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

\+ **FAO(OS) (COMM) 309/2018 & CM APPL. 54176/2018**

HORLICKS LTD & ANR ..... Appellants

Through: Mr.Chander M.Lall, Sr.Advocate with Mr.Ankur Sangal, Ms.Pragya Mishra & Ms.Sucheta Roy, Advocates.

Versus

HEINZ INDIA PVT LTD ..... Respondent

Through: Mr.Amit Sibal, Senior Advocate with Ms.Ishani Chandra, Mr.Ankit Rastogi and Ms.Shubhie Wahi, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA

O R D E R

% 15.03.2019

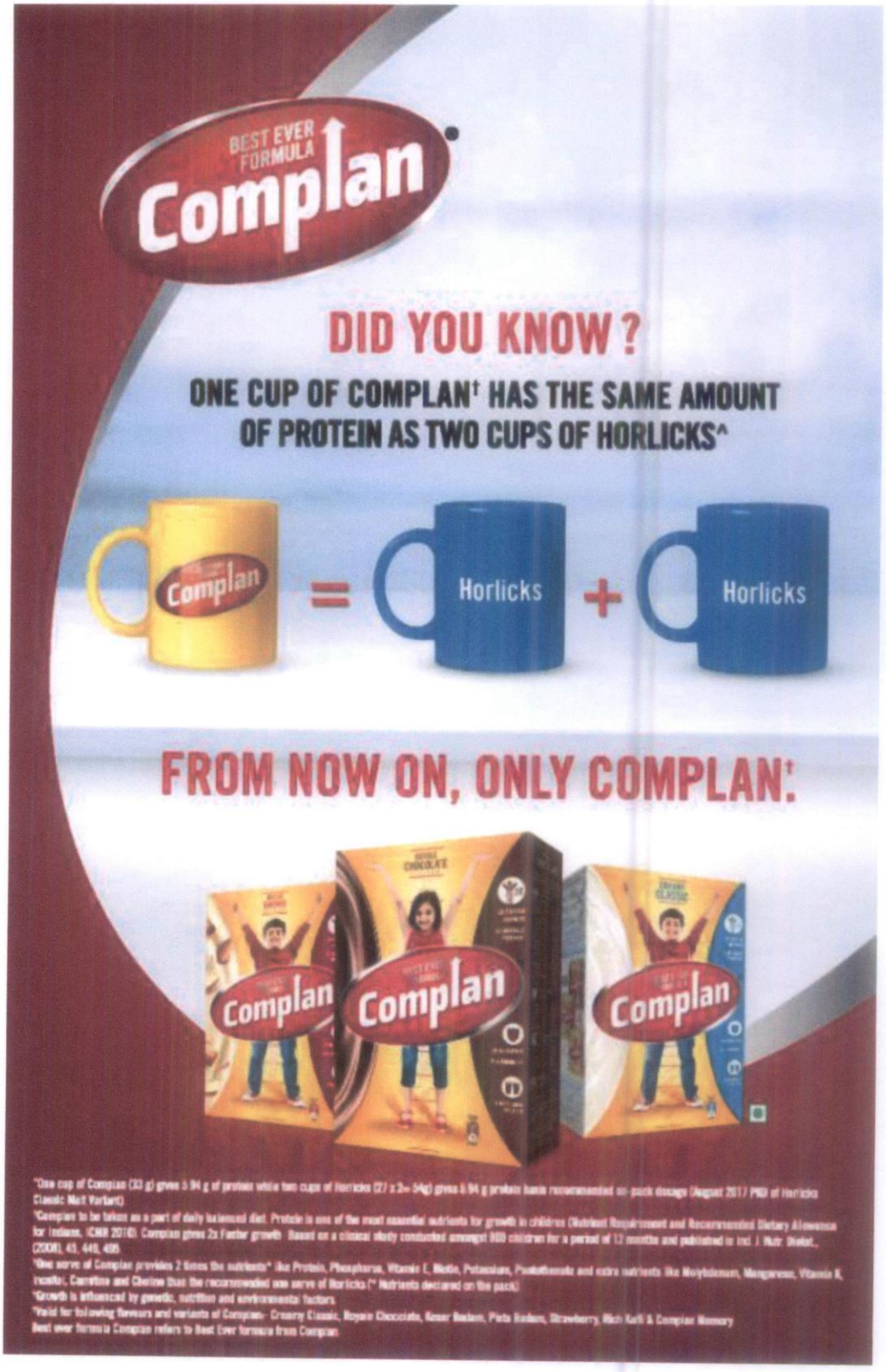
Dr. S. Muralidhar, J.:

1. This order is confined to one of the grounds raised in the present appeal under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (the 'CPC') and Section 10 of the High Courts Act, 1966. The appeal is directed against the order dated 17th December 2018 passed by the learned Single Judge in IA No.13793 of 2017 in CS (Comm) No.808 of 2017.

