff's product is to be made. Further, the defendant is ready to suffer a decree against the Whats App Advertisement.

VI. ANALYSIS AND FINDINGS:

38. I have considered the submissions made by the learned senior counsels for the parties.

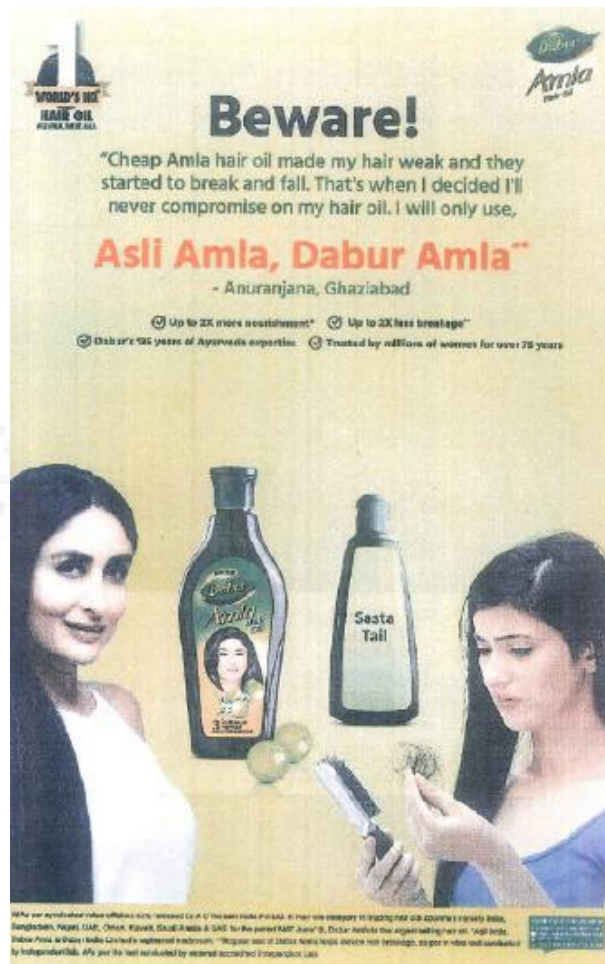
(i) Suppression and Misrepresentation

(a) Bombay High Court

39. Admittedly, the plaintiff, prior to filing of the present suit, had challenged an earlier advertisement of the defendant before the High



Court of Bombay in the form of a suit being Commercial IP Suit (L) No.1262 of 2019. The advertisement impugned in the said suit is as under:



40. At the time of hearing of the *ad interim* application, the defendant made a 'with prejudice' offer to change the shape of the bottle with which the comparison was being made. The defendant, thereafter, came up with a modified advertisement, which is reproduced as under:



have noted above, several manufacturers and traders in the market, who are marketing amla hair oils, which are priced lesser than the Defendant's hair oil. It is difficult to hold, as noted above, that lesser priced products, as a class, have been sought to be disparaged in the advertisement. If it is the Plaintiff's case that 'cheap hair oil' is indeed an idea associated with their products, they will have to make out such a case at the trial of the suit or prima facie even at the hearing of the Interim Application. On a mere say so, and on the basis of materials placed before this court at this ad-interim stage, it is not possible to hold that the reference to 'cheap hair oil' evokes the memory of the Plaintiff's hair oil. Though the word 'cheap' used in the advertisement has connotations with reference to both 'quality' and 'price', it is difficult to hold that the word 'cheap' is used only in the sense of lesser price and in no other sense or that, in doing so, the memory evoked is of the Plaintiff's products, thereby disparaging the same as being of substandard quality."

42. The *ad interim* application was thereafter disposed of by the learned Single Judge of the High Court of Bombay vide its order dated 14.02.2020, observing as under:

"8. First of all, this Court cannot persuade itself to believe that in substance, the impression sought to be conveyed to an ordinary man on the street or buyer of the goods in question is that all products of 'Amla Hair Oil', which are priced lesser than the Plaintiff's 'Amla Hair Oil', are inferior in quality or that they lead to hair fall or hair breakage. That certainly, in my opinion, is not the impression meant to be conveyed or is likely to be conveyed to a reasonable man on the street or an ordinary/y consumer of the subject goods. The Defendant, of course, as I



have noted above, may be said to have meant to use the words 'cheap oil' or 'sasta tel' as suggestive of lesser price and not necessarily of inferior quality. It is, certainly arguable, as Mr. Tulzapurkar suggests, that the word here conveys both meanings; it may, in fact, in that sense have been used tongue in cheek; but it, by no means, suggests that what the advertisement disparages are products of lesser price as a class. What the advertisement, taken at its plain face value, conveys is that there could be products which are cheap (that is, of lesser price), but the consumers better beware - these might be cheap, not just in terms of price, but even in terms of quality; these might yet be harmful and lead to conditions such as hair fall or hair breakage. In comparison, the Plaintiff's products are shown as 'True Amla', that is to say, of a purer variety. There is no disparagement in this of the whole range of cheaper (in terms of price) variety of amla hair oil generally, much less of any one product in particular, or, for that matter, the Plaintiff's amla hair oil. All that this suggests is that the Defendant, in its advertisements, calls upon consumers to pay more attention to quality rather than go merely by price. The disparagement, in other words, if at all there is any, is of products, which are 'cheap', not just in terms of price, but also of quality. It may well be that both senses of the word 'cheap' or 'sasta' are invoked in the present case to convey the above. Ambivalence such as this, rejected in the copy, actually lends literary merit or artistic value or adds punch to the advertisement. There is no suggestion here, as Mr. Tulzapurkar suggests, that all products of lesser price are generally inferior, much less that the Plaintiff's product in particular is inferior.

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10. As I have noted above, it is difficult to hold that what are disparaged in



the impugned advertisement are lesser price products as a class. So also, the Plaintiff has not shown at this prima facie stage that the phrases 'cheap hair oil' or 'sasta tel' used in the advertisement were indeed an idea associated solely with the plaintiff's product. It is difficult to say, on the basis of materials produced before the court, that the reference to 'cheap hair oil' or 'sasta tail' evokes the memory of the plaintiff's hair oil."

43. I am informed that it is only after the suspension of the *interim* order passed in the present suit, that the plaintiff, belatedly, has challenged the order dated 14.02.2020 passed by the learned Single Judge of the High Court of Bombay in the form of an appeal.

