

MANU/DE/0896/2003

**Equivalent Citation:** 2003(27)PTC305(Del)**IN THE HIGH COURT OF DELHI**

FAO (OS) No. 432/2001

Decided On: 01.09.2003

Appellants: **Pepsi Co., Inc. and Ors.****Vs.**Respondent: **Hindustan Coca Cola Ltd. and Anr.****Hon'ble Judges/Coram:**

Usha Mehra and O.P. Dwivedi, JJ.

**Counsel:**

For Appellant/Petitioner/plaintiff: Kapil Sibal, Sr. Adv., Pratibha M. Singh, Ritika Talwar and Anubha Arora, Advs

For Respondents/Defendant: Iqbal Chhagla, Sr. Adv. and P.S. Shroff, Adv. for Respondent No. 1 and Abhishek Manu Singhvi, Sr. Adv., T.S. Murthy and J. Mehta, Advs. for Respondent No. 2

**Subject: Intellectual Property Rights****Acts/Rules/Orders:**

Copyright Act, 1957 - Section 14, Copyright Act, 1957 - Section 51, Copyright Act, 1957 - Section 52A; Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 1, Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 2; Trade and Merchandise Marks Act, 1958 - Section 29, Trade and Merchandise Marks Act, 1958 - Section 29(1)

**Cases Referred:**

Lord Diplock in Erven Warnink B.V. and Anr. v. J. Townend & Sons (Hull) Limited and Anr., 1980 RPC 31; Gujarat Bottling Co. Ltd. v. The Coca Cola Co., AIR 1995 SC 2372; Hindustan Lever v. Colgate Palmolive (I) Ltd., 1998 (1) SCC 720; Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr., 1999 PTC (19) 741; Reckitt & Colman of India v. Kiwi TTK Ltd., 1996 PTC (16) 393; State of A.P. v. Nagoti Venkataraman, 1996 (6) SCC 409, 1996 (16) PTC 634 (SC); MacMillan & Co. Ltd. v. K & J Cooper, 1924 PC 75; Dr. Pepper & Co. v. Sambo's Restaurants, 517 F. Supp. 1202; Kleier Advertising Agency v. Premier Pontiac, 2 USPQ 2 d 1152; Sinanida v. La Maison Kosmeo, 139 The Law Times 365; Kirk v. J & R Fleming Limited, 1929 Ch. D. 44; Satsang and Anr. v. Kiron Chandra, AIR 1972 Calcutta 533; Manojab Cine Productions v. A. Sundaresan, AIR 1976 Madras 22; Nav Sahitya Prakash and Ors. v. Anand Kumar and Ors., AIR 1981 Allahabad 200; Camlin (P) Ltd. v. National Pencil Industries, 2nd 1985 (II) Delhi 813, 1986 (6) PTC 1 Del; Glaxo Operations U.K. Ltd. Middlesex (England) v. Samrat Pharmaceutical Ltd., Kanpur, AIR 1984 Delhi 265, 1984 (4) PTC 66 (Del); Bismag Ltd. v. Amblins (Chemists) Ltd., [1940] 2 ALL E.R. 608; Irving's Yeast Vite Ltd. v. FA Horsenail, (1934) 51 RPC 110; Ruston and Hornby Ltd. v. Zamindara Engineering Co., AIR 1970 SC 1649, PTC (Suppl)(1) 175 (SC); Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., 2001 (5) SCC 73, 2001 PTC (21) 300 (SC); R.G. Anand v. Deluxe Film, AIR 1978 SC 1613, PTC (Suppl) (1) 802 (SC); AGL Sydney v. Shortline Country Council, 17 IPR 199; C. Cunniah & Co. v. Balraj & Co., AIR 1961 Madras 111; R & C Products PTY Ltd. v. S.C. Johnson & Sons, 26 IPR 98

**Citing Reference:**

Discussed		6
Mentioned		18

**Case Note:**

**Intellectual Property Rights - infringement - Sections 14, 51 and 52A of Copyright Act, 1957, Order 39 and Rules 1 and 2 of Code of Civil Procedure, 1908 and Sections 29 and 29 (1) of Trade and Merchandise Marks Act, 1958 – whether respondents product disparaged product of appellants namely 'PEPSI COLA' – allegedly substantial portion of commercial of appellant copied and communicated to public amounting to infringement – respondent denied allegation on ground that according to Section 14 copying of cinematographic film must be identical in all respect – roller coaster commercial of respondent literal imitation of copyright work of appellant with some**

## JUDGMENT

### Usha Mehra, J.

1. "Frivolity has become a serious business these days. Television commercials which are meant to portray a stylization of the good life are crafted with great care, using all the skills that the arts and psychology have produced."

