

MANU/TN/0980/2008

Equivalent Citation: 2008-4-LW628, (2008)7MLJ1119, 2009(40)PTC653(Mad)**IN THE HIGH COURT OF MADRAS**

O.A. Nos. 493 and 494 of 2008 in C.S. No. 451 of 2008

Decided On: 04.09.2008

Appellants: **Colgate-Palmolive (India) Limited**
Vs.Respondent: **Anchor Health and Beauty Care Private Ltd.****Hon'ble Judges/Coram:**

V. Ramasubramanian, J.

Counsel:

For Appellant/Petitioner/Plaintiff: Aravind P. Datar, Sr. Counsel for Sathish Parasaran, R. Parthasarathy and Rahul Balaji, Advs.

For Respondents/Defendant: C. Harikrishnan, Sr. Counsel, Elizabeth Seshadri, Adv. for Iyer & Thomas, H. Karthik Seshadri, Advs.

Subject: Media and Communication**Subject: Civil****Acts/Rules/Orders:**

Consumer Protection Act, 1987 ;Monopolies and Restrictive Trade Practices Act, 1969 - Section 36A, Monopolies and Restrictive Trade Practices Act, 1969 - Section 36(1), Monopolies and Restrictive Trade Practices Act, 1969 - Section 55; Lanham Act ;Federal Trade Commission Act - Section 5(1), Federal Trade Commission Act - Section 12, Federal Trade Commission Act - Section 15, Federal Trade Commission Act - Section 15(1); Broadcasting Act, 1981 ;Cable Broadcasting Act, 1984 ;European Communities Act ; Young Persons (Harmful Publications) Act, 1956 ;Emblems and Names (Prevention of Improper Use)Act, 1950 ;Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 ;Indecent Representation of Women (Prohibition) Act, 1986 ;Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 ;Transplantation of Human Organs Act, 1994 ;Drugs and Cosmetics Act, 1940 ;Prize Competition Act, 1955 ;Prize Chits and Money Circulation Schemes (Banning) Act, 1978 ;Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ;Cable Television Networks (Regulation) Act, 1995 - Section 6; Cable Television Network Rules, 1994 - Rule 7, Cable Television Network Rules, 1994 - Rule 7(2), Cable Television Network Rules, 1994 - Rule 7(4); Cable Television Networks (Regulation) Rules ;Non-Broadcast CAP Code ;Consumer Protection Act, 1986 - Section 2(1), Consumer Protection Act, 1986 - Section 3; Consumer Protection Act (Amendment), 1993 ;Consumer Protection Act (Amendment), 2002 - Section 13, Consumer Protection Act (Amendment), 2002 - Section 13(3B), Consumer Protection Act (Amendment), 2002 - Section 14(1); Human Rights Act, 1998 - Section 12; Competition Act, 2002 - Section 66; Trade Practices Act, 1969 ;Communications Act, 2003 - Section 319; Indian Penal Code (IPC) - Section 292(2), Indian Penal Code (IPC) - Section 292(A); Companies Act, 1956 - Section 25; Drugs and Cosmetics Rules - Rule 149A; Constitution of India - Article 19(1), Constitution of India - Article 19(2), Constitution of India - Article 21; Control of Misleading Advertisements Regulations, 1988 - Regulation 2(2); Control of Misleading Advertisements (Amendment) Regulations, 2000 ;Consumer Protection from Unfair Trading Regulations, 2008 ;Business Protection from Misleading Marketing Regulations, 2008

Cases Referred:

McDonalds v. Burgerking (1986) FSR 45; Erven Warnink, B.V. v. Townend & Sons (Hull) Ltd 1980 RPC 31; Jay Kanak Bhai Bhatt v. Union of India; Ulick, et al v. PC World Communications, Inc. 1986 WL 84368; Southern Shows Inc. v. Exposition Enterprises 1985 US Dist. Lexis 22039; Wren v. Weild (1869) LR 4 QB 730; Western Counties Manure Co v. Laws Chemical Manure Co. (1874) LR 9 Ex.218; Ratcliff v. Evans (1892) 2 QB 524; Timothy White v. Gustav Mellin 1895 AC 154; De Beers Abrasive Products Ltd. and Ors. v. International General Electric Co. of New York Ltd and Anr. 1975 (2) ALL ER 599; Evans v. Harlow; White v. Mellin (1895) AC 154; Church & Dwight v. Siftco Canada 1994 CPR Lexis 2069; Chloride Industries Ltd v. The Standard Batteries Ltd.; Reckitt & Colman of India Ltd v. M.P.Ramachandran and Ors. 1999 PTC (19) 741; Reckitt & Colman of India Ltd v. Kiwi T.T.K. Ltd. 1996 (16) PTC 393; Pepsi Co., Inc. and Ors. v. Hindustan Coca Cola Ltd 2003 (27) PTC 305 (Del); Reckitt Benckiser (India) Limited v. Naga Limited and Ors. 2003 (26) PTC 535; Dabur India Ltd. v. Emami Ltd 2004 (29) PTC 1; Dabur India Limited v. Colgate Palmolive India Ltd AIR 2005 Delhi 102; Karamchand Appliances Pvt. Ltd. v. Sh. Adhikari Brothers and Ors. 2005 (31) PTC 1 (Del); Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd. 2006 (32) PTC 307; Hindustan Lever Ltd. v. Colgate Palmolive India Ltd. 1998 (1) SCC 720; United States of America v. Bayer Corporation; Hamdard Dawakhana v. Union of India AIR 1960 SC 554; Sakal Papers (P) Ltd v. Union of India AIR 1962 SC 305; Indian Express Newspapers (Bombay) Pvt Ltd v. Union of India 1985 (1) SCC 641; Lewis J. Valentine v. F.J. Chrestensen; Virginia Board case 425 US 748 : 48 L Ed 2d 346 (1976); Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd 1988(4) SCC 592; Secretary, Ministry of Information and Broadcasting, Government of India v. The Cricket Association of Bengal (1995) 2 SCC 161; Peoples Union for Civil Liberties (PUCL) v. Union of India AIR 2003 SC 2363; Microdata v. Rivendale Ltd 1991 FSR 681; Macmillan Magazines Ltd v. RCN Publishing Co. Ltd (1998) FSR 9; Bestobell Paints Ltd v. Bigg (1975) FSR 421; Boehringer Ingelheim Limited v. Vetplus Ltd. 2007 EWCA Civ 583; Colgate Palmolive (India) Ltd v. Hindustan Lever Ltd (1999) 7 SCC 1; Tata Press Ltd v. Mahanagar Telephone Nigam Ltd. 1995 (5) SCC 139; Sakal Paper case AIR 1962 SC 305 : (1962) 3 SCR 842; Bennett Coleman case (1972) 2 SCC 788 : (1973) 2 SCR 757

Case Note:

Civil – Offending Advertisement – Petitioner and respondent were competitor company – Petition filed for permanent injunction for restraining telecast of impugned television advertisement –

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Petitioner also claimed damages – Petitioner contended that words ‘First’ and ‘Only’ used in impugned advertisement are misleading and false as petitioner’s product also contain all the ingredients mentioned in advertisement by respondent – Further, petitioner was in market and selling product much before the introduction of product by respondent – Whether petitioner entitled to get injunction? – Held, respondent guilty of unfair trade practice, by projecting their product as only product containing 3 ingredients and as first product to provide all round protection - Even by their own admission, respondent’s claim being the ONLY and FIRST toothpaste is not intended to convey the meaning that it does – Thus, it is in public interest not to permit respondent to continue with such misleading claim – Therefore, petition allowed to limited extent by restraining respondent from using words FIRST and ONLY in impugned advertisement

JUDGMENT

V. Ramasubramanian, J.

1. "Comparison lies at the root of modern advertising" says Cornish, W., in his "Intellectual Property"(4th Edn., Page 656). In McDonalds v. Burgerking (1986) FSR 45 Whitford J., warned that "advertisements are not to be read as if they are testamentary provision in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared". Yet, comparative advertisements have led to a lot of litigation and the case on hand is one.

2. C.S. No. 451 of 2008 has been filed by Colgate Palmolive (India) Ltd., for a permanent injunction restraining the defendant from in any manner continuing the telecast of the impugned Television advertisements, filed as plaint document No. 3 in a Compact Disk (CD) or telecasting any other advertisement which is disparaging or slandering the Colgate tooth pastes and for damages to the tune of Rs. 10,01,000/-. Pending suit, the plaintiff has come up with -

(i) O.A. No. 493 of 2008 for an interim order of injunction restraining the respondent from making any false, misleading or disparaging representations or from making any slanderous statements/representations in respect of the plaintiff's products and

(ii) O.A. No. 494 of 2008 for an interim order of injunction restraining the respondent from showing, screening, exhibiting or telecasting the offending TV Commercials/advertisements which seek to disparage/denigrate the applicant's products.

3. Simultaneously, M/S. Swabhanu Universal Agencies, the stockist of Colgate Palmolive (India) Ltd., has come up with a similar suit C.S. No. 452 of 2008 for identical reliefs. Pending their suit, they have come up with - O.A. No. 495 of 2008 for an interim order of injunction restraining the respondent from in any manner continuing with the telecast of the impugned Television advertisements, filed as plaint document No. 3 and recorded in a CD.