2. By the said impugned order, the learned Single Judge dismissed the aforementioned application filed by the Appellants, Horlicks Limited ('Appellant No.1') and Glaxosmithkline Consumer Healthcare Limited ('Appellant No.2'), (the Plaintiffs in the suit) under Order XXXIX Rules 1 and 2 CPC seeking temporary injunction to restrain the Respondent Heinz India Private Limited (the Defendant in the suit) from issuing, communicating or publishing "the impugned advertisement or any part thereof or any other advertisement of the similar nature, in any media including digital/electronic or social media or in any other manner disparaging the goodwill and reputation of the Plaintiffs and their products sold under the trade mark HORLICKS." For the sake of convenience the Appellant will hereafter be referred to as the Plaintiffs and the Respondent as the Defendant.

The impugned advertisement

3. The trigger for the suit in which the afore-mentioned application under Order 39 Rules 1 and 2 CPC was filed by the Plaintiffs is the following advertisement which was published in the newspaper Telegraph in both the Kolkata as well as Patna editions which is stated to have come to the knowledge of the Plaintiffs on 11th November 2017:


BEST EVER FORMULA
Complan
DID YOU KNOW ?
ONE CUP OF COMPLAN† HAS THE SAME AMOUNT OF PROTEIN AS TWO CUPS OF HORLICKS^
Complan
=
Horlicks
+
Horlicks
FROM NOW ON, ONLY COMPLAN‡.
Complan
Complan
Complan

Proceedings in the suit

4. The suit was filed on 21st November 2017 and came up for hearing on 23rd November 2017. The order passed in the suit as well as in IA 13793 of 2017, the application seeking interim injunction read as under:

> "Let the plaint be registered as a suit.
>
> Issue summons in the suit and notice of-the application to the defendant.
>
> Ms. Anuradha Sallhotra, Advocate accepts the summons and notice. She prays for and is permitted to file the written statement and reply within a period of two weeks. Replication/rejoinder, if any, be filed before the next date of hearing.
>
> Learned senior counsel for the defendant fairly states that till the next date of hearing, the defendant shall not publish the impugned advertisement.
>
> The statement made by learned senior counsel for the defendant is accepted by this Court and the defendant is held bound by the same.
>
> List on 16th January, 2018."

5. The aforementioned advertisement is referred to as 'the impugned advertisement' in the above order dated 23rd November 2017 and for the purpose of the present order this Court proposes to use the same terminology to describe it. The case was next heard on 16th January 2018 when the following order was passed:

> "Learned counsel for defendant prays for and is permitted to re-file the reply affidavit during the course of the day.

The written statement is directed to be filed within a period of two weeks.

Learned counsel for plaintiff is permitted to file replication and rejoinder within a period of four weeks.

List the matter before Joint Registrar for admission/denial of documents on 06th March, 2018.

List the matter before Court for disposal of interim application on 03rd April, 2018.

The interim arrangement to continue."

6. It is thus seen that the interim arrangement put in place by the order dated 23rd November 2017 was directed to continue. The Defendant filed its written statement on 24th January 2018 and the Plaintiffs filed the replication thereto on 13th February 2018.

7. Following the filing of written submissions by the Plaintiffs on 17th April 2018 and the Defendant on 23rd April 2018, arguments commenced before the learned Single Judge on the application for interim injunction on 9th May 2018. The order passed on that date at the conclusion of the hearing reads as under:

"List for further arguments on 04th July, 2018.

Parties are directed to file their additional written submissions not exceeding two pages within a period of three weeks.

Interim order to continue."