2. The vast majority of the viewer of the commercial advertisement on electronic media are influenced by the visual advertisements as these have a far reaching influence on the psyche of the people, Therefore, discrediting the product of a competitor through commercial would amount to disparagement as has been held by the High Courts and the Supreme Court of India as well as the Law laid down by Courts in U.K. & U.S.A.

KERLY'S LAW OF TRADE MARKS AND TRADE NAMES BY DAVID KITCHIN AND ANR. in Appendix 16, deals with Council Directive 84/450 of September 10, 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising where the Council of the European Communities having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof while taking into consideration the effect of misleading advertisement which reaches beyond the frontiers of individual Member States, adopted the directives in the form of Articles. Article 3(a) deals with Comparative advertising which shall, as far as the comparison is concerned, be permitted if the following conditions are met:

"(a) it is not misleading according to Articles 2(2), 3 and 7(1).

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name."

3. The reading of the above would show that comparative advertising cannot be permitted which discredits or denigrates the trade mark or trade name of the competitor. Therefore, while analysing the respective arguments of the parties we have to keep all these factors in mind. We have to see whether in the present case the respondents have disparaged the product of the appellants' namely "PEPSI COLA".

4. Pepsi Company Incorporation Along with Pepsico (India) Holdings Limited and Pepsi Foods Limited, the appellants (plaintiff's before the trial court) filed suit against Hindustan Coca Cola and others. Along with that suit appellants also filed an application for grant of ad interim injunction seeking order restraining the respondents from in any manner infringing upon the registered trade mark of the appellants by use of the word "Peppi" which according to appellant is deceptively similar to that of the appellants' product "PEPSI" in the advertisements and commercials. Restraint order was also sought from infringing upon the copy right of the appellants in the words "Yen Dil Mange More" in television commercials including copying the roller coaster commercial of the appellants. The appellants in fact wanted a restraint order restraining the respondents from telecasting the impugned commercials or any other form of advertisements through print advertising or electronic media as according to the appellants, the impugned commercials infringed the trade mark and copyright of the appellants and disparaged the appellants' product resulting in dilution of appellants' goodwill and reputation.

5. Hindustan Coca Cola Limited and Coca Cola India Pvt. Ltd., the respondents (defendants in the suit) contested the said application. By the impugned order of the learned single Judge the application for interim injunction was dismissed on the grounds that prima-facie no case is made out nor the balance of

manupatna convenience lies in favor of the appellants for the grant of interlocutory injunction. The learned Judge further observed that the issues which have been raised in the suit can be decided only after the evidence is led by the parties. That in order to protect the right of the appellants, in the meantime it has been ordered that if at the final stage and after detailed arguments, the appellant succeeds in the suit, the respondent would pay damages and Therefore, directed the respondents to furnish an undertaking to pay damages to the appellants within four weeks from the decision of the suit in favor of the appellants and against the respondents. It is this order of the learned Single Judge which is under challenge.

6. We shall now state the facts and the conclusion arrived at by the learned single Judge as are material for the purpose of deciding this appeal.

7. The appellant is a registered owner of the mark "PEPSI", "PEPSI COLA" and "GLOBAL DEVICE". It also claims to be the owner of the copy right in the words "Yen Dil Mange More", which is a trade mark of the appellants under the Trade and Merchandise Marks Act, 1958, Appellants claim exclusive rights in the roller coaster commercial. The globe device is an original artistic work under the Copy Right Act. Appellants' contention is that it popularized its products by means of publicity in the print media, electronic media, hoardings, banners etc. Various advertisement themes are introduced by the appellants. It is the appellant who coined the phrase "Yen Dil Mange More" for advertising "PEPSI" and this phrase has now caught up and is associated with "PEPSI COLA". It is the case of the appellant that with a view to promote their products that is "Thums Up" and "Sprite", the respondents got series of television commercials launched. These commercials according to the appellants disparaged the products of the appellants, thereby infringing the trade mark and copy right of the appellants in relation to its registered trade mark "PEPSI", "GLOBE DEVICE" and the phrase "Yeh Dil Mange More". The roller coaster commercial 'has been copied by the respondents thereby infringing the copy right of the appellant.

8. The case of the appellant was contested by the respondents, inter alia, on the ground that the Cola War is a matter of trade rivalry and a market place matter. It ought not to spill over to the court of Law. The appropriate forum for settling the commercial dispute is a market place. Moreover, respondents have neither infringed the trade mark nor copy right of the appellant nor in any way disparaged the products/goods of the appellants. The respondents were puffing to promote their goods which is a healthy competition. Moreover, advertisements are nothing more than a probity and are aimed at pocking funs at the advertisements of the others which is permissible in Law.

