MANU/DE/0982/2005

Equivalent Citation: 2005(31)PTC1(Del)

IN THE HIGH COURT OF DELHI

IAs 7128 and 7547/04 and 127/05 in CS (OS) No. 1184/2004

Decided On: 23.05.2005

Appellants: **Karamchand Appliances Pvt. Ltd.**
Vs.
Respondent: **Sh. Adhikari Brothers and Ors.**

Hon'ble Judges/Coram:
T.S. Thakur, J.

Counsels:
For Appellant/Petitioner/plaintiff: Arun Jaitely and Rajiv Nayyar, Sr. Advs., Pratibha M. Singh, Abhinavy Mukherjee and Samrita Gujral, Advs

For Respondents/Defendant: V.P. Singh, Sr. Adv. and Man Mohan Singh, Adv.

Subject: Intellectual Property Rights

Acts/Rules/Orders:
Copyright Act, 1957 ;Design Act, 2000 ;Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 1, Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 2, Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 4

Cases Referred:
White v. Melin, 1895 AC 154; Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark, Ltd., 1899(1) QB 86; Allen v. Food; De Beers Abrasive Products Ltd. and Ors. v. International General Electric Co. of New York Ltd. and Anr., 1975 (2) ALL ER 599; 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 (6) 393; Pepsi Co., Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr., 2003 (27) PTC 305; Dabur India Ltd. v. Emami Ltd., 2004 (29) PTC 1 (Del) : 112 (2004) DLT 73; Dabur India Ltd. v. Colgate Palmolive India Ltd., 2004 (29) PTC 401 : 115 (2004) DLT 667

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Case Note:
Intelectual Property Right - Infringment of Trademark - Present application filed for restraining defendants from telecasting what is described as GOOD KNIGHT TURBO REFILL commercial, which according to former disparages its product and results to dilution of its brands - Held, manufacturer or a tradesman is entitled to boast that his goods are best in world, even if such a claim is factually incorrect - While a claim that goods of a manufacturer or tradesman are best may not provide a cause of action to any other trader or manufacturer of similar goods, moment rival manufacturer or trader disparages or defames goods of another manufacturer or trader, aggrieved trader would be entitled to seek reliefs including redress by way of a prohibitory injunction - Claim of a technological advantage over product of plaintiff has not been established - Statement that pluggy device shown in offending advertisement is a 15 years old method - plaintiff's version that 1.6% Prallethrin Chemical composition used in liquid was registered in relevant has not been disputed - Therefore telecast of modified commercial is liable to be restrained not only because commercial disparages product manufactured and marketed by plaintiff but also because claim made by defendants about any technological advantage justifying disparagement are not substantiated - Therefore it is directed that pending disposal of suit, defendants shall not telecast commercial advertisements in its original form or in modified form - Application disposed of accordingly

JUDGMENT

T.S. Thakur, J.

1. A producer of consumer goods whether the same be expensive automobiles or items of daily use like toiletries is in the words of Lord Diplock 'unlikely to find a path beaten to his door' in the absence of an

expensive advertising campaign. Who hasn't heard of the Cola war, or noticed campaigns where one producer compares his goods with those of his competitors, more often than not making claims which are exaggerated that end up confusing the consumer no end. With the electronic media, emerging as the most powerful instrument for dissemination of information and the ever increasing dependence of the consumers on the same, nothing really matters unless it is visible on the small screen that today has found a place in every household including those in rural India. The fight for a larger market share unleashes economic battles most of which get settled in the market place, but there are some that refuse to die down and eventually end up in the Court. Recourse to legal proceedings is in such cases guided by sound economic considerations for the battle in the market place can turn bloody, considering the fact that the resources of those engaged in the fight are unlimited.

2. The parties to the present suit have locked horns in somewhat familiar circumstances. The fight is over an advertisement campaign meant to promote sale of Mosquito Repellents, which both the parties are manufacturing and marketing. The plaintiff has prayed for an order restraining the defendants from telecasting what is described as GOOD KNIGHT TURBO REFILL commercial, which according to the former disparages its product and results to dilution of its brands.