4. On 25.4.2008, the applications for ad interim ex parte injunction were moved and I directed the learned Counsel for the applicant/ plaintiff to take private notice to the respondent. After service of notice, the applications for injunction were moved in the Vacation Court, on the ground that urgent interim orders were required. On 21.5.2008, the respondent/defendant filed an affidavit of undertaking to the effect that the defendant would not use the words "only" and "first" in their offending advertisement, till the applications for injunction were heard and disposed of. This undertaking was given without prejudice to the rights of the respondent/defendant, only in view of the fact that there was no time in the Vacation Court to hear detailed arguments on the applications for injunction. Therefore, after the reopening of Court after Summer Vacation, all the applications were taken up for hearing and I heard Mr. Arvind P. Datar, learned Senior Counsel and Mr. P.S. Raman, learned Senior Counsel appearing for the plaintiffs in C.S.Nos.451 and 452 of 2008 respectively and Mr. C. Hari Krishnan, learned Senior Counsel and Mrs. Elizabeth Seshadri, learned Counsel appearing for the respondent/defendant in both the suits.

5. While the plaintiff in C.S. No. 451 of 2008 is the manufacturer of Dental Care products, including tooth pastes under the Trade Mark "Colgate", the plaintiff in C.S. No. 452 of 2008 is their stockist. The defendant in both the suits manufactures and markets tooth pastes under the brand name "Anchor". Both of them have been indulging in an "advertisement war" against each other, for quite some time. Interestingly, the plaintiff and the defendant fight the war partly on the tarmac of satellite Television Channels and partly in Courts. The antecedents of the plaintiff and the defendant show that the moment a new advertisement is launched by one of them, it is challenged by the other in a Court of Law as amounting to disparagement. As Lord Diplock opined in Erven Warnink, B.V. v. Townend & Sons (Hull) Ltd 1980 RPC 31, it would have been better if economic battles are confined only to the market place.

6. The grievance of the plaintiff in these suits is that the defendant recently came out with a Television Commercial, advertising their tooth paste "Anchor". The TV Commercial was telecast in Tamil as well as in Hindi in various Satellite Channels. In the advertisement, a Hindi Film actress advises her daughter that "Anchor" tooth paste is the only tooth paste containing Triclosan, Calcium and Fluoride and that it is the first tooth paste providing all round protection. Ultimately, the actress questions the viewer as to when the viewer would change over to "Anchor" tooth paste. The plaintiff has filed the Story Board of the Tamil version of the impugned advertisement and its Hindi version as plaint document Nos.5, 6 and 7 along with the suit.

7. The objection of the plaintiffs is not to the advertisement as a whole. The objection is confined only to 4 issues. They are as follows:

(i) The first objection of the plaintiff is to the claim made in the advertisement that "Anchor" is the "ONLY" tooth paste containing all the 3 ingredients viz., Calcium, Fluoride and Triclosan.

(ii) The second objection of the plaintiff is to the statement in the advertisement that "Anchor" is the "FIRST" all round protection tooth paste.

(iii) The third objection of the plaintiff is to the statement that the Fluoride in "Anchor" tooth paste gives 30% more cavity protection.

(iv) The fourth objection of the plaintiff is to the statement that Triclosan contained in "Anchor" tooth paste is ten times more effective in reducing bacteria.

8. The first and second objections of the plaintiffs to the use of the words "ONLY" and "FIRST" in the offending

advertisement of the defendant, is on the basis that even the products of the plaintiff contained all the 3 ingredients viz., Calcium, Fluoride and Triclosan and that long prior to the appearance of the defendant in the market, the plaintiff established itself as a pioneer in the world of Dental Care products such as tooth paste. Therefore according to the plaintiff, the defendant's claim that their tooth paste is the only tooth paste containing all the 3 ingredients and that their tooth paste is the first to provide all round protection, is obviously a false statement. Though according to the plaintiff, a false statement which stops at being a mere puffery may be within the tolerance limits permitted by law, a claim which exceeds the said limit would amount to disparagement of the other people's products and that therefore the same cannot be allowed to continue. Similarly, the third and fourth objections of the plaintiff with regard to the fluoride protection and the efficiency of Triclosan, are on the basis that every tooth paste is supposed to contain 1000 ppm (particles per million) of fluoride and that the fluoride content is also regulated by Rule 149-A of the Drugs and Cosmetics Rules. When the ingredients of a normal tooth paste are just the same, the claim of superiority that the defendant's product would give 30% more cavity protection and 10 times more effective in fighting bacteria, were obviously false, intended to mislead the consumers.

9. The respondent originally filed a counter affidavit, wherein the respondent confined itself only to certain preliminary objections regarding the conduct of the plaintiff. It is stated in the said counter affidavit that in view of the fact that there are several litigations pending between the plaintiff and the defendant, mediation was already initiated before a learned Judge of the Delhi High Court at the instance of the Delhi High Court and that the plaintiff had suppressed this fact in the plaint. The respondent has also stated that they have already filed a suit for injuncting the plaintiff from using the slogan "all round decay protection" as it is an imitation of the respondent's slogan "all round protection". The respondent has given a summary of the litigations pending before various Courts between the very same plaintiff and the defendant, which in brief, are as follows:

Case No.	Court in which pending	Parties to the litigation	Prayer
C.S. No. 4118 of 1996	High Court, Bombay	Plaintiff and the Defendant	An exclusive right of Colgate to the Red and White colour combination on the Carton of their tooth paste is the subject matter of this suit. Interim injunction was refused and the suit is awaiting disposal.
C.S. No. 1648 of 2002	High Court, Delhi	Plaintiff herein v. Vipul P. Chedda	The Hanger Tray used for hanging tooth brushes and the Red and White colour combination in the Carton are the subject matters of this suit. No injunction granted and the suit is pending.
C.S. No. 691 of 2002	High Court, Delhi	Plaintiff and the Defendant	This case relates to the colour combination in the container of the tooth powder. Interim order granted in favour of the plaintiff and the appeal against the same is pending.
C.S. No. 1804 of 2003	High Court, Delhi	Plaintiff and the Defendant	This case relates to total tooth brush of the plaintiff and the wave tooth brush of the defendant. No interim order was granted and suit is pending.
C.S. No. 304 of 2004	High Court, Delhi	Plaintiff and the Defendant	Design of the tooth brushes is the subject the subject matter of the suit. Injunction application dismissed as not pressed. Suit pending.
C.S. No. 1709 of 2005	High Court, Delhi	Plaintiff herein V. Atul Shah	This suit relates to the "all round protection" Carton of the defendant. No injunction in force. Mediation failed and suit pending.
W.P. No. 4165 of 2006	High Court, Delhi	Jay Kanak Bhai Bhatt V. Union of India	This writ petition challenges the grant of registration of a Trade Mark in favour of Colgate, on the ground that the Trade Marks Registry, granted registration in a colour combination, after advertising in the Journal, the scheme of the label in Black and White. An interim stay of the registration

10. As a matter of fact, the plaintiffs themselves have filed as document No. 4, the list of legal proceedings pending between them and the defendant before various Courts. It is seen from the said list that apart from the suits and the writ petition listed out by the respondent in their counter affidavit, there is one more suit in C.S. No. 1597 of 2007 on the file of the Delhi High Court where the respondent is the plaintiff and the applicant is the defendant. Apart from the 7 suits and one writ petition, the plaintiff and the defendant are also engaged in a pitched battle before the Trade Marks Registry and the Controller of Patents and Designs, in Opposition Applications and Cancellation Applications. There appears to be at least 11 such proceedings pending before those authorities, apart from the 7 suits and a writ petition.

11. Thus, in their first counter affidavit, the respondent has merely highlighted that there are several proceedings pending in various Courts and that the plaintiff had burked the information relating to the reference of the parties to mediation by the Delhi High Court. It is also contended in the counter affidavit that the Television Commercial complained of by the plaintiff contains only the positive features of the defendant's tooth paste and that there is no negative comment about the plaintiff's tooth paste. It is also stated in the counter affidavit that the advertisement did not make a reference to any other tooth paste. According to the respondent, there is nothing in the Television Commercial which disparaged or denigrated the plaintiff's product and that therefore no injunction could be granted.

12. After the respondent filed the counter affidavit, the applicant filed a reply raising an additional issue that an advertisement was posted in the webportal "youtube", in which the respondent showed the tooth paste of other companies, with the artist rejecting all other tooth pastes towards the end of the advertisement. This reply affidavit was filed by the applicant in order to disprove the statement made by the respondent in their counter affidavit to the effect that the tooth paste of other companies are not referred to in their TV Commercial at all.

13. In response to the reply affidavit filed by the applicant, the respondent filed a statement titled as "Response to the Reply Affidavit". Though such a procedure of filing a Response, is unknown to law, it is contended by the respondent that they were forced to do so since an allegation relating to the advertisement in the webportal "youtube" was raised for the first time by the plaintiff in their reply affidavit. For a moment, I do not wish to enter into this controversy, since there are enough controversies on hand between the parties to be resolved.

14. It is only in the "Response to the Reply Affidavit" that the respondent has attempted to meet the 4 objections of the applicant/plaintiff directly. Since they go to the root of the matter, they are extracted as follows:

(a) With regard to the first objection of the plaintiff regarding the use of the word "ONLY", the defendant contends that the word "ONLY" is intended to mean that among the White tooth paste range, the defendant's product contains the 3 ingredients.

(b) In respect of the objection relating to the usage of the word "FIRST", the defendant contends that it relates to the use of the slogan "all round protection", coined by the defendant for the first time in the year 2005.

(c) With regard to the third objection, the defendant contends that the superiority of Triclosan is well known and that all the 3 ingredients are not present even in Colgate's Cibacca Variant.

(d) With regard to the fourth objection, the defendant contends that the usage of optimum quantity of fluoride protects against tooth decay and that it is neither false nor disparaging.