9. On these and other allegations the learned single Judge determined the questions of disparagement against the appellant by saying that commercial was healthy competition. It was mere pocking the product of the appellant which is permissible. Respondents had not denigrated the product of the appellant. To say it is "Bacchon Wala Drink" does not amount to disparaging. Further held that the phrase "Yeh Dil Mange More" is not copy right able nor respondent infringed the "Global Device" of the appellant. There is no infringement of the appellant's roller coaster commercial.

10. In this background we have to determine (i) whether prima facie the respondents have disparaged the products of the appellants; (ii) whether the globe devise and the phrase "Yeh Dil Mange More" is copy right able and if so whether this copy right has been infringed by the respondent; (iii) whether the essence of the roller coaster has been copied by the respondents and if so the affect of the same.

11. Firstly, we have to appreciate the commercial in which on the bottle the word "Peppi" is written, whether it meant and stood for "PEPSI". From the visual it is clear that bottle is PEPSI though the word written is Peppi. For arriving at this conclusion we are supported by three factors namely the actor i.e. the boy who is called from the audience is asked to give his preference of Cola drink. He mutters PEPSI in muted manner but from movements of his lips, it can be seen he says PEPSI. Secondly, there are only three cola drinks i.e. PEPSI, Thums UP and COCA COLA. The latter two belong to respondents, hence the bottle of Cola colour on which word "Peppi" is written has to be "PEPSI". Thirdly, the GLOBAL DEVICE and the colour scheme on that with the word Peppi is that of the appellant. Hence, it can safely be concluded that the comparison in the commercial is with PEPSI. Now the question for consideration is whether the commercial by depicting that the boy preferred Thums UP as against PEPSI because Thums UP is strong drink while PEPSI is for children as children like sweet, amounts to disparagement or it is only a healthy competition and puffing the product of the respondents.

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 discredit on, slightlying of and depreciate."

13. In the electronic media the disparaging message is conveyed to the viewer by repeatedly showing the commercial everyday thereby ensuring that the viewers get clear message as the said commercial leaves an indelible impression in their mind. To decide the question of disparagement we have to keep the following factors in mind namely; (1) Intent of commercial (ii) Manner of the commercial (iii) Story line of the commercial and the message sought to be conveyed by the commercial. Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or the condemning product of the competitor then it

manupatra amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable. Take for example the commercial which is at page 30 (Annexure A) filed with the plaint which describes "PEPSI" as a "Bachhon Wali Drink" and the same is mocked at in the commercial and the message is "that the kids who want to grow up should drink "Thums Up." The entire commercial advertisement is shown to convey that the kids should prefer "Thums Up" as against "PEPSI", which is sweet and meant for small children and not grown up boys. The commercial shows that the lead actor asks a kid which is his favorite drink. He mutters the word "PEPSI", which can be seen from his lip movement though the same is muted. The lead actor thereafter asks the boy to taste two drinks in two different bottles covered with lid and the question asked by the lead actor is that "Bacchon Ko Konsi pasand aayegi"? After taste the boy points out to one drink and says that that drink would be liked by the children because it is sweet. In his words he says. "Who meethi hain, Bacchon ko meethi cheese pasand hai". He discredited the drink one which according to him has a sweet taste. He preferred the other drink which according to him tastes strong and that grown up people would prefer the same. At that point, the lead actor lifts the lid from both the bottles and the one which is said to be strong taste reveals to be "Thums Up", and one which is sweet, word "Peppi" is written on the bottle with a globe device and the colour that of the "PEPSI". Realizing that he had at the initial stage given his preference for "PEPSI" and subsequently finding it to be a drink for kids, the boy felt embarrassed. This embarrassment gesture he depicts by putting his hands on his head.