8. On 16th July 2018 counsel for both the Plaintiffs and the Defendant handed over to the learned Single Judge a compilation and additional written submissions which were taken on record. The case was directed to be listed for further arguments on 28th August 2018.

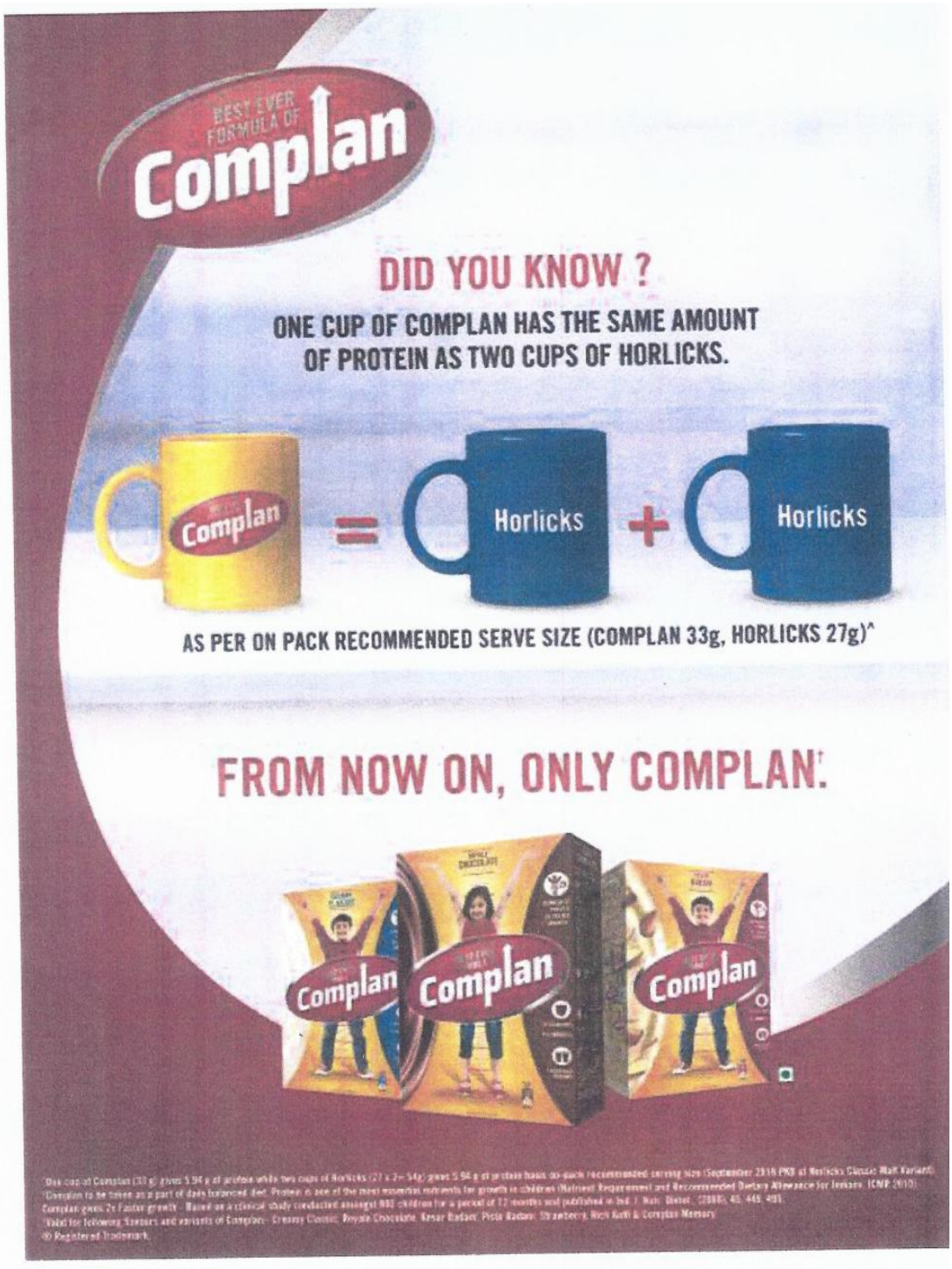
9. The arguments of the learned Senior counsel for the Plaintiffs in the application for interim injunction were heard by the learned Single Judge on 28th August 2018 and 4th September 2018. On 24th September 2018 the arguments of the Defendant commenced. The Senior counsel for the Defendant also handed over further written submissions which were taken on record by the learned Single Judge.