44. As far as the above litigation is concerned, the plaintiff in its plaint of the present suit has stated as under:

"BOMBAY ACTION

a. Suit before the Bombay High Court titled as 'Marico Limited Vs. Dabur India Limited' being COMIP/96/2021 filed by the Plaintiff in 2019- The said proceedings was filed by the Plaintiff against the Defendant against an advertisement which showed a similar bottle as of the Plaintiff's product Nihar Shanti Amla Hair Oil next to a fictitious consumer with a brush in one hand and a tuft of hair in another along with the following caption "SAAWDHAAN.. " "SASTEY AMLA TEL SE MERE BAAL TOOTNEY AUR JHADNEY LAGEY THEY ISILIYE HAIR OIL KE SAATH KOI SAMJAUTHA NAHI, MERE LIYE SIRF ASLI AMLA, DABUR AMLA".

b. That during the hearing of the interim injunction application in the said proceedings, Defendant proposed to change the size and shape of the bottle reflected in the said



advertisement. The interim injunction application was disposed off by the Hon'ble Court vide Order dated 14 February 2020. The said suit proceedings are pending before the Hon'ble Bombay High Court for final adjudication. Further, as per the best knowledge of the Plaintiff the advertisement impugned in the said Suit was discontinued by the Defendant."

45. A reading of the above extracts from the plaint would show that the plaintiff has made no reference to the order dated 04.12.2019 of the High Court of Bombay. Even the reference to the order dated 14.02.2020 conceals more than what it reveals. An impression is sought to be created that the *interim* application was disposed of by the High Court as the defendant proposed to change the size and shape of the bottle reflected in the advertisement impugned therein and that the said advertisement was discontinued by the defendant thereafter. ** This is the half-truth.

46. The findings of the High Court of Bombay in the orders dated 04.12.2019 and 14.02.2020, which have been extracted hereinabove, had a vital bearing on the adjudication of the application seeking *interim* relief filed by the plaintiff along with the present suit. It was incumbent on the plaintiff to, therefore, clearly disclose the said proceedings in a fair and transparent manner. The plaintiff is clearly guilty of concealment and misrepresentation/misstatement of facts with respect to the proceedings before the High Court of Bombay.

47. As noted hereinabove, the learned senior counsel for the plaintiff, while admitting the above folly, has tried to explain the same



by stating that each advertisement has to be considered on its own merit. While there is no dispute on this proposition of law, the fact remains that the complaint of the plaintiff in the suit before the High Court of Bombay was almost similar if not identical to the present suit. It was, therefore, incumbent on the plaintiff to have fully and truthfully disclosed the orders of the High Court of Bombay. In fact, the plaintiff itself disclosed the High Court of Bombay proceedings by prefacing it as under:

“50. That the Defendant has time and again published disparaging advertisement against the Plaintiff’s Product by making false and baseless statements. The history of the proceedings before different high courts between the parties, which deals with issue of disparagement for the identical products are provided as under:”

48. A reading of the above would show that when it suited the plaintiff, the plaintiff wanted to take advantage of the proceedings before the High Court of Bombay. It is only when its folly was caught and highlighted by the learned senior counsel for the defendant, that the plaintiff is now seeking refuge of the principle of law that each advertisement must be considered on its own merit and by contending that the proceedings before the High Court of Bombay would not have any relevance to the present suit. The plaintiff cannot approbate and reprobate and resile out of its own stand taken in the present proceedings.

(b) **ASCI Action**



49. There have been multiple actions taken by the plaintiff before the ASCI. On being questioned regarding the concealment and misrepresentation of such proceedings, the plaintiff sought to explain the same away by way of a note, which for convenience is reproduced hereinbelow:

S.No.	Details of the Document	Allegation of the Defendant	Response of the Plaintiff
1.	<p>ASCI Complaint No.1801 FTCC. 15</p> <p>Ad-29 December 2017-1099-1101, Vol VI, Plaintiff Documents dated 25.07.2022</p> <p>Complaint-2 January 2018- 1102-1107, Vol VI Plaintiff Documents dated 25.07.2022</p>	<p>These proceedings before ASCI were suppressed.</p>	<p>In these proceedings, the claim of 'Asli Amla Dabur Amla' was found to be misleading. (Para 32 of IRP Order -1129, Vol VI Plaintiff Documents dated 25.07.2022)</p> <p>Therefore, there was no reason for the Plaintiff to suppress the proceedings. The failure of the plaintiff to rely on the said favourable proceedings in the plaint, if anything highlights the haste with which the suit was prepared.</p>
	<p>FTCP-10 January 2018-1110-1111, Vol VI, Plaintiff Documents dated 25.07.2022</p> <p>IRP -5 April 2018-1112-11129, Vol VI Plaintiff Documents dated 25.07.2022/179, Vol I, Plaintiff Documents dated 12.07.2022</p>	<p>ASCI held that the claim of '2X strength' by the Defendant was substantiated based on technical reports. (Para 30, IRP Order 1112@1128, Vol VI Plaintiff Documents dated 25.07.2022)</p>	<p>The Defendant has not disclosed to the court that the composition of Dabur Amla hair oil which supported the claim of 2X strength in that ad is no longer marketed or sold by the Defendant. (Old Composition-IRP Order at pg. 1122, Vol VI Plaintiff Documents dated 25.07.2022 and current compositions at Para 101, Pg 54, Written Statement)</p>

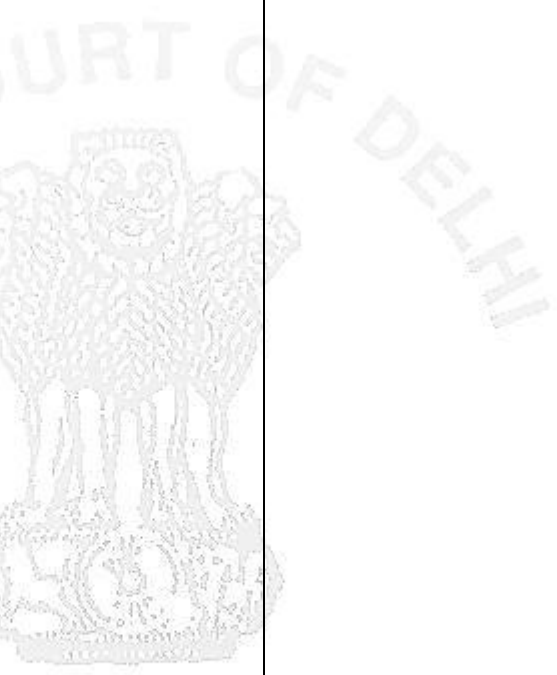


			<p>Hence, the test reports before ASCI and the ASCI finding in this regard is not material to the Defendant's in the market today.</p> <p>For the products in the market today, the Defendant has not been able to show any technical report to support the claim of 2X strength.</p>
		<p>ASCI held sasta amla is not disparaging. (Para 29, IRP Order at pg 1128, Vol VI Plaintiff Documents dated 25.07.2022)</p>	<p>The impugned advertisement before ASCI contained the following statement:</p> <p>“Saste tel ke behkawe mein na aayein, chuniye ussee jo de quality ka vada, na ki use jisme ho tel zyada”</p> <p>The aforesaid statement was found to be a factual statement as the Defendant had established that its product provided better tensile strength based on higher content of vegetable oil in the Defendant's product. Hence, this was found to be not disparaging. (para 30, IRP Order at pg. 1128, Vol VI Plaintiff Documents dated 25.07.2022)</p> <p>Further, ASCI also finds that the use of the word Sasta is not disparaging because other Amla hair oils use more quality of mineral oil as compared to vegetable oil which costs double the price of mineral oil and hence other parties</p>