14. Second advertisement which appears at pages 35-45 (Annexure B) filed with the plaint is another commercial advertisement in which the star actor asks the audience. "Ek Sawaal do glass. Bacchon ko konsi drink pasand aayegi?" As in the first commercial, in this commercial also the drinks are covered and one described as a sweet drink called "Bacchonwala" and the bottle comparing the Globe Device and the mark "Peppi". Like in the first advertisement, in this also the boy covers his head with his arms and hands in the gesture of embarrassment. Then there is another commercial advertisement at pages 46-50 and at page 51 as Annexures C and D of the plaint. These two commercial advertisements are on the same line as the earlier one. The word "PEPSI" is uttered in muted way. Similarly the globe device and the mark " " is used on the bottle. On the choice of the boy for Peppi i.e. Pepsi the lead actor mockingly says, "Wrong Choice Baby". In these commercials the bottle which resembles "PEPSI" and is referred to as "Peppi" is termed as "Bacchon Wali". "Thums Up" is referred to as "Bado Ke Liye and Damdar Hai". Pepsi is projected to be a drink for kids, as it is "Sweet". These commercial through the electronic media, Mr. Kapil Sibal, Sr. Advocate contended disparage the goods of the appellant because by comparison, the respondents have tried to denigrate the product of the appellant in the eye of the young audience. Respondent projected Pepsi to be only a sweet drink hence of inferior quality. Mr. Kapil Sibal, Sr. Advocate then contended that by competitive advertisement the respondent could at best say that their Cola is better by giving reason but they couldn't denigrate appellant's Cola by calling it a sweet drink meant only for small children, and not meant for grown up. Hence, choice of the boy for PEPSI was said to be wrong amounts to disparagement. These advertisements by the respondents are not only made in mocking manner but in fact denigrate the goods of the appellant when the lead actor said "Wrong choice baby", and that the "Thums Up" is a right choice. The saying of the lead actor "Kyo Dil Mange No More" in fact depict the product of the appellant in poor and inferior form.

15. Countering these arguments, Mr. Iqbal Chhagla, Senior Advocate contended that the Cola War between the parties can't be dragged to the court. Comparative advertising is a facet of the "Cola War". The appellant even through its commercials have attempted to parody the products and advertisements of "Coca Cola". To support his contentions Mr. Chhagla relied on the observation made by Lord Diplock in Erven Warnink B.V. and Anr. v. J. Townend & Sons (Hull) Limited and Anr. 1980 RPC 31 where it is opined that the economic battles should be confined to the market place. By granting the injunction, Mr. Iqbal Chhagla, Sr. Advocate contended this Court would be hampering healthy competition in the market. Rival claim of better product in comparison to rival product can only be displayed in the market place. This is nothing but puffing one's products which can give no cause of action to a competitor. Moreover, courts are not the appropriate forum to resolve the differences of opinion regarding quality of products of the parties. The appellant has not come to the court with clean hands. Appellant in fact has been indulging in the same advertisement war, Therefore, is not entitled to any equitable relief. The appellant has in fact been protected by the learned Single Judge vide the impugned order thereby asking the respondent to furnish undertaking that in case appellants succeed it can recover damages from the respondents. Supreme Court in the case of Gujarat Bottling Co. Ltd. v. The Coca Cola Co., MANU/SC/0472/1995 : AIR1995SC2372 has observed that while considering the grant of temporary injunction the Court should beside other consideration, must also look to the conduct of the party invoking the jurisdiction. That the conduct of the party seeking the relief should be free from blame which in this case is not. Dr. A.M. Singhvi, Sr. Advocate contended that calling a drink as "Bachhonwali" i.e. meant for children cannot amount to denigrating the product of the appellant. Calling it children's drink does not mean it is bad, harmful or inferior drink. Therefore, to say it is children drink or it is sweet would not amount to disparagement. It only conveys that "Peppi" is sweet and sweet things are not preferred by grown up. It is only meant to puffing the respondents product.

16. After analysing the submissions made by the counsel for the parties the picture which emerges can be summed up thus; it is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior. It has been so held in the following cases :

(i) Hindustan Lever v. Colgate Palmolive (I) Ltd., MANU/SC/0899/1998 : AIR1998SC526 .

(ii) Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr., 1999 PTC (19) 741.

(iii) Reckitt & Colman of India v. Kiwi TTK Ltd. 1996 (16) PTC 393.

17. By calling the Cola drink of the appellants "Yen Bacchon Wali Hai. Bacchon Ko Yeh pasand Aayegi", "Wrong Choice Baby", the respondents depicted the commercial in a derogatory and mocking manner. It can't be called puffing up. Repeatedly telecasting this commercial will leave an impression on the mind of the viewers that product of the appellant i.e. "PEPSI" is simply a sweet thing not meant for grown up or growing children. If they choose PEPSI, it would be a wrong choice. The message is that kids who want to grow should not drink "PEPSI". They should grow up with "Thums Up". The manner in which this message is conveyed does show disparagement of the appellant's product.