3. The plaintiffs case, as set out in the plaint, is that it is engaged in manufacturing and marketing a range of household insecticides and mosquito repellents since the year 1992. These products come in various forms including, coils, mats, liquid vapourisers etc. and are sold under the well-known brands ALL OUT and BAYGON. The plaintiff claims to have concerned over the years' reputation of being a quality oriented company which is constantly innovating new products and focusing on product development in order to ensure that the products are both efficient in functioning and safe for everyday use. It was, according to the plaintiff, the first company in India to start its business in liquid vapourisers, which was seen as a revolution in 'mosquito repellent product' industry. It claims to have designed different apparatus for use of liquid vapourisers, which are extremely popular in the market. The first variety of these vapourisers was 'ALL OUT Liquid Plug in vapouriser' which was later improved upon so as to make the transparent top cover glow and function like a night lamp. The second variety in this range introduced in 1998 and 2000 offered apparatus in fluorescent orange, green and purple colours. Both the varieties are called pluggy models which have been extensively used in the plaintiff's advertising campaigns in Print and Electronic Media. The plaintiff's case is that the image of the ALL OUT pluggy immediately connects the brand and the product with the plaintiff. It also claims to be the market leader in liquid vapourisers business with a 63% share for its apparatus.

4. The plaintiff's further case is that it has been advertising its vapouriser apparatus with a unique design, get up and look in the form of an animated creature having limbs which is moving about and showing the efficacy of the product. The product advertisement of the plaintiff is, according to the plaintiff, unique for unlike other products, the plaintiff uses an animated brand messenger instead of a celebrity to endorse the product. The trademark ALL OUT under which the product is sold is registered under the registration numbers set out in the plaint.

5. Defendant No. 3 is, according to the plaint, one of the competitors of the plaintiff whose products are sold under the trademark GOOD KNIGHT, JET, BANISH & HIT. The defendant company is also engaged in the manufacture of mosquito repellents in India. The defendant appears to have released a television commercial shortly before the institution of the suit which according to the plaintiff completely disparages, denigrates and shows the plaintiff's product in bad light. The commercial is, according to the plaintiff, intended to convey to the viewers the message that the plaintiff's product is outdated and less efficient than the product manufactured by defendant No. 3. This television commercial has appeared in a number of television channels including that of defendants No. 1 and 2. The commercial depicts a lady using the latest household gadgets like a plasma TV, a modern double door refrigerator and a tablet PC. The commercial then shows the lady moving towards the plug point in which the All Out pluggy vapouriser and refill set are plugged. The commercial then depicts the lady walking towards the said apparatus with the background 'baki sab latest macchar bhagane ka tareeka wahi 15 saal purana' [the rest everything is latest but the manner of chasing away mosquitoes is the same 15 years old). The lady in the commercial then unplugs the ALL OUT pluggy with the background 'Apnaiye latest GOOD KNIGHT TURBO REFILL" (about latest GOOD KNIGHT TURBO REFILL). A few seconds later, the background statement is 'iske turbo vapours macchar bhagayein dugni teji se'. (its turbo vapours chase away the mosquitoes at double the speed).

6. The plaintiff's grievance is that the offending commercial uses ALL OUT Pluggy and ALL OUT Refill of the plaintiff and that the commercial depicts the same as 15 years old, hence outdated in comparison to defendant No. 3's GOOD KNIGHT TURBO REFILL. These statements are, according to the plaintiff, false to the knowledge of defendant No. 3 keeping in view the fact that the liquid vapouriser refill was first introduced with the present formulation as late as in the year 2000. The plaintiff also makes a grievance against the manner in which the lady unplugs the ALL OUT vapouriser and makes a statement that the pluggy is an outdated product. This part of the commercial is, according to the plaintiff, a complete disparagement of the plaintiff's product. The statement that the pluggy is an outdated product is, according to the plaintiff, completely false in as much as the 'Chemical composition of the two products, i.e. the product of the plaintiff and that of defendant No. 3, is the same. The plaintiff also finds the statement 'dugni teziase' made in the commercial objectionable as it constitutes an insinuation that the plaintiff's product is half as efficient as that of defendant No. 3's product. The correctness of this statement is also assailed by the plaintiff particularly