			<p>could sell their oil at a cheaper price as compared to the Defendant's. (Para 29, IRP Order at pg 1128, Vol. VI plaintiff documents dated 25.07.2022)</p> <p>In the present case, however, the term 'Sasta' is evocative of the Plaintiff because the thrust of the Plaintiff's advertising campaign has been it is cheaper than the Defendant's Amla hair oil. In any event, the impugned ad disparages the class of cheaper hair oils as a whole, of which the plaintiff is the market leader. (para 23 (b), Pg 34-35, Plaint; also see Plaintiff's ads at pgs. 393-400 of Plaintiff's documents filed with the suit)</p>
2.	<p>ASCI Complaint No.1810 FTCC. 13-29 October 2018</p> <p>Ad-17 October 2018-1130-1132, Vol. VI, Plaintiff Documents dated 25.07.2022/160, Vol I, Plaintiff Documents dated 12.07.2022</p> <p>Complaint-29 October 2018-1134-1165, Vol. VI, Plaintiff Documents dated 25.07.2022</p>	<p>Plaintiff, in the plaint, has misrepresented that the FTCP recommendation dated 13.11.2018 was upheld in the IRP vide order dt. 21.1.2019</p>	<p>The FTCP recommendation found the ad impugned therein to be misleading on several counts. One of those was that 'Asli Amla, Dabur Amla' was misleading. In the IRP, vide order dated 21 January 2019, without getting into merits of the tagline being misleading or not, it was held that on trade mark issues, ASCI does not interfere. (IRP@1171, Vol VI, Plaintiff Documents dated 25.07.2022)</p> <p>Pertinently, the aforesaid</p>



	<p><i>164, Vol I, Plaintiff Documents dated 12.07.2022</i></p> <p><i>FTCP-13 November 2018- 1166-1167, Vol VI, Plaintiff Documents dated 25.07.2022/197, Vol I, Plaintiff Documents dated 12.07.2022</i></p> <p><i>IRP – 21 January 2019 – 1170-1171, Vol VI, Plaintiff Documents dated 25.07.2022/201, Vol I, Plaintiff Documents dated 12.07.2022</i></p>		<p><i>order in IRP upheld that the advertisement of the Defendant was misleading in all other respects. (IRP @1170, Vol VI, Plaintiff Documents dated 25.7.2022)</i></p>
		<p><i>The Plaint does not disclose that 'Asli Amla Dabur Amla' is a registered trade mark.</i></p>	<p><i>The use of the term 'Asli Amla Dabur Amla' in the Advertisement before ASCI was being used in a trade mark sense.</i></p> <p><i>The manner in which the tag line is used in the impugned Print Advertisement is not trade mark use and is clearly to disparage and convey the message that it is the only genuine amla hair oil.</i></p>



			<p><i>(Para 22, Pg 54, Replication)</i></p> <p><i>A trade mark registration is immaterial and no defence to disparaging use.</i></p>
3.	<p><i>ASCI Complaint Compliant No.1911 FTCC.10-26 November 2019</i></p> <p><i>Ad-16 November 2019 – 1172, Vol VI, Plaintiff Documents dated 25.07.2022</i></p> <p><i>FTCP – 5 December 2019-1177-1178, Vol VI, Plaintiff Documents dated 25.07.2022</i></p>	<p><i>Plaintiff has suppressed this proceeding where ASCI allows the Defendant to use its World's No.1 Hair Oil claim.</i></p>	<p><i>ASCI Guidelines state that any claim on the basis of an award/ranking can only be relied upon for a year after the award/ranking. (Guideline 3, ASCI Guidelines for Usage of Awards/Rankings in Advertisements)</i></p> <p><i>The World No.1 claim before ASCI was on the basis of 2018 report (@pg 1177, Vol VI, Plaintiff's docs dt. 25.7.22) and the same was of no relevance in 2022 at the time of filing of the suit. (Para 12(d), Pg 13-14, Replication)</i></p>

50. The above explanation, however, does not cut much ice with this Court. As far as the disclosure of ASCI actions of the plaintiff is concerned, the plaintiff had stated as under in its plaint:

“ASCI ACTION

a. That the Plaintiff filed a complaint bearing reference No: 1810-FTCC.13 before ASCI, on 29 October 2018, against a television commercial of the Defendant, wherein the Defendant made several statements and had sought to disparage other AMLA hair oils by inter alia issuing a message to the consumers that the usage of the same leads to hair breakage and referring to them as "sasta amla" / cheap amla oils. The said complaint of the Plaintiff was upheld by ASCI



and a decision / recommendation dated 13 November 2018 including those in respect of strength and efficacy of the Plaintiff's product. It is pertinent to note that even in the advertisement which was before ASCI, the Defendant had made a claim of "Asli Amla, Dabur Amla" and their was held that the Defendant cannot use the same. Thereafter, the said order was challenged by the Defendant before an Independent Review Panel (IRP). The recommendation /decision passed by the ASCI was upheld vide order dated 21 January 2019."

51. The plaintiff has, therefore, disclosed only the complaint No.1810-FTCC.13 in the plaint, stating that the said complaint was upheld by ASCI vide its decision/recommendation dated 13.11.2018 including on the aspect of strength and efficacy of the plaintiff's product making specific reference to the tagline of the defendant "**Asli Amla, Dabur Amla**". The plaintiff asserts that the defendant was enjoined from using the same. The plaintiff further stated that the decision of ASCI has been upheld by the Independent Review Panel ("IRP") vide its order dated 21.01.2019.

52. The above representation is incorrect. In fact, the IRP vide its order dated 21.01.2019 had rejected the complaint of the plaintiff against the tagline "**Asli Amla, Dabur Amla**" holding that the defendant had produced a Trade Mark Certificate with regard to the same and on trade mark issues, ASCI does not interfere. It was observed that the plaintiff can, therefore, approach the appropriate authority on this issue. The reference to this order in the plaint was therefore, incorrect.



53. The plaintiff made no disclosure of the ASCI complaint no.1801-FTCC.15 in the plaint. By an order dated 10.01.2018, ASCI had rejected the complaint of the plaintiff against the claim of the defendant of 'Upto 2X hair strength' and of disparagement. In a review filed by the plaintiff, the IRP vide its order dated 05.04.2018, relying upon an earlier order dated 11.06.2010, dismissed the review against the '2X' claim of the defendant.