18. In one of the commercial the lead actor appears on the screen and asks two boys to come on the stage and point out their favorite drink. One of the boy indicated his preference by mouthing of the word "PEPSI". He was asked by the lead actor to taste the drink from both the bottles which were covered by the glasses. After taking a sip from each of the bottle, that boy gave preference of one over the other. When the reason for the preference was asked, the boy tells that one of them is a sweet drink meant for children and uses the word "Yen meethi hein. Bachhon Ko meethi pasand hai" "Yen Bachhon wall hai" (it is sweet, children like sweets. It is meant for children). The moment it is said, the lid is lifted up by lead Actor from the bottles. The drink which the boy says "Bachhon wali" meant for children, on that it is written "Peppi". The other bottle is of Thums Up. The comparison is in fact between Pepsi and "Thums Up". It can be seen from the fact that the bottle named as Peppi is shown to certain Cola of Cola colour. The logo used in the commercial on that bottle consists of circular device and red & blue colour Along with the word Peppi written underneath. That the respondent depicted the bottle with the mark "Peppi" and the global device on it is a clear insinuation that the respondent is showing the product of the appellant i.e. PEPSI meant for children only. Though the actor mouthed the word "PEPSI" in a mute form yet from lip movement one can say he was uttering the word "PEPSI". It is an admitted case of the parties that there are only three Colas having Cola colour namely PEPSI, COCA COLA and Thums UP, There is no other drink having Cola colour. The bottle of "Peppi" which the advertiser showed has Cola colour, it is compared with "Thums UP" which is owned by the respondents, who are also the manufacturer of "COCA COLA". Therefore, it cannot be said that the insinuation was against any other Cola other than "PEPSI COLA". The description of the bottle though with the name of "Peppi" fits to be that of "PEPSI COLA". It cannot be said that the respondents were not comparing their product "Thums UP" with "PEPSI COLA". As said by Justice Barin Ghosh in the case of Reckitt & Colman of India Ltd. (Supra) that one can boast about technological superiority of his products and while doing so can also compare the advantages of his product with those which are available in the market. He can also boast about the relative advantages of his own product over the other products available in the market. He can also say that the technology of the products available in the market has become old or obsolete. He can further add that the new technology available to him is far more superior to the known technology, but he cannot say that the known technology is bad and harmful or that the product made with the known technology is inferior. In the present case while comparing "Thums UP" with Peppi i.e. PEPSI, the respondents have tried to project to the customers that the appellants' product is not meant for adults or for grown-up children. "Young and growing children would not like PEPSI as it is sweet meant for children. Hence, of inferior quality. This by no stretch of imagination can be called a mere comparison or boasting of the superior technology of respondents. Rather this shows the product of the appellants in poor state and of inferior quality. No doubt by saying that it is a drink meant for children as such may not denigrate appellants' product but the manner in which the boy felt embarrassed when he is told that the drink for which he gave preference was not meant for grown up and strong children depicts the product of the appellant in low estimation and of less worth. It is nothing but denigrating the product of the appellants. The expression on the face of the boy indicates that being grown up he must not have given preference for PEPSI. The manner in which the commercial is shown and the way the actor puts his hands on his head feeling embarrassed is nothing but disparaging the products of the appellant. To say that a particular drink is "Bachhon Wali Drink" is one thing but to ridicule the preference for Pepsi by action showing the boy feeling embarrassed after knowing his preference conveys a very serious message particularly when the lead actor says "wrong choice baby". This is a clear indication that the product of the appellants is inferior. The observation of the learned Single Judge that this comparison whereby Thums Up has been stated to be a drink for grown up is poking fun, to our mind, is not a proper appreciation of the commercial. Puffing does not mean one should denigrate the product of the competitor.

19. Admittedly puffing one's product by comparing others' goods and saying his goods are better is not an actionable claim but when puffing or poking fun amount to denigrate the goods of the competitor, it is actionable. Calcutta High Court in the case of Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr. 1999 (19) PTC 741 while dealing with the question of disparagement, laid down the principles which the court should look into while granting the injunction. One of the principles is that the Court has to look at whether the advertisement or the commercial, as the case may be, merely puff the product of the advertiser or in the garb of doing so directly or indirectly contends that the product of the other trader is inferior. In the present case in the garb of puffing up its product i.e. "Thums Up" prima facie respondents have tried to depict the product of the appellant as inferior.

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20. On the other hand, contentions of the counsel for the respondents that merely calling PEPSI COLA a sweet drink or "bacchon wala hein" by itself does not in any way indicate that respondent hinted appellant's product as inferior. The products which are liked by children do not become inferior or harmful nor by saying so respondents denigrated or disparaged the product of the appellant.

21. There is no doubt that comparison is permissible so long it does not undervalue the product of the rival. In the commercials shown by respondent and as quoted above children are made to understand that young people don't drink sweet Cola. It is not an indication of superiority in technology of respondent's drink but showing inferior quality of the appellant's product as if "PEPSI COLA" is not liked by the young people or that it is meant only for children, Therefore, the choice of the Boy for Pepsi is said to be a wrong choice. By projecting so the respondent through the lead actor conveys in a sophisticated way that the product of the appellant is rubbish.