15. The respondent/defendant has also enclosed a copy of a legal notice issued by their counsel to the webportal "youtube", challenging their action in posting an advertisement without their authorisation. On the basis of the said legal notice, the respondent/defendant contends that they are not responsible for the advertisement that appeared in the "youtube" without their knowledge or consent.

16. From the respective pleadings extracted above, it is seen that there are 2 fundamental aspects in the present case, on which there is no dispute. They are as follows:

(a) From the Television Commercial which is filed in the form of a CD and played before me on the Laptop in the Court, it is clear that the respondent claims that their "Anchor" tooth paste is the only tooth paste containing Triclosan, Calcium and Fluoride. The respondent also claims in the advertisement that their "Anchor" tooth paste is the first tooth paste to provide all round protection. Similarly, the advertisement shows a claim that the fluoride in "Anchor" tooth paste provides 30% more cavity protection and the claim that Triclosan fights germs 10 times more.

(b) It is not the case of the respondent, atleast before this court, that their "Anchor" tooth paste is the only tooth paste containing all 3 ingredients. It is also not their case that their tooth paste is the first to arrive in the market historically. This is why the respondent seeks to explain the rationale rather than justify the use of the words "ONLY" and "FIRST" in their advertisement. In other words, the respondent does not seek to establish that there are no other tooth pastes which contain all 3 ingredients. The respondent does not also seek to establish that their product was the first to arrive in the market. On the other hand, the word "ONLY" is sought to be explained with reference to a range of their own products and the word "FIRST" is sought to be explained not with reference to the product but with reference to the slogan "all round protection".

17. In view of such a stand taken by the respondent, it is clear that their product is neither the only product to contain all the 3 ingredients nor the first in the market. Therefore if the advertisement in question sends a message to a man of average intelligence and a weak brain amenable to an advertisement wash, as though the defendant's product is either the only product containing all 3 ingredients or the first in the market, such a message is misleading. This is exactly why, the first lesson taught to a consumer, in movements to create awareness, is that "every rupee spent on advertisement is a nail on the coffin of consumer's sovereignty".

18. But, unfortunately, there is no codified law in India to restrain companies from indulging in false publicity campaign (except to a limited extent under the MRTP Act and the Consumer Protection Act). We only have judge-made laws developing in the recent past. But the decisions of various Courts which have contributed to

the development of law on this issue from "English decisions". Traditionally, English Law appears to have generally leaned in favour of Free Trade and Commerce, basically on account of 4 factors viz.:

- (i) It is only through trade and commerce that the British managed to expand their horizons and proclaim that the sun never set in their empire.
- (ii) The level of awareness on the part of the consumers in Britain is very high when compared to the level of awareness on the part of the consumers in developing countries like ours. The ability of consumers to sift the chaff from the grain is much greater there.
- (iii) The fixation of tortious liability on the manufacturers and marketers of products and the entitlement of consumers to damages of unimaginable proportions, is firmly rooted in the English soil, but the same is not the position in India.
- (iv) All contracts, except perhaps the contract of Insurance which is one of *Uberrima Fidei*, are founded upon the principle of *Caveat Emptor* (buyer beware).

19. In view of the above, I have my own doubts regarding the applicability of English decisions to the issue of disparaging advertisements, especially after the developments that have taken place in U.K., in the recent past, to which I shall advert to later. Moreover, the law as it developed in England from the 16th century as one relating to slander of title to land and then the slander of goods, passing through *Timothy White v. Gustav Mellin* (1895) upto *De Beers case* 1975 (2) ALL.E.R.599, appears to have taken a different turn thereafter, with consumerism gaining momentum. Interestingly, our Consumer Protection Act was enacted in 1986 while the one in U.K., was enacted only subsequently in 1987. Therefore some of the English decisions on the point, rendered 30 years ago in England, may not be of relevance today even in their soil. Nevertheless I shall consider the decisions relied upon by the learned Senior Counsel appearing on either side.

20. Mr. Arvind P. Datar, learned Senior Counsel relied upon the decision of the District Court, Illinois in *Ulick, et al v. PC World Communications, Inc.* 1986 WL 84368, in which the District Court granted an injunction prohibiting the defendant from making a false claim that their magazine was the "FIRST" sophisticated magazine to be entirely written, edited and produced on personal computer based systems. The Court upheld the objection to the use of the word "FIRST" on a finding of fact that the plaintiff's magazine preceded the defendant's magazine.

21. The learned Senior Counsel also relied upon a decision of the District Court, North Carolina Charlotte Division in *Southern Shows Inc. v. Exposition Enterprises* 1985 US D. L 22039, in which the Court granted an injunction restraining the respondent from using the word "ONLY", in relation to a home and garden show conducted by the defendant. While granting the injunction, the Court observed that "when a statement is shown to be actually false, consumer reaction to the advertising need not be shown and that the very falsity of the claim is sufficient to show the plaintiff's likelihood of success in the suit on merits".

ENGLISH LAW RELATING TO SLANDER OF GOODS

22. The English law relating to slander of goods, had its origin in slander of title to land, from the end of 16th century. It appears that the tort liability was initially extended in *Wren v. Weild* (1869) LR 4 QB 730, from slander of title to land, to include slander of goods. Disparagement as to quality, involving no denial of title was recognised in *Western Counties Manure Co v. Laws Chemical Manure Co.* (1874) LR 9 Ex.218, where the manure produced by the plaintiff was alleged by the defendant to be of low quality. It was held therein that an action is maintainable when the defendant made a false statement about the plaintiff's goods to their comparative disparagement and such false statement caused the plaintiff to lose customers. The next case was *Ratcliff v. Evans* (1892) 2 QB 524, where Bowen, L.J., held as follows:

An action will lie for written or oral falsehoods, not actionable per se, or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce and where they do produce, actual damage.

23. *Timothy White v. Gustav Mellin* 1895 AC 154, which is oft quoted by Indian courts, then followed. In that case, the House of Lords was concerned with an action brought forth by the Proprietor of food products for infants. In the bottles in which the plaintiff in that case sold its products, the defendant affixed a label, containing a recommendation to the public to try another product on the ground that it was far more nutritious and healthy than any other preparation yet offered. The trial Judge dismissed the action on the ground that the label was merely the puff of a rival trader and that no cause of action was disclosed. This was despite the fact that the plaintiff produced evidence from two analysts and a physician to the effect that the plaintiff's product was suitable for infants and that the product recommended by the defendant was pernicious and dangerous for young infants. On appeal, the Court of Appeal ordered a new trial. However, the House of Lords reversed the decision of the Court of Appeal and restored that of the trial Judge. While doing so, Lord Herschell, the Lord Chancellor quoted with approval, Lord Denman, in *Evans V. Harlow*, which reads as follows:

The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious and defamatory' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action.

While concurring with the Lord Chancellor, Lord Watson summarised the essential requirements for maintaining an action for disparagement, on the following lines:

Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance. In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they

have occasioned special damage to the plaintiff. Unless each and all of these three things be established, it must be held that the defendant has acted within his rights and that the plaintiff has not suffered any legal injury.

Again Lord Shand also reiterated the same view, while concurring with the views of the Lord Chancellor and the other Lords and said that "in order to constitute a libel of the class here complained of, there must be a statement in disparagement of the plaintiff's goods, and that the statement must be false and injurious".

24. Three tests were laid down in the aforesaid case viz., (i) that the defendant's representations were made of and concerning the plaintiff's goods; (ii) that they were in disparagement of his goods and untrue; and (iii) that they have occasioned special damage to the plaintiff.

25. Thus what started of as an action for mere slander of title to land, by the end of 16th century, assumed different dimensions and different names such as slander of goods, injurious falsehood, trade libel, disparagement or malicious falsehood (used by Bowen. L.J., in *Ratcliff v. Evans*). After *White v. Mellin*, the decision followed invariably without fail by Indian courts, is the one in *De Beers Abrasive Products Ltd and Ors. v. International General Electric Co. of New York Ltd and Anr.* 1975 (2) ALL ER 599, wherein the Chancery Division followed the ratio in *Evans v. Harlow and White v. Mellin*. In that case the Chancery Division considered the question as to what amounted to a mere puffery and the distinction between a mere puff and an actionable disparagement. Since it is this case which is oft quoted in the decisions of various High Courts, it is necessary to look into this case in greater detail. In that case, the plaintiffs were the manufacturers of a natural diamond abrasive marketed under the Trade Mark "Debdust", used for cutting concrete. The defendants were manufacturers of an abrasive made from synthetic diamond. The defendants issued a pamphlet purportedly containing laboratory reports for providing a comparison of the performance and qualities of both the products. On the ground that the pamphlet contained adverse comments about their product, the plaintiff sued for damages. The defendants sought an order to strike out the statement of claim on the ground that the plaint disclosed no cause of action. It was the contention of the defendant that the pamphlet merely sought to project the superiority of the defendant's product in a glorified manner and that therefore it was not an actionable wrong. While dismissing the motion for striking out the statement of claim, the Chancery Division went into the question of what amounted to disparagement. The relevant portion of the decision is as follows:

What precisely is the law on this point? It is a blinding glimpse of the obvious to say that there must be a dividing line between statements that are actionable and those which are not; and the sole question of a dry point of law such as we are discussing here is; where does the line lie? On the one hand, it appears to me that the law is that any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival's goods. Thus in the well known case of the three adjoining tailors who put notices in their respective windows reading: 'The best tailor in the world', 'The best tailor in this town', and 'The best tailor in this street', none of the three committed an actionable offence."