when the Chemical composition of the product is the same in both the cases. The use of the three dimensional reproduction of what the plaintiff claims is a drawing of its pluggy is, according to the plaintiff, violation of its rights under the Copyright Act, 1957. In short, the plaintiff's grievance is that the commercial being telecast is disparaging, infringing trademark of the plaintiff and its copyright and tantamounts to dilution of the said trademark apart from being an act of unfair competition against the plaintiff.

7. The suit was accompanied by an application under Order XXXIX Rule 1 and 2 of the CPC for the grant of an ad interim ex-parte injunction against the defendants. Mukul Mudgal, J, before whom the suit and the application came up for preliminary hearing passed an order on 26th October, 2004 restraining defendant No. 3, its Distributors, Officers and Directors from airing or getting aired the impugned television commercial GOOD KNIGHT TURBO REFILL or any other edited version of the same.

8. Aggrieved by the aforementioned order of injunction defendant No. 3 preferred FAO(OS) No. 231/2004, which was heard and disposed of by a Division Bench of this Court by order dated 5th November, 2004. While the Appellate Court did not deal with the rival contentions of the parties it added the following words "which does not disparage the goods of the respondent" at the end of the operative portion of the injunction order. The result, Therefore, was that the order of injunction after the addition made by the Division Bench reads as under:

> "an ad-interim ex-parte injunction deserves to be granted restraining the respondent No. 3, its Distributors, Officers, Agents, Directors, Servants acting on behalf of respondent No. 3 from airing or getting aired the impugned television commercial "GOOD KNIGHT TURBO REFILL" or any other edited or other version of the said commercial which does not disparage the goods of the respondent."

9. The matter having thus come back to this Court, the defendants filed their reply to the injunction application and sought vacation of the interim order under Order XXXIX Rule 4 CPC. In the meantime, the defendant appears to have started telecasting a new commercial with some modifications. The airing of the said commercial in which a look-a-like of the plaintiff's product in the same orange colour was used was also assailed by the plaintiff in CCP(O) No. 154/2004. The plaintiff's case in the said petition was that the defendants were continuing their disparaging campaign in a disguised fashion and thereby violating the order of injunction passed by this Court. Action in contempt was Therefore, prayed for against the defendants for what was according to the petitioner a blatant violation of the order of injunction issued by this Court.

10. On 8th December, 2004, when CCP(O) No. 154/2004, came up for hearing Mr. V.P. Singh, senior counsel appearing for the defendant made a statement that the advertisement against which the plaintiff has made a grievance in the contempt petition had not been aired since 1st December, 2004. Shortly thereafter the plaintiff filed is No. 127/2005, praying for urgent orders in terms of prayers (a), (b), (c) & (d) in CCP(O) No. 154/2004 and for costs. One of the reliefs which have prayed for in the contempt petition was an order permitting the plaintiff to notify the television channels concerned not to telecast the offending commercial including any modified or edited version thereof. The application pointed out that the defendants were not only violating the order of injunction but even the solemn statement made by their counsel before this Court.