22. The court in the case of Reckitt & Colman of India v. Kiwi TTK LTD. 1996 (16) PTC 393 while applying the principles laid down in the earlier case of Reckitt & Colman of India v. M.P. Ramachandran and Anr. (Supra) held that the comparative advertising is permissible, however, a promoter of product is not entitled to defame the goods of its competitor. It is opined that "the Courts will injunct the defendant from publishing or circulating an article if the dominant purpose is to injure the reputation of the plaintiff." In the present case Mr. Kabil Sibal, Sr. Advocate's contention that the intention of the respondents is to show to the public at large through the electronic media that appellants' product i.e. "PEPSI COLA" has a limited appeal and that too among the children, it amounts to disparaging the "PEPSI COLA". The way the lead actor after seeing the expression of the boy say "wrong choice baby" speaks slightly of the product of the appellant. The strict liability status Mr. Kapil Sibal contended comes into play if there is infringement of appellant's right as in this case the appellants have been able to establish the legal right which has been infringed, Therefore, there is no question of going to the market place for fighting the commercial war as suggested by respondents. Dr. AM. Singhvi's contention that the conduct of the appellant is such which would dis-entitle it to any discretionary relief or that the appellant has not come to the court with clean hands. 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 defense to denigrate the product of the appellant nor the market place is a suitable substitute for injunction.

23. The next question for consideration is about infringement of copy right and literary work of the appellant namely the phrase "Yeh Dil Mange More". According to appellants the ownership and copyright of the slogan "Yeh Dil Mange More" vest with them. Appellants got the copyright of this slogan registered in July, 1999. It attained distinctive character. This work has been exclusively associated with the appellant and has a connection with the product of the appellant. It is fully evocative of appellant's work and business. To support his contentions, Mr. Kapil Sibal relied on following decisions (i) State of A.P. v. Nagoti Venkataraman, MANU/SC/1267/1996 : (1996)6SCC409 : 1996 (16) PTC 634 (SC); (ii) MacMillan & Co. Ltd. v. K & J Cooper 1924 PC 75 : (iii) Dr. Pepper & Co. v. Sambo's Restaurants 517 . Supp. 1202; (iv) Kleier Advertising Agency v. Premier Pontiac 2 USPQ 1152; (v) McCarthy on Trade Mark & Unfair Competition, 3rd Edition 6-38 to 6-38.1.

24. Relying on these decisions Mr. Kapil Sibal contended that even a portion of a song which is a part of the copyright work is also protected as a literary work. Relying on Nimmer on Copyright Vol-1 1996 para 2.05p. Mr. Kapil Sibal contended that the slogan "Yeh Dil Mange More" is a literary work hence copy right able. The finding of the learned Single Judge that there is no copyright in "Yeh Dil Mange More" would mean that no company can exercise its rights on tests advertising theme. Hence, finding of the learned Single Judge are not only contrary to the statutory rights of the appellants but also against the provisions of Copyright Act. The advertising catch phrases are entitled to copyright protection. It is the original work of the appellant and, Therefore, protect the advertising theme of the same. To popularise this copyright work i.e. "Yeh Dil Mange More" the appellant has spent enormous amount on this advertising theme. "Yeh Dil Mange More" is a successful theme in India of the appellant. The judgments relied by respondent namely Sinanida v. La Maison Kosmeo, 139 The Law Times 365; and Kirk v. J & R Fleming Limited 1929 Ch. D. 44 are distinguishable on facts. In the case of Sinanida (Supra) plaintiff had copied already existing slogan, hence it was held that it was not original literary work of the plaintiff. Court further held that when "slogan" consists of an original composition in four lines of verse, in which there may be copyright, and the same may be said of an original composition in prose. In the case of Kirk (Supra) relying Sinanida's case Court observed that when a sentence is proved to have been in common use then it is not copyright able nor can be protected. These cases are distinguishable because the slogan of the appellant is not a common place phrase. It is original combination of words from two different languages thereby conveying the theme of the advertising. It has acquired distinctiveness and association with the product of the appellant.