Where, however, the situation is not that the trader is puffing his own goods, but turns to denigrate those of his rival, then, in my opinion, the situation is not so clear cut. Obviously the statement: 'My goods are better than X's' is only a more dramatic presentation of what is implicit in the statement: 'My goods are the best in the world'. Accordingly, I do not think such a statement would be actionable. At the other end of the scale, if what is said is: 'My goods are better than X's, because X's are absolute rubbish', then it is established by dicta of Lord Shand in the House of Lords in *White v. Mellin* (1895) AC 154, which were accepted by counsel for the defendants as stating the law, the statement would be actionable.

Between these two kinds of statements there is obviously still an extremely wide field; and it appears to me that, in order to draw the line, one must apply this test, namely, whether a reasonable man would take the claim being made as being a serious claim or not. A possible alternative test is to ask whether the defendant has pointed to a specific allegation of some defect or demerit in the plaintiff's goods. This is, I think, the test favoured by the learned editors of the last few editions of *Salmond on Torts*"

If traders take the time and trouble to dress up their advertising material in this manner, then I think they must stand by it; and, if it contains, as in the case here, statements in disparagement of the plaintiffs' goods and if, further, on investigation those statements prove to be false and the plaintiff can show malice, the precise constitutes of which for present purposes I think it is better not to investigate, it appears to me that they must answer for it.

26. Interestingly, *White v. Mellin* is a case in which, in my humble opinion, the result did not follow the reasoning of the court. In that case, though the plaintiff's products were sold in bottles packed in a wrapper, the defendant covered them with his own wrapper and started selling them. The wrapper used by the defendant, over and above the wrapper of the plaintiff, carried the offending message that someone else's product is better than that of the plaintiff. Yet the decision of the trial Judge to dismiss the action, was upheld by the House of Lords. But in *De Beers Products* case, the defendant circulated a pamphlet containing technical data relating to the comparative performance of synthetic diamond abrasives and natural diamond abrasives. The data was allegedly collected and compiled by a so called "Application Laboratory". Therefore, while dismissing the motion for striking out the plaintiff's statement of claim (on the ground that it disclosed no reasonable cause of action) the Chancery Division held (as seen from the last portion of the above extract) that the statements made by the defendant must be proved to be false, to maintain an action.

27. In *Church & Dwight v. Siftco Canada* 1994 CPR L 2069, a Canadian Court was concerned with an action brought forth by a Company manufacturing and marketing Baking Soda, against a competitor who made a claim which reads as follows:

Sifto Baking Soda ' One of the richest sources of naturally occurring sodium bicarbonate is found deep in the Colorado Mountains. The North American Salt Plant at Rio Blanco taps into this vast underground deposit, producing the purest possible baking soda, contained in this box. Sifto Baking Soda has no chemical additives, making it the only naturally occurring baking soda on the market. 100% effective. 100% natural.

The said advertisement was challenged as disparaging on the ground that it would make the public believe that the plaintiff's product is not the purest possible product and that the plaintiff's product contains chemical

manupatna additives. While granting an injunction in favour of the plaintiff, the Canadian Court held as follows:

False advertising, is also actionable as the tort of injurious falsehood. This tort protects an interest in disposing of one's property, products or business. Statements which disparage property are actionable where they cast "an aspersion on the nature of his business or the quality of his merchandise as such". Fleming, *The Law of Torts*, 7th ed., p. 671.

To make out this tort, a plaintiff must establish actual economic loss and that the offensive statements were false and made with the intent to cause injury without lawful justification (Fleming, *op. cit.*). It has also been held that the party complaining of injury must have been identified by name.

An argument was advanced in the said case that there was no direct reference either to the plaintiff or their products. While rejecting the said argument, on the ground that there was virtual domination of the market place by the plaintiff's product and that therefore the same was identifiable by implication, the Court held as follows:

While "puffery" is countenanced in advertising, a direct, untruthful disparagement is not. Where, as here, the target of the advertising copy is clear, the advertising is tortious.

Interestingly, the decision of the Canadian Court came in for criticism on the ground that even while finding the adjective 'purest possible' as offending, the court accepted the adjective '100% pure' as mere puffery, though both had the same connotation.

LAW RELATING TO DISPARAGING ADVERTISEMENTS IN INDIA

28. Turning to the development of law on the issue in India, it appears that the earliest decision was that of the Calcutta High Court in *Chloride Industries Ltd v. The Standard Batteries Ltd* decided on 30-9-1994. It was an action brought forth by the manufacturers of Exide Battery against their competitor on the ground that the competitor indulged in disparagement. A single Judge of the Calcutta High Court held therein that if the goods are disparaged maliciously or with some other such intent to injure and not by way of fair trade rivalry, the same would be actionable. Though this is an unreported decision, it was cited and followed in the subsequent decision of the same High court in *Reckitt & Colman of India Ltd v. M.P. Ramachandran and Ors.* 1999 PTC (19) 741.

29. The decision of the Calcutta High Court in *Reckitt & Colman of India Ltd v. M.P. Ramachandran and Ors.* 1999 PTC (19) 741 appears to have set the trend in the direction that the law has taken in India, over the last decade. Almost all subsequent decisions on the point of law refer to the said decision. Five principles were enunciated in the said decision which are as follows:

- I) A tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue.
- II) He can also say that his goods are better than his competitors', even though such statement is untrue.
- III) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
- IV) He, however, cannot while saying 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.
- V) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining the repetition of such defamation.

30. The above five principles were cited with approval by S.K. Mahajan., J in *Reckitt & Colman of India Ltd v. Kiwi T.T.K. Ltd.* 1996 (16) PTC 393 decided in May 1996. In that case, the Delhi High Court was concerned with an action brought forth by the manufacturers of a liquid shoe polish under the brand name 'Cherry'. The defendant in the action was marketing a shoe polish under the brand name 'Kiwi'. In an advertisement released in the electronic media, a bottle of the defendant's shoe polish with the name KIWI written on white surface was shown against another liquid polish described as 'OTHERS' marketed by Brand X. While the word KIWI written on the defendant's bottle would not drip, the word 'OTHERS' written in the other bottle was shown dripping. The other bottle looked like the one used by the plaintiff for their product since it had a red blob on its surface. Therefore the plaintiff complained of disparagement. S.K. Mahajan. J, held that on account of the red blob appearing on the surface of the other bottle shown in the advertisement, it was offensive and granted an injunction to that limited extent and held as follows:

12. The settled law on the subject appears to be that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad so as to puff and promote his goods. It, therefore, appears that if an action lies for defamation an injunction may be granted.

31. The next decision is also that of the Delhi High Court in *Pepsi Co., Inc. And Ors. v. Hindustan Coca Cola Ltd MANU/DE/0896/2003*. In that case, an advertisement in which a boy was shown preferring THUMS UP to PEPSI on the ground that the former was a stronger drink while the latter was meant for children, was in issue. While holding that the same amounted to disparagement, the Division Bench of the Delhi High Court held in paragraph-12 and 22 as follows:

12. What is disparagement. The New International Websters' Comprehensive Dictionary defines disparage/disparagement to mean, "to speak of slightly, undervalue, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a

reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation." The Concise Oxford Dictionary defines disparage as under, to bring dis-credit on, slighting of and depreciate."

22...The war of advertisement against each other's products is going on but that does not entitle the respondents to contend nor can be permitted to plead the past conduct as a good defence to denigrate the product of the appellant nor the market place is a suitable substitute for injunction.

32. In *Reckit Benckiser (India) Limited v. Naga Limited and Ors.* 2003 (26) PTC 535, the Delhi High Court was concerned with an advertisement in which Dettol soap was allegedly shown in poor light by the manufacturer of an Ayurvedic soap. But the plaintiff sued only for injunction and did not claim damages. Therefore, the learned Judge of the Delhi High Court refused to grant an injunction on the ground that in the absence of a primary and substantive claim (for damages) the relief of injunction would ordinarily be barred. But in paragraphs-3 and 7 of the judgment, the learned Judge elicited the law on the point, as follows:

3. Clerk & Lindsell on Torts draws a distinction between malicious prosecution and defamation, in that "defamation protects the Plaintiff's reputation, while malicious falsehood protects the Plaintiff's interest in his property or trade". In its chapter on Libel and Slander, American Jurisprudence, Second Edition, Volume 50 declares that –

Generally, the publication of any false and malicious statement which tends to disparage the quality, condition, or value of the property of another, and which causes him special injury or damage, is actionable. ... A cause of action for defamation generally does not arise in favour of one whose merchandise or products are criticized, not for the purpose of obtaining a competitive advantage, but merely to express displeasure or dissatisfaction therewith, nor is an advertisement actionable which does no more than state a claim that the plaintiff's goods are inferior to those of the defendant.... It is firmly established that malice, express or implied, in the making of the slanderous statement is an essential ingredient of a cause of action for slander of title". Halsbury's Laws of England, Fourth Edition, Volume 45 defines tort as 'civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of a right imposed or conferred by law rather than by agreement'.

If a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action. I find it difficult, nay impossible, to hold a party liable for libel when all that has been stated by the competitor is the truth. Truth is always a complete defence against any assault or challenge regardless of whether any damage is sustained as a result of it. It is indeed unfortunate that the Government has not established an authority armed with sufficient powers to put a stop to false advertising. It is not difficult to distinguish between claims that are exaggerated and those which are false; the latter should be stopped by a Regulatory Authority. The public perception is that Dettol soap shares the same medicinal and curative qualities as the Dettol liquid. It matters little whether this misunderstanding has been contrived by the manufacturer or has developed in the consumers mind independently. However, in the present case it is the Plaintiff's own averment that this belief has been induced by it and nevertheless it is sanguine enough to expect discretion to be exercised in its favour. If any party, such as the Defendant, helps in correcting the error, it commits no illegality. The tortious injunction, which is the backbone of the present action, is predicated on falsehood, and in the present circumstances, the falsehood can be laid at the door of the Plaintiff and not of the Defendant. Once this conclusion is arrived at, it is not possible to grant any injunctory relief.