11. Defendant No. 3 has filed a written statement in which several contentions have been raised. It is inter alias alleged that the plaintiff has no registration of the design of the shape and configuration of the Refill under the Design Act, 2000. It is denied that defendant No. 3 has ever disparaged the products of the plaintiff in any manner directly or indirectly. No case according to the plaintiff is made out for passing off as the products in question are being sold in the market under different brand names and different designs. The colour scheme, lay out and getup of the products is also totally dissimilar. It is also denied that the commercial in question has used the plaintiff's trade mark ALL OUT. According to the defendant, the apparatus shown in the commercial is a commercial apparatus, which is being manufactured by the defendant. The commercial does not according to the defendant seek to convey the message that the plaintiff's product is outdated or less efficient than that of the defendant. It is also asserted that the defendant's product is based on the latest technology and that the commercial does not contain any false statement regarding the same.

12. I have heard learned counsel for the parties and perused the record. Two questions primarily arise for considerations, of which the first in order is whether a rival tradesman can carry on an advertisement campaign which disparages or denigrates the products of another and the second question is whether the TV commercials of the defendants in the present case in any manner disparage and/or denigrate the products of the plaintiff's. I propose to deal with the questions ad Serialtim.

RE: Question No. 1

13. It is trite that no one can by his act of omission or commission cause to another an injury to his or her reputation or goodwill nor can a rival in trade or industry slander or defame the goods or products of another trader or manufacturer. Law would consider any slanderous campaign or comment to be an actionable injury which the Courts would step in to prevent in appropriate cases. The fact however remains that in the world of business and commerce it is not uncommon to find one manufacturer or trader acting in a manner that has

the effect of running down the product of another by showing it in poor light. The rights and obligations flowing from such injurious campaigns for gains, if not for supremacy have often come under judicial scrutiny and have been settled by a long line of decisions of the Courts in this country and in England. The leading decision of the House of Lords in White v. Melin 1895 AC 154, first examined the situations in which an action would lie against a tradesman for an advertisement campaign considered objectionable by his rivals. The Court held that the plaintiff would not be entitled to an injunction unless he established that a tort had been committed and that merely puffing up one's goods by saying that the same are the best, would not amount to a disparagement of the goods of the rival. The law was pithily summarized by their Lordships in the following words:

> But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are.
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> XXXXXXXXX
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> Mr. Moultan sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rivals. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course obettero means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect."

14. The above decision was followed by Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark, Ltd., 1899(1) QB 86. In that case the products of two rival manufacturers were compared by an examiner who certified that one of the products had a slight edge over the other, but for all practical purposes they could be regarded as equal. The Court of appeal did not find that statement actionable even if untrue. It observed:

> "The truth is that the defendants' circular when attentively read comes to no more than a statement that the defendants' white zine is equal to, and, indeed, somewhat better, than the plaintiffs'. Such a statement, even if untrue and the cause of loss to the plaintiffs, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not enough to convert what is prima facie a lawful into a prima facie unlawful statement. It is not unlawful to say that one's own goods are better than other people's; and Allen v. Food (1) shows that malice in such a case is immaterial."

15. In De Beers Abrasive Products Ltd. and Ors. v. International General Electric Co. of New York Ltd. and Anr. 1975 (2) ALL ER 599, the Chancery Division considered the above two decisions while dealing with a case where the performance and quality of the products were compared and goods of one of the two manufacturers disparaged. The Court observed:

> "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 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 notice 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.
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> XXX XXX XXX
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> 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 XV 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. Mallin, which were accepted by counsel for the defendants as stating the law, the statement would be actionable."

16. Nearer home the law was following the reasoning in the English decisions summarized by the High Court of Calcutta in Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr. 1999 (19) PTC 741 and a Single Bench of this Court in Reckitt & Colman of India v. Kiwi TTK Ltd. 1996 (6) PTC 393.

17. In Pepsi Co., Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr. 2003 (27) PTC 305, the Division Bench of this Court noticed the decisions rendered on the subject and observed:

> "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."

18. To the same effect are the decisions of the Court in Dabur India Ltd. v. Emami Ltd., MANU/DE/0442/2004 : 112(2004)DLT73 , Dabur India Ltd. v. Colgate Palmolive India Ltd. 2004 (29) PTC 401 and Dabur India Ltd. v. Colgate Palmolive India Ltd., MANU/DE/1231/2004 : 115(2004)DLT667 .