25. Similarly the GLOBE DEVICE is a registered trade mark of the appellant. By showing GLOBE DEVICE of the colour scheme on the bottle on which word "Peppi" is written and then saying "Yeh Dil Mange No More". Mr. Kapil Sibal said such use of a registered trade mark in comparative advertising constitutes infringement of registered trade mark in terms of Section 29(1) of the Trade and Merchandise Marks Act, 1958. The effect of permitting the use of the Globe Device which is a registered trade mark of "PEPSI" to any other manufacturer for its product or for comparison would take away the statutory rights of the appellants. Non protection against such infringement would lead to drastic consequences and would be contrary to the basic tenets of Copyright

26. Countering these arguments Mr. Iqbal Chhagla said that registration of copyright does not create any statutory right. It only show existence of copyright and nothing more. Copyright can be rebutted and challenged. To support this contention he placed reliance on the following decisions (i) Satsang and Anr. v. Kiron Chandra, MANU/WB/0114/1972 : AIR1972Cal533 ; (ii) Manojab Cine Productions v. A. Sundaresan AIR 1976 Mad 22; (iii) Nav Sahitya Prakash and Ors. v. Anand Kumar and Ors., MANU/UP/0177/1981 : AIR1981All200 ; (iv) Camlin (P) Ltd. v. National Pencil Industries 1985 (2) Delhi 813 : 1986 (6) PTC 1 (Del). Moreover, stringing together of various common place words cannot be the subject matter of copyright. The definition of literary work in Section 2(o) of the copyright entails that a literary work has to be unique or original and not merely formation of some ordinary words into a phrase. For this argument he placed reliance on the decision in the case of Glaxo Operations U.K. Ltd. Middlesex (England) v. Samrat Pharmaceutical Ltd., Kanpur, MANU/DE/0257/1983 : AIR1984Delhi265 .

27. The infringement of trade mark under Section 29(1) of the Act of 1958 in India is not based on the law in England as provided under Section 4(1)(b) of the 1938 Act. The 1938 Act changed the law in England to constitute the use of a trade mark of a rival trader for the purpose of comparison as infringement as held in Bismag Ltd. v. Amblins (Chemists) Ltd. [1940] 2 ALL E.R. 608. The law recognised in India under the Act of 1958 is as laid down in Irving's Yeast Vite Ltd. v. FA Horse-nail (1934) 51 RPC 110 and not as laid down in bids mag's case (Supra). Section 29 of the Act of 1958 has omitted the provision of Clause (b) Section 21 of the 1940 Act which in turn was based on Section 4(1)(b) of the 1938 Act in England. Hence in view of the law laid down in India comparative advertising is permissible and the infringement occurs only when the registered mark is used by the rival for the purpose of indicating the origin of the goods as being his.

28. From the analysis of the arguments advanced by the counsel for the parties it becomes clear that in terms of Section 29(1) of the Act infringement would occur if appellant's mark had been used in the course of trade. Section 29(1) of the Act which is reproduced as under requires the usage in the course of trade of a mark which is identical with or deceptively similar to the trade mark of the appellant.

"29. Infringement of registered trade marks -

(1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark."

29. Usage should be in relation to the goods of the appellant and in such a manner rendering the use of mark likely to be taken as being used as a trade mark by the respondent. That is not even the case of the appellant. It is nowhere alleged by the appellant that respondents have used the globe device of the appellants for its products nor passed on its products under the Trade Mark or globe device of the appellant. We find force in the submission of Mr. Iqbal Chhagla that the impugned advertisement neither uses the trade mark of the appellants in the course of trade nor in any manner suggest the connection of appellants trade mark with respondent's goods. Moreover comparative advertising is permissible as held by this Court in Reckitt & Coleman v. Kiwi TTK Ltd. (Supra) subject to the rider that it does not denigrate the product of the appellant. Therefore, the contention of the appellant that the use of its trade mark for comparative advertising is ipso facto infringement of the appellants trade mark prima facie has no substance. In support reliance can be placed on the following decisions; (i) Kaviraj Pandit Durga Dutt Sharma v. Navratan Pharmaceutical Laboratories, MANU/SC/0197/1964 : [1965]1SCR737 ; (ii) Ruston and Hornby Ltd. v. Zamindara Engineering Co. MANU/SC/0304/1969 : [1970]2SCR222 ; (iii) Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., MANU/SC/0199/2001 : [2001]2SCR743 decided on 8th November, 2000. If a trader compares his goods with the goods of a rival without in any way advertising that the trade mark is used in relation to his goods, there is prima facie no infringement. Even otherwise this is only a prima facie view and if ultimately after trial court comes to any other view then the appellants can be compensated as rightly observed by the learned Single Judge. Similarly use of the phrase in the commercial advertisement "Yen Dil Mange No More" can at best be mocking or parodying in the context it is used but does not amount to infringement of trademark of the appellant. Respondent did not use the slogan of the appellant for its products. Hence on this court also we find no ground to interfere with the order of the learned Single Judge.