33. The advertisement asking the viewers to forget CHYAWANPRASH in summer season and to take to AMRITPRASH, was the subject matter of dispute in *Dabur India Ltd v. Emami Ltd* 2004 (29) PTC1 and a learned Judge of the Delhi High Court quoted with approval all the above decisions.

34. Again in *Dabur India Limited v. Colgate Palmolive India Ltd* AIR 2005 Del 102, an advertisement showing the tooth powder manufactured by a competitor to be abrasive, was in issue. Even while granting an injunction, a learned Judge of the Delhi High Court doubted the applicability of English precedents, in paragraphs-19 and 20 of his judgment and held as follows:

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

Willes, J. - The action cannot be maintained. Assuming the article to be libellous, it is not a libel on the plaintiff; it only reflects on a class of persons dealing in such objects; and it is immaterial in this view whether they are genuine or not. If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual, which (350) there is not there. There is nothing to show that the article was inserted with any special reference to the plaintiff. It does not appear that the defendant knew of his existence.

But further, I am of opinion that this is no libel, for that it is protected by the privilege of fair discussion on a matter of public interest, it is not appearing that it was malicious." With the greatest respect to the reasons said to be contained in the above English judgment, I totally disagree with the view of Willes J., for the following reasons:

(a) It deals with libel and not a commercial advertisement.

(b) It contains no worthwhile reasons.

(c) English Judgments are not binding on me particularly when Dabur India's judgment (supra) of a learned Single Judge covers the issue.

(d) It proceeds on the footing that the defendant was not aware of the plaintiff's existence.

20. The practice of undue obeisance to English jurisprudence without any thought to the merit and reasoning of such judicial wisdom should also be discouraged.

35. In *Karamchand Appliances Pvt. Ltd v. Sh. Adhikari Brothers and Ors.* MANU/DE/0982/2005 the Delhi High Court was concerned with mosquito repellents ALL OUT and GOOD NIGHT. The offending advertisement showed a lady removing the ALL OUT pluggy and replacing it with GOOD NIGHT with a background voice claiming that the latter's turbo vapour chases the mosquitoes at double the speed. While granting an injunction, the Delhi High Court held in paragraph-19 as follows:

19. Two propositions clearly emerge from the above pronouncements, namely, (1) that a manufacturer or a tradesman is entitled to boast that his goods are the best in the world, even if such a claim is factually incorrect, and (2) that while a claim that the goods of a manufacturer or the tradesman are the best may not provide a cause of action to any other trader or manufacturer of similar goods, the moment the rival manufacturer or trader disparages or defames the goods of another manufacturer or trader, the aggrieved trader would be entitled to seek reliefs including redress by way of a prohibitory injunction

36. In *Godrej Sara Lee Ltd v. Reckitt Benckiser (I) Ltd* 2006 (32) PTC 307, the Delhi High Court was concerned with an advertisement in which an insecticide by name "MORTEIN" was shown to be more effective in destroying cockroaches and mosquitoes than the plaintiff's product "HIT", which had two versions, one for mosquitoes and one for cockroaches. A.K. Sikri, J., of the Delhi High Court analysed in detail, the entire case law right from the earliest decision of the Calcutta High Court. However, he refused injunction on the ground that the plaintiff was guilty of concealment of material facts and also on the ground that the advertisement just highlighted the product of the defendant as better than that of the competitor. In paragraph-25 of his judgment, the learned Judge extracted the definition of disparagement as follows:

25. What is disparagement. Black's Law Dictionary defines 'disparagement' as well as 'disparagement of goods' in the following manner:

Disparagement:

Matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible, things or upon their quality.

A falsehood that tends to denigrate the goods or services of another party is actionable in a common law suit for disparagement. The same conduct is also actionable under certain state statutes and can form the basis for an F.T.C. Complaint. There is no private federal cause of action for disparagement under the Lanham Act.

Disparagement of goods:

A statement about a competitor's goods which is untrue or misleading and is made to influence or tends to influence the public not to buy.

37. In *Eureka Forbes Ltd.,-v.- Pentair Water India (P) Ltd* 2007 4 K.L.J. 122, the Karnataka High Court also followed the ratio laid down in all the aforesaid rulings and granted an injunction restraining the defendant from disparaging either UV water purifiers in general or the plaintiff's product 'AquaGuard' in particular.

38. So far the issue does not appear to have gone upto the Apex court for an authoritative pronouncement of the law on the point, except in a case arising out of an interim order of injunction granted by the M.R.T.P. Commission in *Hindustan Lever Ltd v. Colgate Palmolive India Ltd* MANU/SC/0899/1998 : AIR1998SC526 . In the said case, an order passed by the MRTP Commission in an injunction application was under challenge in an appeal under Section 55 of the MRTP Act before the Supreme court. In the said case also, the subject matter of dispute was an advertisement issued by Hindustan Lever Ltd., claiming that its "New Pepsodent" toothpaste was "102% better than the leading toothpaste". Colgate Palmolive Ltd., filed a complaint on the file of the MRTP Commission under Section 36A (viii) & (x) of the MRTP Act. They also moved an application for injunction. In the injunction application, the MRTP Commission recorded a prima facie finding that the reference made in the advertisement to the "leading toothpaste" was that of Colgate. Therefore an interim order of injunction was granted apart from certain directions. The said order was under challenge before the Supreme Court. The Supreme Court refused to interfere with the order on the ground that the interlocutory order passed by the Commission was purely a discretionary order. But the Supreme Court did not go into the question of law in great detail in that case.

39. But unfortunately, all the above decisions of the various High courts have not taken note of some interesting developments that have taken place in U.K. and U.S.A., post 1980s. As stated earlier, even De Beers case was decided in 1975, much before the Consumer Protection Act, 1987 was enacted in U.K. Apart from the Consumer Protection Act, 1987, several other statutory regulations have also been introduced in England and commercial advertising has come under scanner. Therefore it is necessary to take note of some of these developments.

HAPPENINGS IN U.S.A.

40. In U.S., the Federal Trade Commission established under the Federal Trade Commission Act, takes care

of false and misleading advertisements. There is a paradigm shift from "competitor's interest" to "consumer's interest" in such cases. In *United States of America v. Bayer Corporation*, the District Court of New Jersey, acting at the instance of the Federal Trade Commission, enjoined the manufacturer of Aspirin Drug from making any therapeutic performance claim for such product unless the respondent possessed a reasonable basis for such claim, consisting of competent and reliable scientific evidence supporting the claim. Well controlled clinical tests conducted in accordance with the criteria set forth in the order was deemed to constitute a reasonable basis for such a claim.

41. Section 5(a)(1) of the Federal Trade Commission Act, declares as unlawful "unfair methods of competition in Commerce and unfair or deceptive acts or practices in Commerce". The Act empowers the Commission to prevent such acts or practices. One such unfair or deceptive act or practice is defined in Sections 12 and 15 U.S.C. 52, as the dissemination of any false advertisement likely to induce the purchase of Food, Drugs or Cosmetics. The Act also defines "false advertisement" in Section 15(a)(1), 15 U.S.C. 55(a)(1) as "an advertisement which is misleading in a material respect".

DEVELOPMENTS IN U.K.

42. In England, all advertisements are subject to a combination of statute, common law and self-regulation. The Advertising Industry in U.K., has been successful in self-regulation. Self-regulation of non-broadcasting advertising began in 1961 when the Advertising Association established the Committee of Advertising Practice (CAP). The Advertising Standards Authority (ASA) was established in 1962 to ensure compliance with the CAP Code. ASA handled complaints about non-broadcast advertisements. There are 2 Committees known as Committees of Advertising Practice ' CAP (Broadcast) and CAP (Non Broadcast) which are independently administered by the Advertising Standards Authority (ASA).

43. The Advertising Standards Authority regulates the content of advertisements, sales promotion and direct marketing in the U.K. They make sure standards are kept high by applying the Advertising Standards Codes. ASA can stop misleading, harmful or offensive advertising. They can ensure sales promotion are run fairly. The authority investigates complaints about advertisements. The Advertising Standards Codes are separated into Codes for TV, Radio and all other types of advertisements. There are also rules for Teletext advertisements, all interactive advertisements and the scheduling of Television advertisements. The fundamental principles underlying the Advertising Standards Codes are that the advertisements should not mislead, cause harm or offence. There are specific rules for certain products and marketing techniques, which include rules for alcoholic drinks, health and beauty, children, motoring, environmental claims, gambling, direct marketing and prize promotions. The majority of U.K., advertising is within the Codes and when the ASA upholds complaints, most advertisers agree to change or remove the advertisement. If they do not, ASA relies on the backing of the Office of the Fair Trading (OFT) and Ofcom.

44. Originally, an independent Broadcasting Authority was constituted under the Broadcasting Act, 1981 to enquire into any complaint that a broadcast advertisement is misleading. Similarly, a Cable Authority was constituted under the Cable Broadcasting Act, 1984, to enquire into any complaint that an advertisement included in a licensed service is misleading. In essence there are 3 different authorities in U.K., viz., (1) The Director General of Fair Trade, to consider complaints against regular advertisements, (2) the IBA to consider complaints about commercial radio and television advertisements and (3) the Cable Authority to consider complaints about misleading cable advertisements.