19. Two propositions clearly emerge from the above pronouncements, namely, (1) that a manufacturer or a tradesman is entitled to boast that his goods are the best in the world, even if such a claim is factually incorrect, and (2) that while a claim that the goods of a manufacturer or the tradesman are the best may not provide a cause of action to any other trader or manufacturer of similar goods, the moment the rival manufacturer or trader disparages or defames the goods of another manufacturer or trader, the aggrieved trader would be entitled to seek reliefs including redress by way of a prohibitory injunction. Question No. 1 is accordingly answered in the negative.

RE: Question No. 2

20. Before examining whether the defendant's product has been disparaged, we must see what would constitute a disparagement. Black's Law Dictionary gives the following meaning to the expressions Disparagement and Disparagement of goods':

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."

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

22. In Pepsi Co. Inc and Ors. v. Hindustan Coca Cola Ltd. and Anr. (2003) 27 PTC 305, the defendants' commercial, said that Pepsi was for children because children like sweet things. The Court found that statement disparaging, and Therefore, restrained the telecast of the advertisement.

23. In Dabur India Ltd. v. Emami Ltd., MANU/DE/0442/2004 : 112(2004)DLT73 , the advertisement of the defendant exhorted the viewers to take Amritprash and not Chawanprash in summers. The Court found this statement also to be disparaging.

24. In Dabur India Ltd. v. Colgate Palmolive India Ltd., MANU/DE/1231/2004 : 115(2004)DLT667 , the defendants advertisement claimed that Lal Dant Manjan was harmful for the teeth. The plaintiff who manufactured Lal Dant Manjan successfully complained to the Court who found the statement and the comparison disparaging.

25. In Reckitt & Colman of India v. M.P. Ramachandran and Anr. 1999 (19) PTC 741, the defendants advertisement showed that 'blue' was a product of obsolete technology, and Therefore, does not dissolves completely in water. The Court found that statement to be disparaging. It held that the statement did not present a technological disadvantage of the product of the petitioner as was asserted by the defendant but an

insinuation against the product itself.

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

27. On behalf of the plaintiff Mr. Jaitley argued that the change in the shape of the device, was so insignificant that the viewers of the commercial would not even notice the same. He relied upon the power of recall of the viewers and submitted that the viewers having seen the original advertisement were bound to recall the same in their memory and ... (illegible) the plugg now being shown with the plaintiff's machine. The argument of the defendant that the machine shown was their (defendant's) machine was, according to Mr. Jaitley, illogical as no sensible trader or producer would denigrate its own product howsoever old the same may be. The statement that the technology which the plaintiff was using was 15 years old was also factually incorrect and hence disparaging. The claim that the machine of the defendant's chased away mosquitoes at twice the speed was both false and fanciful, according to the learned counsel.

28. The pluggy device which was shown in the first version of the defendants commercial no longer appears in the modified version in as much as the shape and the colour combination of the device is marginally altered. The defendant's version is that what is shown in the modified version is a device, the design whereof is registered in its name. In other words, the commercial does not any more show the plaintiff's device or any device deceptively similar to it. Two aspects need to be examined in that backdrop. The first is whether the altered design of the pluggy device makes any material difference in the matter of conveying the message which the commercial intends to convey to the viewers. The second aspect is whether a disparagement of a general concept is actionable in law, if such disparagement is otherwise unsustainable on the touchstone of any technological advantage, which the defendant's product may be enjoying over the product, that is, disparaged.