54. On the issue of '**sasta**', the IRP observed as under:

"28. In the present case the advertiser has not made reference to any particular rival product, much less to the complainant's product. The case of the advertiser is that both the advertiser and the complainant have almost equal market share in terms of volume, both covering 80% market share in the aggregate, and, therefore, reference to "aam saste amla tel" was to the large number of other amla hair oils in the fragmented balance 20% share.

29. Even otherwise, the word "sasta" would mean " low cost " or " inexpensive", and not necessarily "cheap". The complainant's representatives did not dispute the advertiser's assertion that the vegetable oil content in the complainant's product is half the vegetable oil content in the advertiser's product and that vegetable oil costs almost twice as much as mineral oil, which the complainant and others use in their products in double proportion and, therefore, the complainant and others are in a position to offer their amla hair oil at almost half the price of the advertiser's product. I am, therefore, of the view that referring to other amla hair oils as "sasta" does not amount to disparagement.

In view of the above conclusion, no discussion is called for with reference to the decisions in



Hindustan Unilever case (supra) and the Reckitt Colmann case (supra)."

55. It was only in relation to the following tagline that the IRP intervened:

*"To koi bhi aam sasta
tel nahi, sirf Dabur amla.
Asli amla, Dabur amla. "*

56. It is important here to note that the issue of the tagline "***Asli Amla, Dabur Amla***" being a registered trade mark of the defendant was not an issue before the IRP. In any case, what was restrained was a complete tagline reproduced herein above.

57. The plaintiff, while disclosing one proceeding before the ASCI, cannot conceal the proceedings which held its claims to be unsubstantiated. This is a clear instance of the suppression of material facts by the plaintiff.

58. The plaintiff had also filed another complaint before the ASCI against another advertisement of the defendant, being Complaint no.1911-FTCC.10, wherein the use of the defendant of 'World's no.1' was upheld by the ASCI vide its order dated 25.07.2022.

59. The submission of the learned senior counsel for the plaintiff that the above proceedings were not disclosed due to urgency in filing of the present suit and that, in fact, orders which were beneficial to the plaintiff were also not referred, cannot be accepted. These were proceedings which were necessary and should have been disclosed by the plaintiff in the plaint, specially when the plaintiff was making a reference to one of these proceedings albeit in an incorrect manner.



Urgency in filing cannot be a *guru mantra* for washing away the sin of concealment.

60. In *M/s Seemax Construction (P) Ltd.* (supra), this Court has observed as under:

*“10. The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking discretionary relief has to approach the court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from court is not entitled to any discretionary relief. The court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the court. Reference may be made to decision in *The King v. The General Commissioners for the purposes of the Income-tax Acts for the District of Kensington, 1917 (1) King's Bench Division 486* where the court refused a writ of prohibition without going into the merits because of suppression of material facts by the applicant. The legal position in our country is also no different. (See : *Charanji Lal v. Financial Commissioner, Haryana, Chandigarh, AIR 1978 Punjab and Haryana 326 (1711)*). Reference may also be made to a decision of the Supreme Court in *Udai Chand v. Shankar Lal*, . In the said decision the Supreme Court revoked the order granting special leave and held that there was a misstatement of material fact and that amounted to serious misrepresentation. The principles applicable are same whether it is a case of misstatement of a material fact or suppression of material fact.”*



61. I would not like to multiply authorities on the above proposition that it is too well settled beyond doubt. A party seeking discretionary relief in form of an *ad interim* injunction, must approach court with clean hands and with full and fair disclosure of all material and vital facts and document, failing which, concealment/misstatement itself is a sufficient ground for the court to deny the discretionary relief, without going into the merits of the dispute.

62. In view of the above settled principal of law, the present application is, in fact, liable to be dismissed only on the ground of concealment and suppression of facts.

63. The mere fact that the *interim* order granted to the plaintiff was suspended on account of such concealment, cannot absolve the plaintiff of the repercussion of the concealment and misstatement of facts. The plaintiff cannot make a virtue out of the fact that when confronted with allegation of concealment, it conceded to suspension of the benefit obtained through such concealment.

64. Similarly, the mere fact that the plaint was filed in urgency, cannot absolve the plaintiff of making a truthful, honest and complete disclosure of facts.

(ii) Forum Shopping

65. I also find merit in the submission of the learned senior counsel for the defendant that the plaintiff has indulged in *forum shopping*. As noted hereinabove, the plaintiff has filed an earlier suit before the High Court of Bombay almost on similar averments and complaints against a similar advertisement issued by the defendant. The High



Court of Bombay vide its orders dated 04.12.2019 and 14.02.2020 found that the plaintiff has not been able to make out a *prima facie* case in its favour for grant of an *ad interim* injunction. The plaintiff has not disclosed any reason why the present suit could not be filed before the High Court of Bombay, especially when the High Court was already seized of a similar dispute. I must herein clarify that this issue is not being considered on the test of lack of territorial jurisdiction but only on the question of forum convenience and on account of *prima facie* opinion of this Court that the plaintiff intentionally avoided filing the present suit before the High Court of Bombay due to the earlier orders passed by the High Court of Bombay in a case with similar issues.

66. In *Cipla Ltd.* (supra), the Supreme Court held that *forum shopping* takes several hues and shades. A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same or similar relief. Another example can be where circumstances are created by one of the parties to the dispute to confer jurisdiction on a particular High Court. Yet another form of forum shopping is by approaching different Courts for the same relief by making a minor change in the prayer clause of the petition. The Supreme Court held that the Court is required to adopt a functional test vis-a-vis the litigation and the litigant, and what is to be seen is whether there is any functional similarity in the proceedings between one Court and another or whether there is sort of subterfuge on the part of the



litigant, to determine if the litigant is indulging in *forum shopping* or not.

67. In ***India Household & Healthcare Ltd.*** (supra), it has been held that the doctrine of comity or amity requires a Court not to pass an order, which would be in conflict with another order passed by a competent Court of law. The Supreme Court quoted with the approval from the Treatise on the Law Governing Injunctions by Spelling and Lewis, as under:

“A Treatise on the Law Governing Injunctions by Spelling and Lewis”

“Section 8, Conflict and loss of jurisdiction – Where a court having general jurisdiction and having acquired jurisdiction of the subject-matter refuse to interfere by issuance of a second injunction. There is no established rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be returned a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or Judge from jurisdiction, yet the granting of the injunction by a second Judge may lead to complications and retaliatory action.....”

68. In fact, in similar circumstances, this Court in ***Allied Blenders and Distillers Pvt. Ltd. & Ors.*** (supra), observed as under:

“32. The facts of the present case are glaring. The parties to the suit in Bombay and the present suit are virtually identical/have a commonality of interest. The said suit in



Bombay was filed in 2009. Interim injunction application was dismissed on 22.02.2011 and a clear prima facie findings of fact were recorded in favour of the defendants and against the plaintiffs. It is thereafter that the present suit has been filed on 10.10.2014. The plaintiffs seek interim orders from this court despite being declined relief by the Bombay High Court.