45. Additionally, other "legacy regulators" were introduced to regulate the contents of advertisements in broadcast media such as Oftel (Office of Telecommunications), the ITC (Commercial Television), the Broadcasting Standards Council and Radio Authority. There are general rules in the non-broadcast CAP Code as well as more specific rules. The former include:

- (i) substantiation of claims in advertisements in that, before an Advertiser distributes a marketing communication, they should hold evidence to substantiate their claims regarding the product;
- (ii) advertisements should not exaggerate or be confusing as to value or use of the product;
- (iii) advertisements should indicate where a comment is an opinion and not a statement of fact;
- (iv) advertisements should not encourage unsafe, violent or anti-social behaviour; and
- (v) advertisements should state prices clearly, prices must relate to the product advertised and prices must match illustrations.

The more specific rules relate to sensitive matters, such as children, alcohol, cigarettes, financial products and services and health and safety products and services.

46. All Broadcast Advertisements in U.K., are vetted before transmission, as a matter of course. Similarly, all TV Commercials are vetted by an agency known as "Clearcast", previously known as the Broadcast Advertising Clearance Centre. All National Radio Commercials are vetted before broadcast by Radio Advertising Clearance Centre. Crossborder complaints are now handled by European Advertising Standards Alliance (EASA) which seeks to maintain high standards across the 25 European Union Member States. Clearcast (formerly known as BACC) is responsible for pre-transmission examination and clearance of Television Advertisements. As part of their licensing agreements with Ofcom, broadcasters are required to clear advertising before its broadcast and the advertisements transmitted on U.K. Terrestrial and Satellite Channels. The pre-production scripts and finished commercials are considered against BACP Television Advertising Standards Code. Some new restrictions have been introduced on advertising for food and soft drink products for children. Advertisers are now required to get a Certificate known as HFSS Certificate (High in Fat, Sugar or Salt) in accordance with the nutrient profiling developed by the Food Standards Agency.

47. Similarly, in exercise of the power conferred by the European Communities Act, a set of Regulations known as "The Control of Misleading Advertisements Regulations 1988" were issued in the United Kingdom. Regulation No. 2(2) of the said Regulations specifies that an advertisement is misleading, if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if by reason of its deceptive nature, it is likely to affect their economic behaviour or for those reasons, injures or is likely to injure a competitor of the person whose interest the advertisement seeks to promote. Those regulations do not apply to investment advertisements or advertisements in investment business. The Regulations empower the Director General of Fair Trading to enquire into any complaint that an advertisement is misleading. The Director is also empowered to bring proceedings for an injunction, against a person concerned with the publication of the misleading advertisement. These regulations were

amended by The Control of Misleading Advertisements (Amendment) Regulations 2000. Recently, the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008, were issued in U.K., in May 2008 in implementation of the European Union Directive.

48. Under the Communications Act, 2003, a Regulatory Body known as Ofcom (Office of Communications) was established in the U.K., as an Independent Regulator and Competition Authority for the U.K. Communications Industry. It is intended to be a super watch dog for the U.K. Communications Industry. Ofcom is enjoined with a duty to set standards for the content of programs to be included in Television Radio services as appear to have best calculated to secure high standards. The standards objectives include among other things, the prevention of advertising which may be misleading, harmful or offensive, in Television and Radio services. Interestingly one of the standards objectives under Section 319 of the Act is to see that "there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners or of otherwise influencing their minds without their being aware or fully aware of what has occurred."

49. The above developments make it clear that after De Beers case 1975 (2) All.E.R 599, much water has flown in U.K., and hence all the 5 principles enunciated in the earliest case in Reckitt Colman v. M.P. Ramachandran by the Calcutta High Court in 1996 and followed by the other High Courts until recently, may not, in my humble opinion, reflect the development of law on the issue, as on date, worldwide. To recapitulate, the first 2 principles laid down in M.P. Ramachandran's case were (1) that a person is entitled to claim that his product is the best in the world, even if it is untrue and (2) that while doing so he would also be entitled to claim that his product is better than his competitor's, even if it is untrue. But with so many regulatory measures and legacy regulators introduced in the recent past, it may not now be possible for manufacturers and marketers of goods and services, even in developing countries, to make "false, misleading and harmful" claims in advertisements. When the law has thus taken a swing from one extreme to the other even in England, it is not possible now to follow those 5 principles laid down in the above decisions, on the basis of English precedents.

INDIAN SCENARIO

50. Now coming to the Indian scenario, there is no codified law regulating advertisements in India. But there are statutory provisions scattered here and there in several enactments, some of which are as follows:

- (i) section 292(2)(b) of Indian Penal Code declaring advertisements relating to obscene material as punishable
- (ii) Section 292-A(e), I.P.C., (inserted by Tamilnadu Amendment Act 25 of 1960 in its application to the State) making it a punishable offence to release advertisements containing indecent and scurrilous matters or matters intended to blackmail others
- (iii) The Young Persons (Harmful Publications) Act, 1956 making it a punishable offence to advertise publications portraying commission of offences, acts of cruelty etc., as would corrupt a young person
- (iv) The Emblems and Names (Prevention of Improper Use) Act, 1950 making an advertiser liable for punishment for using select emblems and names for commercial purposes
- (v) The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (which came up for consideration in Hamdard Dawakhana case), prohibiting misleading advertisements relating to drugs and magical remedies
- (vi) The Indecent Representation of Women (Prohibition) Act, 1986 prohibiting advertisements containing indecent representation of women
- (vii) The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 prohibiting advertisements relating to prenatal determination of sex
- (viii) The Transplantation of Human Organs Act, 1994 prohibiting advertisements inviting offers for the sale of human organs
- (ix) The Drugs and Cosmetics Act, 1940 preventing the use of the reports of a test or analysis of the Central Drugs Laboratory for advertising a drug or cosmetic
- (x) The Prize Competition Act, 1955 and The Prize Chits and Money Circulation Schemes (Banning) Act, 1978
- (xi) The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, prohibiting the advertisement of Cigarettes and other Tobacco Products
- (xii) The Cable Television Networks (Regulation) Act, 1995 prohibiting (under Section 6) the transmission of advertisements on the cable network, which are not in conformity with the Advertisement Code, set out under Rule 7 of the Cable Television Network Rules, 1994.

51. The Advertisement Code set out under Rule 7 of the Cable Television Network Rules, 1994 does not deal with false, misleading or disparaging advertisements. The code seeks to prohibit advertisements offending morality, decency and religious susceptibilities of the subscribers. Rule 7 (2) of the said Rules, prohibits any advertisement-- (i) which derides any race, caste, colour, creed and nationality (ii) which is against the Constitution (iii) which tends to incite crime, disorder, violence or breach of the laws or glorifies violence or obscenity (iv) which presents criminality as desirable (v) which exploits the national emblem (vi) which projects a derogatory image of women (vii) which exploits social evils like dowry, child marriage and (viii) which promotes the sale or consumption of (a) cigarettes, alcohol or other intoxicants and (b) infant milk substitutes, feeding bottles or infant foods. But rule 7 (4) stipulates that "the goods or services advertised shall not suffer from any defect or deficiency as mentioned in the Consumer Protection Act, 1986". Rule 7(9) prescribes that "No advertisement which violates the standards of practice for advertising agencies as approved by the Advertising Agencies Association of India, Bombay, from time to time, shall be carried in the cable service."

52. The Advertising Standards Council of India (ASCI) is a non statutory Tribunal set up in 1985 and

manupatra incorporated under Section 25 of the Companies Act, 1956. It entertains and disposes of complaints based on its Code of Advertising Practice (CAP). The Code is based on certain fundamental principles, one of which is "To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements".

53. Though the enforcement of the above Advertisement Code, by virtue of Rule 7 (9) of the Cable Television Network Rules appears plausible in theory, the aforesaid Rules do not create an enforcement mechanism which has the necessary teeth. Therefore, one has to look up to the MRTP Commission, constituted under The Monopolies and Restrictive Trade Practices Act, 1969 enacted with a view to curb monopolistic, restrictive and unfair trade practices. The Act defined an "unfair trade practice" under Section 36A as follows:

36A. Definition of unfair trade practice.—In this Part, unless the context otherwise requires, "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any good or for the provision of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or mode;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, re-conditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(vii) makes to the public a representation in a form that purports to be ---

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation --- For the purposes of Clause (1), a statement that is ---

(a) expressed on an article offered or displayed for sale, or on its wrapper or container, or

(b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale, or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is,

and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement.

Explanation --- For the purpose of Clause (2), "bargain price" means ---

- (a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
- (b) a price that a person who reads, hears, or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

54. It is seen from the above definition of "unfair trade practice" that it includes any false representation that the goods are of a particular standard, quality, quantity, grade, composition, style or mode. It also includes the making of a false or misleading representation concerning the need for or the usefulness of any goods or services. Section 36A(1)(vii) makes even a warranty or guarantee of performance efficacy or length of life of a product or of any goods not based on adequate or proper tests, as an unfair trade practice. Section 36A(1)(x) makes a "false or misleading fact disparaging the good, services or trade of another person" as an unfair trade practice.