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

30. There is merit even in the second limb of Mr. Jaitley's contention that what the advertisement denigrates and rubbishes is the very concept of a pluggy device like the one manufactured and marketed by the plaintiff. A disparagement even if generic would remain a disparagement and can be restrained at the instance of a party, who manufactures or trades in that class of goods regardless whether the technology used is modern or obsolete. The defendant is indeed entitled to boast that its product is the latest in the market and even the best but it cannot describe either the technology or the concept used by any other manufacturer or trader in the manufacture or sale of his products as obsolete or worthless. Comparative advertisement is permissible, so long as such comparison does not disparage or denigrate the trademark or the products of a competitor. Comparison of different features of two products showing the advantages, which one product enjoy over the other is also permissible provided such comparison stops short of discrediting or denigrating the other product. Viewed thus the defendant's commercial, which shows the model in the same taking out the pluggy device by describing it as 15 years old and obsolete method is a clear case of disparagement of devices like that of the plaintiff's that are based on that concept or technology and would Therefore, be impermissible.

31. Mr. V.P. Singh, counsel appearing for the defendant all the same argued that a comparison based on technological advantage which the defendant's product enjoys over the plaintiff's and which brings out the deficiency in the plaintiff's device may not be treated as an actionable disparagement. According to him, all that the commercial shows is that the technology used for the defendant's product is in comparison to the one used for the manufacture of pluggy devices more recent and modern and that by doing so the commercial simply puffs up the product of the defendant without casting any aspersion on the product of the plaintiff. He urged that truth was a defense for any action against defamation or disparagement of goods. The argument looks attractive at its face value but is not equally sound when examined closely. The devices manufactured by the parties are based on the same concept. The concept is simple and intelligible even to a layman. The devices use a compound 96.40% of which is solvent deodorized kerosene with 1% each of

perfume and stabilizer added to the same. Prallethrin is used as an active ingredient that counts for the remaining 1.60%. The compound is contained in a bottle immersed in which is one end of the wick the other profounding out of the container at the top. The exposed end of the wick is inside an electrically heated device which helps the compound to get vaporised. There is thus no real distinction between the two products either from the point of view of the concept underlying their manufacture or technology used for the purpose. And yet the defendant claims that its product chases away mosquitoes at twice the speed. There is no scientific basis or method for verifying that claim as indeed there appears to be no basis even for making it. But in order to puff up the product, the defendant may be entitled to boast no matter unjustifiably about the efficacy of the device and the speed at which the mosquitoes would flee from it. Parliament may in the larger interests of the consumer public by law provide a mechanism to regulate and/or prevent the making of such exaggerated claims. But in an action against a wrong caused by a disparaging advertisement, the question as to how and to what extent the claim made in the advertisement is justified may have to been examined only to the extent same is necessary for determining the limited issue before the Court.

32. Suffice it to say that the claim of a technological advantage over the product of the plaintiff has not been established. So also the statement that the pluggy device shown in the offending advertisement is a 15 years old method or device does not appear to be factually correct. The plaintiff's version that 1.6% Prallethrin Chemical composition used in the liquid was registered in the year 2000 has not been disputed. The argument that the apparatus shown in the modified commercial is a 15 years old apparatus of the defendant itself is not borne out by the material on record, according to which the design for the defendant's pluggy apparatus was registered as late as in May 2002. Even the 'blue' design of the pluggy used in the modified commercial by the defendants was registered in 1996, according to the defendants. Such being the position neither the contents of the fluid used in the device nor the design justifies the statement that the same are 15 years old. I am, Therefore, of the view that the telecast of the modified commercial is liable to be retrained not only because the commercial disparages the product manufactured and marketed by the plaintiff but also because the claim made by the defendant about any technological advantage justifying the disparagement are not substantiated.

33. I, accordingly, direct that pending disposal of the suit, the defendants shall not telecast the commercial advertisements in its original form or in the modified form as at Annexure-P4 to is No. 127/2005.

34. IAs No. 7128/04, 7547/04 & 127/05 are with these directions disposed of. CS(OS) No. 1184/2004

Post for admission and/or denial of the documents before the Joint Registrar on 1st September 2005. The parties may file any further documents in the meantime.