33. *Keeping in view the legal position it is manifest that this court has to give due deference to the enunciation made by another court especially when the litigants are the same. In my opinion, the above legal proposition squarely applies to the facts of the case. The plaintiff having filed suit based on identical facts before the Bombay High Court and having been declined an interim injunction cannot now try to overreach the said order of the Bombay High Court and file the present suit in Delhi High Court seeking an interim injunction. If this court were to agree with the contentions of the plaintiff and were to pass an interim order in favour of the plaintiff it would be passing an order wholly contrary to the order of the Bombay High Court.”*

69. In my view, the above judgment squarely applies to the facts of the present case as well. As noted hereinabove, the complaint of the plaintiff, though in relation to a different advertisement, is almost similar to the one raised and pending adjudication before the High Court of Bombay, wherein interim relief was refused to the plaintiff. The plaintiff not only concealed but also misstated the orders passed in those proceedings. In any case, the plaintiff has not given any reason why it chose not to invoke the jurisdiction of the High Court of



Bombay, but instead, chose this Court as a preferred Court of jurisdiction. I *prima facie* find that the plaintiff has indulged in *forum shopping*, which would itself disentitle the plaintiff to any relief.

(iii) Disparagement

70. Before I consider the two impugned advertisements of the defendant on merit, I shall first remind myself of the tests laid down for judging the claim of injunction on allegation of disparagement.

71. First of all, as held by the Supreme Court in *Tata Press* (supra), “Commercial Speech” is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India.

72. In *Pepsi Co.* (supra), a Division Bench of this Court has held that while deciding the question of disparagement, one has to keep the following factors in mind, namely:

- (i) intent of the commercial;
- (ii) manner of the commercial;
- (iii) story line of the commercial and the message sought to be conveyed by the commercial.

73. It was held that out of the above factors, “manner of commercial” is very important. If the advertisement in question is ridiculing or condemning the product of the competitor, then it amounts to disparagement, but if the impugned commercial is merely stating the qualities of one’s own product as being better or best without derogating other’s product then that is not actionable. Mere



puffing of goods is not actionable. Tradesman can say his goods are best or better, but by way of comparison, the tradesman cannot slander or defame the goods of the competitor, nor can he call it bad or inferior.

74. In *Colortek Meghalaya Pvt. Ltd.* (supra), a Division Bench of this Court, taking note of the Constitutional guarantee accorded to “commercial speech”, has held as under:

“14. On the basis of the law laid down by the Supreme Court, the guiding principles for us should be the following:—

(i) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.

(ii) An advertisement must not be false, misleading, unfair or deceptive.

(iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.

To this extent, in our opinion, the protection of Article 19(1)(a) of the Constitution is available. However, 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.

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18. On balance, and by way of a conclusion, we feel that notwithstanding the impact that a telecast may have, since commercial speech is protected and an advertisement is commercial speech, an advertiser must be given enough room to play around in (the grey areas) in the advertisement brought out by it. A plaintiff (such as the Appellant before us) ought not to



be hyper-sensitive as brought out in Dabur India. This is because market forces, the economic climate, the nature and quality of a product would ultimately be the deciding factors for a consumer to make a choice. It is possible that aggressive or catchy advertising may cause a partial or temporary damage to the plaintiff, but ultimately the consumer would be the final adjudicator to decide what is best for him or her.

75. Another Division Bench of this Court, in ***Colgate Palmolive Company and Anr v. Hindustan Unilever Ltd.*** (supra), reiterated that while it is open for a person to exaggerate the claims relating to his goods and indulge in puffery, it is not open for a person to denigrate or disparage goods of another. In case of comparative advertisement, a certain amount of disparagement is implicit. If a person compares its goods and claims that the same are better than that of its competitors, it is implicit that the goods of his competitor's are inferior in comparison. To this limited extent, puffery in the context of comparative advertisement does involve showing the competitor's goods in a bad light. As long as the advertisement is limited only to puffing, there can be no actionable claim against the same, however, while doing so, one is not allowed to make a statement that the goods of others are bad, inferior, or undesirable, as that would amount to defaming or denigrating the goods of others, which is actionable. The Division Bench further held that if a person wilfully and intentionally uses a disparaging expression and puts out an advertisement which can, plausibly, be construed as disparaging the goods and services of



the other and the intention of putting out that advertisement is to seek benefit from making disparaging statements against competitor's goods, such person would not be entitled to a defence that an innocuous meaning of the advertisement is also available. The Court further held as under:

“35. The learned counsel for the respondent has advanced his contentions in respect of the multiple meaning rule on the fundamental premise that it is mutually exclusive to the test, as to the inference drawn by an average reasonable man reading or viewing the advertisement. However, this in our view is erroneous as applying the multiple meaning rule does not, by implication, exclude the need to examine as to how the advertisement is viewed by an average reasonable person. It is now well settled that in order to examine the question, whether an advertisement is misleading or whether the same disparages the goods/services of another or leads a viewer to believe something which is not true, it must be examined as to how the same is perceived by an average reasonable man. But we do not think that in order to examine how a reasonable man views an advertisement, all perceptions except one must be discarded. While determining how an advertisement is viewed by a reasonable person, in some cases, it may be necessary to examine whether an average reasonable person could view the advertisement in a particular manner, even though another reasonable view is possible. We do not think, it is necessary that all reasonable views except one must be discarded while determining the question as to how an advertisement is perceived. The presumption that there must be a single reasonable man militates against the principle that two or multiple acceptable views may be adopted by different persons who are fully



qualified to be described as reasonable persons.”

76. There could also be disparagement of goods as a class, like in the case of ***Gujarat Co-Operative Milk Marketing Federation Ltd. & Ors.*** (supra), wherein a Division Bench of the High Court of Bombay, found as under:

“27. It could thus be seen that for deciding the question of disparagement, Court will have to take into consideration intent of the commercial, manner of the commercial and storyline of the commercial and the message sought to be conveyed by the commercial. We will also be required to consider as to whether manner of the commercial is ridiculing or condemning product of the competitor, to come to the conclusion that it amounts to disparagement. However, if manner of the commercial only shows advertiser's product better or best without derogating the other's product then the same would not amount to disparagement.