55. However, The MRTP Act, 1969 is sought to be repealed by Section 66 of The Competition Act, 2002 (Section 66 does not appear to have been notified so far). But fortunately, the power to enquire into complaints of unfair trade practices is also vested with the Consumer Forum, in view of the fact that the provisions of Section 36A of MRTP Act, 1969 (extracted above) stands imported verbatim into the Consumer Protection Act, 1986 by the Amendment Act 50 of 1993. The definition of "unfair trade practice" found in Section 36A(1) of the MRTP Act, 1969, is adopted in pari materia in Section 2(1)(r) of the Consumer Protection Act, 1986. But once Section 66 of The Competition Act, 2002 is notified and the MRTP Commission is dissolved, a manufacturer or a stockist or a dealer, cannot invoke the provisions of the MRTP Act. But he may be able to approach the Competition Commission. However, he cannot invoke the provisions of the Consumer Protection Act, since that Act is intended only for the benefit of consumers and not for the benefit of manufacturers, marketers or service providers. But he may have a common law remedy to approach the civil court subject however to other constraints. By virtue of Rule 7(4) of the Cable Television Network Rules, 1994, a consumer's right to seek redressal against an advertisement which falls under the category of "unfair trade practice" stands fortified.

56. The law relating to unfair trade practice existing from 1969 under the MRTP Act and later imported into Consumer Protection Act, 1986 does not appear to have been taken advantage of by very many persons to prune misleading advertisements, despite the introduction of Cable Television Networks (Regulation) Act, 1995 and the Rules issued thereunder. But before jumping to a conclusion that such a remedy is available for the asking, we may have to examine one more fundamental issue, namely that of advertisement as a free commercial speech and the status of the right of the consumer to know and receive information, both of which forms part of the fundamental right of freedom of speech and expression.

ADVERTISEMENT AS FREE COMMERCIAL SPEECH VIS-A-VIS FUNDAMENTAL RIGHTS OF CONSUMERS

57. In an Article on "Commercial Advertisement and Freedom of Speech", Justice K.K. Mathew (Retired), Supreme Court of India, wrote as follows:

The art of puffing, that is piling panegyric superlative upon superlative like pelion upon ossa has come to stay in the art of advertisement. This is done with the intention of inflating the quality of a product and thus to commend it to the public. There are many sellers offering too many products with wide variety of characteristics changing from time to time and the self serving source of the data will inevitably render the information inaccurate. There are also many areas where key information necessary for consumers to make a sensible choice between rival brands is absent. It might be that an independent agency or Government would be able to play the role of supplying information more accurately to the consumers on which they could rely with greater certitude.

"By persistent repetition, the tastes and ideas of a society can be and have been changed."

(Incidentally, the phrase "Pelion upon Ossa" used by K.K. Mathew, J in the above article refers to Greek mythology, in which the giants Otus and Ephialtes, attempted to defeat the gods by putting mount Ossa upon mount Olympus and mount Pelion upon mount Ossa to reach the sky. But they were killed by Apollo. Therefore the phrase is normally used to signify massive but fruitless efforts, piling difficulty upon difficulty)

58. The Constitutional status of a Commercial Advertisement was considered by the Supreme Court in Hamdard Dawakhana v. Union of India MANU/SC/0016/1959 : 1960CriLJ671 . It was held therein that "an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed". The Constitution Bench of the Apex Court held in that case that when an advertisement "takes the form of a Commercial Advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech, for the object is not propagation of ideas ' social, political or economic or furtherance of literature or human thought; but the commendation of the efficacy, value and importance of the product which it seeks to promote." The Supreme Court went on to hold in the said decision that the right to publish and distribute commercial advertisements, cannot be said to be a part of freedom of speech guaranteed by the Constitution.

59. However, in the next decision Sakal Papers (P) Ltd v. Union of India MANU/SC/0090/1961 : [1962]3SCR842 , the Supreme Court held that an enactment which empowered the Government to regulate the prices of newspapers and to regulate the allocation of space for advertisement matter, placed restraints on the freedom of press to circulate. The Supreme Court also held in the said decision that the curtailment of the advertisements would bring down the circulation of the newspaper and as such, would offend Article 19(1)(a) of the Constitution. The argument that the object of the enactment in regulating the space for advertisements is to prevent unfair competition, was repelled by the Court on the ground that it had a bearing on the circulation of a newspaper and hence there would be a direct interference with the freedom of speech

60. The view taken in Hamdard Dawakhana case was later explained in Indian Express Newspapers (Bombay) Pvt Ltd v. Union of India . It was clarified therein that the observations made in Hamdard Dawakhana case, were based upon the decision of the American Supreme Court in Lewis J. Valentine v. F.J. Chrestensen and that the subsequent decisions of the American Supreme Court did not approve the ratio in the earlier one. Therefore ultimately, the Supreme Court held in Indian Express Newspapers case as follows:

In view of the foregoing, we feel that the observations made in Hamdard Dawakhana case, are too broadly stated and the Government cannot draw much support from it. We are of the view that all Commercial Advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.

61. The issue again cropped up when the Mahanagar Telephone Nigam Ltd, sought to injunct Tata Press Ltd from printing and publishing the list of subscribers on the ground that they alone had exclusive right to do so. When the matter went up to the Supreme Court, the Supreme Court held in Tata Press Ltd v. Mahanagar Telephone Nigam Ltd MANU/SC/0745/1995 : AIR1995SC2438 that "publication of advertisements is a free commercial speech" and hence protected under Article 19(1)(a) of the Constitution. Some portions of the said decision are of relevance for the case on hand and hence they are extracted hereunder:

23. Advertising as a "commercial speech" has two facets. Advertising which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech". In relation to the publication and circulation of newspapers, this Court in Indian Express Newspaper case , Sakal Paper case MANU/SC/0090/1961 : [1962]3SCR842 and Bennett Coleman case MANU/SC/0038/1972 : [1973]2SCR757 has authoritatively held that any restraint or curtailment of advertisements would affect the fundamental rights under Article 19(1)(a) on the aspects of propagation, publication and circulation.

25. We, therefore, hold that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.

While advertng to the law in United States on the subject, the Supreme Court observed as follows:

15. After the decision in Virginia Board case 425 US 748 : (1976) 48 L Ed 2d 346 , it is almost settled law in the United States that "commercial speech" is entitled to the First Amendment protection. The Supreme Court has, however, made it clear that Government was completely free to recall "commercial speech" which is false, misleading, unfair, deceptive and which proposes illegal transactions. A political or social speech and other public-affairs-oriented discussions are entitled to full First Amendment protection whereas a "commercial speech" may be restricted more easily whenever the Government can show substantial justification for doing so

In this Tata Press case, the Supreme Court went on to hold that "the protection of Article 19(1)(a) was available to the speaker as well as to the recipient of the speech " since "the economic fulfilment of a citizen has to be guided by the information disseminated through the advertisements

62. The right to know was interpreted by the Supreme court as "a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of the Constitution" in Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd MANU/SC/0412/1988 : AIR1989SC190 . Even with regard to telecasting of events such as cricket, football and hockey etc., the Supreme Court held in Secretary, Ministry of Information and Broadcasting , Government of India v. The Cricket Association of Bengal MANU/SC/0246/1995 : [1995]1SCR1036 that "the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained."

The above view was quoted with approval in Peoples Union for Civil Liberties (PUCL) v. Union of India MANU/SC/0234/2003 : [2003]2SCR1136 , where the Supreme Court lamented that disinformation, misinformation and non-information, all equally create an uninformed citizenry which would finally make democracy a mobocracy and farce.

63. Even in U.K., the concern to protect free speech is reflected in the approach to interim injunctions in claims of malicious falsehood. (Microdata v. Rivendale Ltd 1991 FSR 681 and Macmillan Magazines Ltd v. RCN Publishing Co. Ltd (1998) FSR 9. In Bestobell Paints Ltd v. Bigg (1975) FSR 421, the defendant alleged that the plaintiff's paint was of poor quality, to put pressure on them to settle a claim arising from its purchase and use. Oliver J., while refusing to grant an injunction, held as follows:

An interlocutory restraint in any case that is not obvious would operate as an unjust fetter on the right of free speech and the defendant's liberty (if he is right) to speak the truth"

In the interests of freedom of speech, the Courts will not restrain the publication of a defamatory statement, whether a trade libel or a personal one, where the defendant says he is going to justify it at the trial of the action, except where the statement is obviously untruthful and libellous.

The above rule summarised in Bestobell relating to prior restraint against malicious falsehood was quoted with approval, in Boehringer Ingelheim Limited v. Vetplus Ltd. 2007 EWCA Civ 583, by a Three Member Bench of the Court of Appeal. However a note of caution was also added therein that when issues of infringement and passing off are involved, in comparative advertising, the question may not be one of pure

free speech. Even Article 10 of the European Convention on Human Rights guaranteed freedom of expression includes the protection of information of a commercial nature. Section 12 of the Human Rights Act, 1998, also laid emphasis on the right to freedom of expression.

64. Thus, on the one hand, advertisements being free commercial speech, enjoy a degree of protection. On the other hand, the right of the consumers to know and to receive information is also protected. Therefore, both rights have to be matched and balanced.

65. Once it is accepted that free commercial speech is a fundamental right guaranteed under Article 19(1)(a), then the curtailment of the same can only be by law that would fall under Article 19(2) imposing a reasonable restriction on such a right, in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

66. As stated elsewhere in this judgment, in so far as commercial advertising is concerned, the major restrictions statutorily imposed upon them are to be traced either to The Consumer Protection Act, 1986 (if they fall under the category of Unfair Trade Practice) or to the Advertisement Code set out under Rule 7 of the Cable Television Network Rules (or the Competition Act, 2002). But there is no effective mechanism under the Cable Television Network Rules to enforce the Code. Therefore, one has to look only to the provisions of The Consumer Protection Act, 1986.