30. Turning to the submission of the appellant on roller coaster commercial having been copied by the respondent and amounting to infringing the copyright, in order to appreciate the same, we may have a glance to the provision of Section 14 of the Copyright Act, which is reproduced as under :-

"14. Meaning of the copyright

For the purpose of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

(a)...

(b)...

(c) ...

(d) In case of a cinematograph film,-

(i) to make a copy of the film including a photograph of any image forming part thereof;

(ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public...."

31. Mr. Kapil Sibal basing his submission on Section 14 contended that the copy can either be of the whole work or of substantial part of the work. In this commercial i.e. of roller coaster, the respondents have completely copied essential elements of the appellant's advertisement. The entire theme of the advertisement is identical and even the sequence of events are identical. The copying of the elements of the appellant's cinematographic film by the respondent in their commercial constitutes infringement. To support his contention he placed reliance on the decision of Supreme Court in the case of R.G. Anand v. Deluxe Film, MANU/SC/0256/1978 : [1979]1SCR218 wherein the Apex Court observed that;

"Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super-additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appear to be a transport rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved..."

32. Mr. Kapil Sibal contended that the respondents are misconstruing the provisions of Section 14 of the Copyright Act to justify their conduct. They cannot be allowed to take shelter to justify their unjustifiable conduct. To support his contentions he placed reliance on the decision in the case of AGL Sydney v. Shortline Country Council 17 IPR 199, which according to him is on all fours applicable to the facts of this case. Since the substantial portion of the commercial of the appellant was copied and communicated to the public by the respondent barring the last portion, it amounts to infringement. That the Roller Coaster commercial is a cinematograph film as defined in Section 2(f) of the Copyright Act hence the use of all the elements of the appellant's commercial for promoting their product violates and infringes the copyright of the appellant under Sections 51 & 52(A) of the Act. Mr. Sibal further contended that use of the appellant's commercial cannot constitute "fair use" nor can it be called parody on appellant's commercial. For this purpose he placed reliance on the following cases; (i) C. Cunniah & Co. v. Balraj & Co. MANU/TN/0167/1961 : AIR 1961 Mad 111, (ii) AGL Sydney v. Shortline Country Council 17 IPR 199, (iii) R & C Products PTY Ltd. v. S.C. Johnson & Sons 26 IPR 98. In all these cases it was observed that if the advertisement or get-up has acquired a special signification then the adoption of elements of that advertisement or get up by other trade may give rise to a misrepresentation and hence injunction should be granted. It was further observed that in deciding whether defendant's work was taken from plaintiff's work there need not be an exact reproduction to support the inference that the defendant's work was taken from the plaintiff's work. A copy is that which comes so near to the original as to suggest the original to the mind of every person seeing it. Therefore, Mr. Kapil Sibal contended that in campaigning the commercial of roller coaster the appellants spent lot of money and it has acquired a special significance and has been associated with the product of the appellant. That life of a campaign or commercial is shell life. It lasts hardly for an year or so. Hence if the interim injunction is not granted against the use of the commercial by the respondents, it will have far reaching consequences. The purpose for which the campaign was launched by the appellant will get defeated and lost. Copying of the entire theme of the advertisement cannot be called competitive advertisement. The loss which appellant will suffer cannot be adequately compensated by money.

34. Countering these arguments Mr. Iqbal Chhagla contended that Section 14 of the Act envisages that copying of the cinematographic film must be identical in all respects and since the roller coaster commercial of the respondents is not a copy of the advertisement of the appellant, Therefore, the provisions of Section 14 of the Act are not applicable to the facts of this case.

35. We were shown the commercial of roller coaster during the proceedings by both parties. By seeing the same an impression which one gathers is that roller coaster of the respondent is a copy of the theme of the roller coaster of the appellant. The roller coaster commercial of the appellant is an original work of the appellant, Therefore, covered under Section 14 of the Act. Not only the presence of roller coaster is replica of the appellant's commercial but even the dress of the boys is also similar. Relying on the observation of Apex Court in the case of R.G. Anand v. Delux Films, MANU/SC/0256/1978 : [1979]1SCR218 it can prima facie be concluded that the roller coaster commercial of the respondent is nothing but a literal imitation of the copyright

manupatna work of the appellant with some variations here and there. Having said so we would be failing in our duty by not restraining the respondents from showing its roller coaster commercial in the present form.

From the above analysis, we partly accept the appeal and restrain the respondent only in respect of showing the commercials annexed with the plaint as Annexures-A, B, C and D and also the commercial of roller coaster in the present form. Only prima facie view has been expressed, Therefore, any observation made hereinabove will have no bearing on the merits of the case.

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