XXXXXXX

30. It could thus be seen that, even according to the Appellant, 30% of the manufactures of the frozen desserts use hydrogenated fat or hydrogenated vegetable oil which is ordinarily known as Vanaspati. As such, even according to the Appellant also, 70% of the manufacturers of the frozen desserts, do not use Vanaspati or hydrogenated vegetable oil. It could further be seen that it is clearly admitted by the Appellant that Vanaspati has harmful effects. No doubt that, Appellant has sought to justify that the advertisement has been aired only to educate the consumers with regard to disadvantages of frozen desserts, which contain hydrogenated fat or hydrogenated vegetable oil ordinarily known as Vanaspati. What the Appellant



desires to convey by the impugned TVCs is that, all manufacturers of Frozen Desserts, including the Plaintiff, use Vanaspati i.e. hydrogenated vegetable oil in manufacturing of its product. The said message is false to the knowledge of the Appellant. The Appellant has again reiterated in subsequent paragraphs about the fact of Vanaspati i.e. hydrogenated vegetable oil being harmful to health. However, we do not want to burden our judgment by reproducing the repeated averments.

31. It could thus be seen that, even according to the own admission of the Appellant, hydrogenated fat or Vanaspati has harmful effects on the health. If, with this knowledge, the Appellant has aired the impugned advertisement, showing that all the manufacturers of frozen desserts use Vanaspati or Vanaspati tel, there can be no manner of doubt that intent of the advertisement is to show that Frozen Desserts are manufactured by using Vanaspati and that the said products which are manufactured with the use of Vanaspati are dangerous to the health. We have no manner of doubt, to hold that TVCs have an effect of disparaging the frozen desserts in general and dissuading the class of consumers from using it. As held in catena of cases, Appellant can very well make a false claim to puff up their product. It can also make statements which are not true to its knowledge to show how its product is superior. It can even compare its products with the competitors. However, the Appellant cannot be permitted to air the advertisement which disparages the product of its competitors.”

77. However, for ascertaining whether goods as a class have been disparaged, there needs to be some indication for identification of the class of goods. General statements may not be sufficient to identify to



a class of goods. In a recent judgment of this Court in **Zydus Wellness Products Ltd. v. Dabur India Limited**, 2022 SCC OnLine Del 4593, it was held that:

36. Thus, there has to be either express or implied reference to a competitor or its goods or a product category. A mere fleeting allusion to some unidentifiable product or product category cannot constitute 'comparative advertising'. For an advertisement to be classified as comparative advertisement, there ought to be some attributes of a product which are depicted in the commercial such as the container, coloured packaging, mark, logo identifying the Plaintiff's product directly or indirectly. Even if such elements are absent, for the Plaintiff to claim generic disparagement, there ought to be some indicators of identification of the product category at least.

78. If a class of goods are disparaged by an advertisement, a leader or person having substantial stake in the generic disparaged goods can maintain an action against the advertisement (Refer: **Dabur India Ltd. v. Emami Ltd.** (supra)- Chyawanprash case; and **Dabur India Ltd. v. Colgate Palmolive India Ltd.** (supra) – Lal Dant Manjan).

79. Now, I shall apply the above principles to the facts of the present Suit.

80. Recently another learned Single Judge of this Court in **Reckitt Benckiser (India) Pvt. Limited & Anr v. Wipro Enterprises (P) Limited**, Neutral Citation Number:2023:DHC:3418 summarized the principles applicable to comparative advertisement as under:-

“103. The principles that emerge



The overall legal position that emerges from these decisions is, therefore, the following:

(i) Where the advertisement does not directly or indirectly refer to the plaintiff's product, the plaintiff could not claim that its product was being targeted merely because it enjoyed a lion's share of the market. Targeting of the plaintiff's product is the sine qua non, whether expressly or by necessary implication. That implication cannot, however, be premised merely on the market share of the plaintiff's product.

(ii) At the same time, even if the rival product was not specifically targeted, an indirect representation, which was sufficient to identify the product, was as good as direct targeting.

(iii) Within the limits of permissible assertions, comparative advertising is protected under Article 19(1)(a) as commercial speech. In comparative advertising, a certain amount of disparagement is implicit.

(iv) Subject to the exception in (v) infra, an advertisement must not be false, misleading, unfair or deceptive, irrespective of whether it is extolling the advertised product or criticising its rival. Misrepresentation and untruth in advertisements is impermissible. An advertisement has necessarily to be honest. It was not only, thereby, required to be accurate and true, but could also not convey an overall misleading message, seen from the stand point of the customer.

(v) Puffery is the only exception, as puffery, by its very nature, involves



exaggeration and embellishment, and an element of untruth is bound to exist in it. Untruth in puffery is permissible only because puffery is inherently not taken seriously by the average consumer. Puffery is not, therefore, to be tested on the anvil of truth. Some element of hyperbole and untruth is inherent in puffery.

(vi) Mere puffery is not actionable. One can claim one's goods to be better than others. Extolling the virtues of the plaintiff's product as containing natural ingredients, absent in other products, was not disparaging. Extolling of one's positive features is permissible.

(vii) However, denigration of a rival's or a competitor's product is completely impermissible. While it is permissible, therefore, to state that the advertised product is superior to the competitor's, it is not permissible to attribute this superiority to some failing, or fault, in the product of the competitor. An advertisement cannot claim that a competitor's goods are bad, undesirable or inferior. The subtle distinction between claiming one's goods to be superior to the others', and the other's goods to be inferior to one's, has to be borne in mind.

(viii) Serious statements of facts cannot, however, be untrue. The truthfulness of such assertions or statements of fact is to be strictly tested.

(ix) What matters is the impression that the advertisement or commercial registers in the viewer's mind. The hidden subtext, so long as it is apparent to the average consumer, therefore, matters. The impact could be conveyed



by clever advertising or innuendo instead of conveying of a direct message.

(x) The reasonable man, from whose point of view the advertisement is to be assessed, is a right thinking member of the general public, and not a member of any particular class or section. He

- (a) is not naïve,*
- (b) can read between the lines,*
- (c) can read in implication into the advertisement,*
- (d) may indulge in some amount of loose thinking,*
- (e) is not avid for scandal and*
- (f) does not select a derogatory, or bad, meaning to be attributed to an advertisement where alternative, non-derogatory meanings are also available.*

(xi) While examining whether a commercial is disparaging, the Court is required to see

- (a) the intent of the commercial,*
- (b) the manner of the commercial and*
- (c) the story line of the commercial, and the message that it seeks to convey.*

What has to be seen is the overall effect of the advertisement, i.e. as to whether the advertisement is promoting the advertised product or disparaging the rival product. The advertisement has to be seen as a whole, not frame by frame. While promoting his product, an advertiser might make an unfavourable comparison, but that may not necessarily affect the story line or message or have an unfavourable comparison as its overall effect.