67. The advent of the Consumer Protection Act, 1986, signaled the arrival of a new era. The Statement of Objects and Reasons of the said Act recognised 2 significant rights for the consumers. They are-

- (1) the right to be informed about the quantity, potency, purity, standard and price of goods to protect consumers against unfair trade practices and
- (2) the right to consumer education.

These rights would become meaningless, if free commercial speech is clipped. The law as it developed from the decision of the Calcutta High Court in *Reckitt Colman v. M.P. Ramachandran* upto *Godrej Sara Lee case* (Delhi High Court), on the basis of English precedents, recognises the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's product. But the recognition of this right of the producers, would be to de-recognise the rights of the consumers guaranteed under the Consumer Protection Act, 1986. To permit 2 rival traders to indulge in puffery, without denigrating each other's product, would benefit both of them, but would leave the consumer helpless. If on the other hand, the falsity of the claim of a trader about the quality and utility value of his product, is exposed by his rival, the consumer stands to benefit, by the knowledge derived out of such exposure. After all, in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit. Therefore, it is only on the touchstone of public interest that such advertisements are to be tested. This is why the Supreme court held in *Tata Press* case that "Public at large is benefited by the information made available through the advertisement." As a matter of fact the very basis of the law relating to Trade Marks is also the protection of public interest only, since the courts think of an unwary purchaser, who may buy a spurious product on the mistaken impression that it was brand 'x'. The same logic should form the basis for an action in respect of disparaging advertisements also.

68. In fine, the following principles emerge namely---

- (a) Publication of advertisements being free commercial speech, is protected by Article 19(1)(a) of the Constitution, as per the dictum of the Apex Court in *Tata Press* case.
- (b) There are a few restrictions on the aforesaid right, which would satisfy the test of reasonableness under Article 19(2). These restrictions could be traced to the definition of the term "unfair trade practice" in Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and Section 2(1)(r) of the Consumer Protection Act, 1986.
- (c) Therefore, only if a case of disparaging advertisement falls within the definition of the term "unfair trade practice", an action may lie. It would lie before a Consumer Forum, at the instance of a consumer or a group of consumers or a voluntary consumer association or even the Central or the State Government (see the definition of the word "complainant" under Section 2(1)(b) of the Consumer Protection Act). It may even lie before the MRTP Commission. (or the Competition Commission after it is constituted).
- (d) An action may lie against such an advertisement before a civil court both at the instance of a manufacturer or marketer and at the instance of a consumer (since Section 3 makes the Consumer Protection Act an additional law and not a law in derogation of any other law), provided that the advertisement in question contains a false representation coming within the 4 corners of sub-clauses (i) to (x) of Clause (1) of Section 2(1)(r) of the Consumer Protection Act.
- (e) A careful scrutiny of all the sub-clauses in Section 2(1)(r) of the Consumer Protection Act would show that 4 types of representations are categorised as "unfair trade practices" namely (1) false representations falling under sub-clauses (i), (ii) and (iii); (2) representations which may not necessarily be false but are nevertheless incorrect coming under sub-clauses (iv) and (v); (3) warranty or guarantee coming under sub-clauses (vii) and (viii); and (4) false or misleading representations falling under sub-clauses (vi), (ix) and (x). If an advertisement contains a false representation within the meaning of sub clauses (i) to (iii) or an incorrect representation within the meaning of sub clauses (iv) and (v) or a warranty or guarantee within the meaning of sub clauses (vii) and (viii) or a false or misleading representation or fact within the meaning of sub clauses (vi), (ix) and (x) of Clause (1) of Section 2(1)(r) of the Consumer Protection Act, then an action may lie.
- (f) In the light of the above statutory prescription, it is doubtful if false claims by traders, about the superiority of their products, either simplicitor or in comparison with the products of their rivals, is permissible in law. In other words, the law as it stands today, does not appear to tolerate puffery anymore. I do not know if "Puffing" which is only a twin sister of "bluffing", permitted by English courts in the past, still has the sanction of law even in England, after the advent of 'legacy

regulators' such as CAP, OfTel, Ofcom, Clearcast etc., and the issue of The Control of Misleading Advertisement Regulations, 1988 (as amended by Regulations of 2000) and the enactment of the Communications Act, 2003.

(g) An advertisement which tends to enlighten the consumer either by exposing the falsity or misleading nature of the claim made by the trade rival or by presenting a comparison of the merits (or demerits) of their respective products, is for the public good and hence cannot be taken to be an actionable wrong, unless 2 tests are satisfied namely (i) that it is motivated by malice and (ii) that it is also false. This is on account of the fact that a competitor is more well equipped to make such an exposure than anyone else and hence the benefit that would flow to the society at large on account of such exposure, would always outweigh the loss of business for the person affected. If 2 trade rivals indulge in puffery without hitting each other, the consumer is misled by both, unless there is increased awareness or Governmental intervention. On the other hand, if both are restrained from either making false representations/incorrect representations/misleading representations or issuing unintended warranties (as defined as unfair trade practice under the Consumer Protection Act), then the consumer stands to gain. Similarly, permitting 2 trade rivals to expose each other in a truthful manner, will also result in consumer education.

69. Keeping the above principles in mind, if we get back to the facts of the present case (which we have perhaps left way behind) it is seen that the advertisement in question contains four claims on the part of the defendant namely, (i) that Anchor is the only toothpaste containing all the three ingredients, namely Calcium, Fluoride and Triclosan, (ii) that Anchor is the first all round protection toothpaste (iii) that Anchor toothpaste gives 30% more cavity protection and (iv) that the Triclosan contained in Anchor is 10 times more effective in reducing Bacteria.

70. As stated earlier in paragraph-14 above, the explanation given by the respondent to the use of the words "only" and "first" are not actually satisfactory. The advertisement certainly gives out an impression that Anchor is the only toothpaste containing all the three ingredients, while it is in fact not. There are other toothpastes in the market which contain all the three ingredients. Similarly, the use of the word "first" is not in relation to the slogan "all round protection", as is sought to be projected. It gives an impression as though historically it is the first to give such protection. The respondent has not come out with any scientific basis for such a claim. Therefore the usage of the words "only" and "first" actually falls within the meaning of Unfair Trade Practice under Section 2(1)(r)(1)(i) and (vi) of the Consumer Protection Act, 1986. The claim made by the respondent tantamounts to a false representation that the goods are of a particular standard, quality and composition. It also tantamounts to a false or misleading representation concerning the need for or the usefulness of their goods. However, I do not think that the claim made by the respondent falls within the meaning of Unfair Trade Practice under Section 2(1)(r)(1)(x), namely, "false or misleading facts disparaging the goods, services or trade of another person".

71. In other words, I find the respondent guilty of an Unfair Trade Practice, because of the false or misleading information that the advertisement purports to propagate. However, I do not find the respondent guilty of disparagement. In such circumstances, what is the test to be adopted for determining whether a restraint order is to be issued against the respondent or not?

72. In *Colgate Palmolive (India) Ltd v. Hindustan Lever Ltd* MANU/SC/0494/1999 : AIR1999SC3105 , the Supreme Court crystallised specific considerations for a Court in the matter of grant of interlocutory injunction as follows:

24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:

- (i) extent of damages being an adequate remedy;
- (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason thereof;
- (iii) the Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;
- (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case ' the relief being kept flexible;
- (v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
- (vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;
- (vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.

73. Thus public interest is one of the tests prescribed by the Apex court in the above case for clinching the issue on such matters. Keeping this salient principle in mind, if we get back to the provisions of the Consumer Protection Act, it is seen that the word "complaint" is defined under Section 2(1)(c) of that Act to include an allegation of unfair trade practice adopted by a trader or service provider after the enactments of Amendment Acts 50 of 1993 and 62 of 2002. Section 13(3B) inserted under Amendment Act 62 of 2002 with effect from 15-3-2003, enables the Consumer Forum to pass interim orders. Similarly, Section 14 (1) (hc) inserted under the very same Amendment Act 62 of 2002, has enlarged the scope of a final order that could be passed by a Consumer Forum. It reads as follows:

14. Finding of the District Forum---

- (1) If, after the proceeding conducted under Section 13, the District Forum is

satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:

...

...

(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.

Thus Parliament has paved the way, by the Amendment Act 62 of 2002, for a consumer forum to issue appropriate directions to a manufacturer or marketer or service provider, responsible for issuing a misleading advertisement, to issue a corrective advertisement.

74. Therefore, on the analogy of the same principle, this Court is also competent to issue appropriate interim orders, in the light of the finding that the respondent is guilty of unfair trade practice, by projecting their product as the only product containing 3 ingredients and as the first product to provide all round protection. Even by their own admission, the claim of the respondent as being the ONLY and FIRST toothpaste is not intended to convey the meaning that it does. Therefore the plaintiffs have a prima facie case. Since it is in public interest not to permit the respondent to continue with such a misleading claim, the balance of convenience is not in favour of the respondent. Applying the test laid down in para 24 (vii) of the decision of the Apex Court in Colgate Palmolive case, it is clear that when public interest is involved, the question of allowing the wrong to continue on the ground that it can be adequately compensated in terms of money, does not arise.

75. Therefore, in the result, all the applications are allowed to a limited extent, restraining the respondent from using the words "ONLY" and "FIRST" in the offending advertisement, in a manner sending a message as though the respondent's product is either the only one containing all 3 ingredients or the first to provide all round protection. However it is made clear that the observations and findings recorded here are only prima facie and shall not prejudice the case of both parties in the final hearing of the suit.