(xii) *The Court should neither undertake an over-elaborate analysis, nor be too literal in its approach.*

(xiii) *The advertisement was to be viewed as a normal viewer would view it, and not with the specific aim of catching disparagement. Words used in the advertisement are meant to be understood in their natural, general and usual sense and as per common understanding.*

(xiv) *The time spent in showing the product was irrelevant; what was relevant was the context in which the product was shown.*

(xv) *A plaintiff cannot afford to be hypersensitive, as the choice of the article which a consumer would select would depend on various factors including market forces, economic climate and nature and quality of the product.*

(xvi) *It is necessary to provide a fair amount of latitude to the advertiser as well.”*

(a) PRINT ADVERTISEMENT

81. As far as the Print Advertisement is concerned, it is the case of the plaintiff that the opening statement “याद रखना, सस्ता आवला, बालो को महंगा पड़ेगा” (*Yaad Rakhna, Sasta Aawla, balo ko mehenga padega*) is alarming and threatening the consumers against all cheaper in price Amla Hair Oils as being inferior and harmful. The plaintiff claims that this amounts to generic disparagement. The learned senior counsel for the plaintiff submits that this is not mere puffery but is a



false declaratory representation of fact which amounts to disparagement. He submits that in fact, '*sasta amla*' is a direct reference to the plaintiff's product, which has been regularly advertised for almost 12 years as being cheaper in comparison to defendant's product. He submits that, the impugned advertisement, therefore, invokes some memory of plaintiff's product and defames it. The learned senior counsel for the plaintiff submits that the plaintiff has 42.35% market share by volume in the Amla Hair Oil category, the advertisement is, therefore, directed against the plaintiff's product.

82. On the other hand, the learned senior counsel for the defendant submits that the word '*sasta*' in the impugned advertisement refers to hair oils which are cheap in terms of quality and price. The advertisement claims that as against ordinary and cheaper hair oils, the defendant's Amla hair oil is better. He submits that a similar claim by the plaintiff has already been considered by the High Court of Bombay in the orders referred to hereinabove, as also by the IRP of ASCI and has been rejected.

83. I have considered the submissions made by the learned senior counsels for the parties.

84. As noted hereinabove, while judging the claim of disparagement, the test to be applied is of an ordinary average consumer and the impact the advertisement would have on such a consumer. It is to be considered whether the advertisement is defamatory of the plaintiffs' goods individually or as a class. In the advertisement impugned before the High Court of Bombay, the message of caution was worded as under:



"सावधान!!

"सस्ते आवला तेल से मेरे बाल टूटने और झड़ने लगे थे इसलिए हेयर आयल के साथ कोई समझौता नहीं, मेरे लिए सिर्फ, असली आवला, डाबर आवला"

85. Considering the same, the High Court of Bombay in the judgement dated 14.02.2020, observed as under:

*"8. First of all, this Court cannot persuade itself to believe that in substance, the impression sought to be conveyed to an ordinary man on the street or buyer of the goods in question is that all products of 'Amla Hair Oil', which are priced lesser than the Plaintiff's 'Amla Hair Oil', are inferior in quality or that they lead to hair fall or hair breakage. That certainly, in my opinion, is not the impression meant to be conveyed or is likely to be conveyed to a reasonable man on the street or an ordinary consumer of the subject goods. The Defendant, of course, as I have noted above, may be said to have meant to use the words 'cheap oil' or 'sasta tel' as suggestive of lesser price and not necessarily of inferior quality. It is, certainly arguable, as Mr.Tulzapurkar suggests, that the words here conveys both meanings; it may, in fact, in that sense have been used tongue in cheek; **but it, by no means, suggests that what the advertisement disparages are products of lesser price as a class.** What the advertisement, taken at its plain face value, conveys is that there could be products which are cheap (that is, of lesser price), but the consumers better beware - these might be cheap, not just in terms of price, but even in terms of quality; these might yet be harmful and leads to conditions such as hair fall or hair breakage. In comparison, the Plaintiff's*



products are shown as 'True Amla', that is to say, of a purer variety. **There is no disparagement in this of the whole range of cheaper (in terms of price) variety of amla hair oil generally, much less of any one products in particular, or, for that matter, the Plaintiff's amla hair oil.** All that this suggests is that the Defendant, in its advertisement, calls upon consumers to pay more attention to quality rather than go merely by price. The disparagement, in other words, if at all there is any, is of products, which are 'cheap', not just in terms of price, but also of quality. It may well be that both senses of the word 'cheap' or 'sasta' are invoked in the present case to convey the above. Ambivalence such as this, reflected in the copy, actually lends literary merit or artistic value or adds punch to the advertisement. **There is no suggestion here, as Mr Tulzapurkar suggests, that all products of lesser price are generally inferior, much less that the Plaintiff's products in particular is inferior.**

10. ...The facts of all these cases are clearly distinguishable from the facts of the present case. The shape, size, colour or contours of the bottle of disparaged product shown in the impugned advertisement cannot be said to be evoking, in any real sense, the memory of the plaintiff's product. **Even, for that matter, the reference to 'Cheap Amla Hair Oil' cannot be said to evoke the memory of the Plaintiff's product.** As I have notes above, it is difficult to hold that what are disparaged in the impugned advertisement are lesser price products as a class. **So also, the Plaintiff has not shown as this prima facie stage that the phrases 'cheap hair oil' or 'sasta tel' used in the advertisement were indeed an idea associated solely with the plaintiff's product.** It is difficult to say on the basis of materials produced before the court, that the reference to 'cheap hair oil' or 'sasta tail' evokes the memory of the Plaintiff's hair oil"

(Emphasis supplied)



86. Though, the above order is not binding on this Court, in my view, being between the same parties and relating to almost similar advertisement against which similar complaint was made by the plaintiff, it has to be given due deference. I am, in fact, *prima facie* in agreement with the above observations of the High Court of Bombay. There is no apparent reference of the plaintiff in the impugned Print Advertisement. The reference to the plaintiff, if any, can be drawn only by a *leap of imagination*, which in my *prima facie* opinion is not warranted. It is merely suggestive of the fact that there could be severe repercussions in using cheaper Amla Hair Oils-cheaper being in quality and price. The leap of imagination that the plaintiff wants this Court to take is too wide. A consumer, while reading the Print Advertisement, would not be able to relate the term of “*sasta amla*” to the plaintiff’s product, because neither is the bottle in the advertisement referring to the plaintiff’s product, nor is it directly or indirectly implying the plaintiff’s product. It is also not a generic disparagement of all cheaper Amla Hair Oil. In my opinion, the advertisement is to be judged from point of view of an ordinary consumer and his perception of the advertisement, which in my *prima facie* opinion would be to see the advertisement as a puffery, rather than from a sensitive competitor like the plaintiff. For the claim of the plaintiff to succeed, the consumer is also to be attributed with an imagination that the mere use of the word ‘*sasta*’, without there being any other indication to the plaintiff’s product can only be the product of the plaintiff, which in my opinion, is not made out even considering



the advertisement campaign of the plaintiff which highlights plaintiff's products being cheaper in price to that of the defendant. Nor is there a disparagement of the class of products in the impugned Print Advertisement. In my opinion, the advertisement merely suggests that buying Amla Hair Oil, which is cheaper in price or quality, might be harmful to the hair. This can be stated to be an opinion but not defamatory of all hair oils that are cheaper in price to that of the plaintiff.

87. The plaintiff then contends that the comparative juxtaposition of the two bottles that is, one of the defendant and the other unmarked but with a red cross with a tagline '*Asli Amla, Dabur Amla*' would convey an impression that only Dabur Amla is real and genuine, and all cheaper oils are not.

88. The above submission does not impress me. As noted above, the tagline '*Asli Amla, Dabur Amla*' is a registered trade mark of the defendant and therefore, the defendant is entitled to use the same. The defendant cannot be enjoined from using its registered trade mark without the registration of the mark being challenged. The Print Advertisement, in fact, itself proclaims that the tagline is the registered trade mark of the defendant. Even otherwise, the tagline cannot be read to mean that only the defendant's product is real or genuine while all the others are fake. The advertiser's creativity cannot be curtailed or enjoined by such hypersensitive approach that the plaintiff wishes this Court to adopt on the impugned advertisement.



89. The plaintiff also challenges the claim of the impugned Print Advertisement that the hair oil of the defendant imparts two times extra strength to the hair. The defendant asserts that the claim is based on a survey. This challenge would therefore, have to be considered on evidence of the parties. In any case, this claim of the plaintiff has also been earlier considered by the High Court of Bombay and ASCI. The same cannot be a ground for grant of an *ad interim* injunction in favour of the plaintiff. Similar will have to be the fate of the other challenge to the Print Advertisement, which I must emphasise, were not even seriously put in question by the learned senior counsel for the plaintiff in the course of oral submissions.

(b) WhatsApp ADVERTISEMENT

90. This now brings me to the WhatsApp Advertisement. In this regard, what is to be considered at the outset is the denial of the defendant of having any role to play in the said message or advertisement.

91. At the same time, the plaintiff asserts that the WhatsApp message was in circulation a day prior to the release of the Print Advertisement and this would have happened only with the concurrence of the defendant. It has also been *prima facie* shown that Mr.Jeevan Gehlot, Sr. Sales Officer of the defendant and Mr.Akshay Agarwal, Marketing Manager of the defendant were party to the circulation of the WhatsApp message/Advertisement.

92. Be that as it may, the defendant has unequivocally submitted that it had no objection if the circulation of the WhatsApp Advertisement is injuncted by this Court.



93. While I have held that *prima facie* it appears that the WhatsApp message has been originated and circulated by the employees of the defendant, at the same time, I must also take note of the e-mail dated 10.06.2022 from Mr.Mohit Garg, an employee of the defendant, to *inter alia* the advertising agency, giving the aim of advertising campaign as under:

“We need a print creative to instigate the feeling self-respect and pridewith our loyal consumers. Below pointers may help you work on it.

This creative is to highlight the fact there is a reason why Dabur Amla is the first choice of consumers since last 80 years. Stronger, longer thicker hair with Dabur Amla. This is Barson ka Sach. That is why millions of households are using it since so many years, making it World’s No 1 Hair Oil.

Only “Dabur Amla is Asli Amla” offers 2X stronger hair.

Regards,

Mohit”

94. In response to the above, the advertising agency informed the defendant vide an email dated 13.06.2022, as under:

“Good evening. Hope all is well. This is regarding the competitive press ad to counter Nihar Shanti Amla.

We have taken forward your thoughts and had worked upon 2 approaches which we as a team feel works and will have impact.

For the tier 2/3 consumers, we feel that if we speak their language they get the message quickly and believe the same.



Attached is the presentation, with the layouts and let us know which one you guys prefer.”

95. The defendant not being satisfied with the response vide e-mail dated 13.06.2022, again reiterated its intent in the following words:

“Not aligned to any of these approaches.

While you have tried new options which is great but where is the option we had asked for? That option was supposed to create a higher ground for dabur amla and it didn't need to have any comparison with shanti amla. That's the reason had spoke to you the other day and requested to think afresh rather than getting into competitive bashing.”

96. Therefore, at this stage, it would be a highly disputed and a mixed and vexed question of facts whether the defendant, as a corporate entity, can be saddled with the liability of the acts of its employees. It would have to be considered whether the WhatsApp message circulated by the employee of the defendant was with the authority and concurrence of the defendant and, if so, the effect thereof.

97. The question then raised by the learned senior counsel for the plaintiff is that the WhatsApp Advertisement/message clearly shows that the impugned Print Advertisement targets only the plaintiff. He submits that in view of the same, the plea of the defendant that the impugned Print Advertisement does not target the plaintiff and/or that the impugned advertisement uses the words '*sasta amla*' in a general sense and not only for the price, cannot be accepted. He submits that the two advertisements read together clearly betray the *mala fide* intent of the defendant in launch of the impugned advertisements.



98. While the above submissions at first blush impressed me and had even persuaded me to grant the *ad interim ex parte* injunction, taking into account the totality of circumstances, cannot be a ground to injunct even the Print Advertisement. Though the WhatsApp message/Advertisement shows that the impugned Print Advertisement is aimed at the plaintiff, however, the ordinary consumer would not have the benefit of having the WhatsApp Advertisement/message along with the Print Advertisement before him/her. It would only be the persons who receive the WhatsApp Advertisement/message along with the Print Advertisement, who would be able to make the connection between the two. Even otherwise, the WhatsApp message/Advertisement merely reflects that the Print Advertisement is aimed against the plaintiff as it calls upon the shop employees to display Print Advertisement, therefore, the Print Advertisement has to be considered independent of the WhatsApp message/ Advertisement and the two cannot be read together, as has been prayed for by the plaintiff.

99. In *Puro Wellness Pvt. Ltd.* (supra), the Division Bench of this Court disapproved of the learned Single Judge considering different material as constituting a ‘campaign’ and, therefore, as a whole. It was held that the merits of each of the distinct elements should have been considered separately and the type of material cannot be conflated with the other.

100. In view of the above, I find that while the plaintiff has not been able to make out a *prima facie* case against the Print Advertisement.



At the same time, the plaintiff has been able to make out a *prima facie* case as far as the WhatsApp message/Advertisement is concerned.

101. Accordingly, the defendant, either directly or through its servants, agents, employees or any other persons working under it, is restrained from circulating the WhatsApp message/Advertisement, during the pendency of the Suit. The defendant must bring this order to the notice of its employees.

102. The applications are disposed of in the above terms.

103. It is made clear that any and all observations made hereinabove are only *prima facie* in nature and should not be considered as a final opinion of the Court or as binding at the time of final adjudication of the Suit.

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104. This is an application filed by the plaintiff seeking condonation of 15 days' delay in filing the replication.

105. For the reasons stated in the application, the delay is condoned and the replication is taken on record.

106. The application is disposed of.

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107. List on 18th August, 2023 before the learned Joint Registrar (Judicial).

NAVIN CHAWLA, J.

JUNE 2, 2023/Ais/KP