The modified advertisement

10. On 10th October 2018 learned counsel appearing for the Defendant handed over in the Court a revised draft of the impugned advertisement, which will hereafter be referred to as the 'modified advertisement' since that is the terminology used in the impugned order of the learned Single Judge. The order passed by the learned Single Judge on 10th October 2018 reads as under:

> "Today learned senior counsel for the defendant, without prejudice to the rights and contentions of the defendant, has handed over a revised draft of the impugned advertisement. The same is taken on record.
>
> Heard in part.
>
> List on 16th October, 2018 at 2.30 P.M."

11. The modified advertisement was as follows:



12. On 16th October 2018 the arguments on behalf of the Defendant continued. On that date the Plaintiffs as well as the Defendant filed their respective rejoinder submissions. On 2nd November 2018, after hearing the reply arguments of the counsel for the Plaintiffs, orders were reserved in IA No.13793 of 2017.

Impugned order of the Single Judge

13. In the impugned order dated 17th December 2018, in para 16 the learned Single Judge notes as under:

> "16. At the outset, Mr. Amit Sibal, learned senior counsel for defendant stated that the defendant, on its own initiative, had modified the impugned advertisement. He undertook that the defendant would publish the modified advertisement in future and not the advertisement impugned in the present plaint. The undertaking given by Mr. Amit Sibal is accepted by this Court and defendant is held bound by the same."

14. In the impugned order, the initial advertisement which led to the filing of the suit is referred to as 'impugned advertisement' and the revised draft of said advertisement as handed over to the learned Single counsel in the Court at the hearing on 10th October 2018 is referred to as 'the modified advertisement'.

15. The conclusions in the impugned order of the learned Single Judge are summarised as under:

(i) The protection given to an advertisement under Article 19(1)(a) of the

Constitution is a necessary concomitant of the right of the public to receive the information in the advertisement.

(ii) The right to privacy cannot be asserted in the present case by the Plaintiffs against the information that is already available in the public domain. The judgment of the Constitution Bench of the Supreme Court in case ***K.S. Puttaswamy v. Union of India (2017) 10 SCC 1*** is inapplicable to the facts of the present case.

(iii) Though in comparative advertising a certain amount of disparagement is implicit, it would be legal and permissible as long as it does not mislead.

(iv) The Plaintiffs themselves had prescribed and recommended 'per serving' size on their packaging to ensure safe consumption of their product in accordance with Regulation 2.12.1(6) of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011 ('Regulations 2011'). The per serving size is a prudent industry practice which is adopted by parties to protect themselves from a liability arising out of the harm resulting from a consumer consuming the parties product in excess and jeopardising his health.

(v) The Defendant was right in its contention that a comparison of 100 gms of the Plaintiffs' HORLICKS and the Defendant's COMPLAN "would be incorrect and misleading as it would induce the consumers to consume three times the recommended 'per serving' size i.e., ten (10) spoons of HORLICKS per cup which could risk the safety of the consumers."

(vi) Since both parties recommend ‘per serving' on their labels as a method of preparation before consumption, ‘per serving’ is the only correct way in which a comparison can be made. In any event, the Plaintiffs cannot be permitted to approbate and reprobate at the same time.

(vii) The impugned advertisement compares a material, relevant, verifiable and representative feature of the goods in question. The allegation that the serving size of COMPLAN had been manipulated to have double the amount of protein of HORLICKS, in the impugned advertisement, “is prima facie incorrect as the recommended serving size of 33 grams for the defendant's product has not been altered since the year 1934.”

(viii) In referring to the protein content the impugned advertisement “deals with one of the important characteristics/parameters of a health drink.” Furthermore, “the impugned advertisement seeks only to compare the protein content in the recommended 'per serving' sizes of both products which is factually true and not misleading in any way. In fact, the information is nutritionally and analytically significant for the recipient customer.”

(ix) Since both parties recommended, 'per serving' size on their labels as a method of preparation before consumption, 'per serving' is the only basis on which a comparison can be made as “a variable like milk cannot be taken into account, while comparing the protein content in both the products, especially when plaintiffs' product can be had with water. Consequently, this Court is of the opinion that in accordance with Section 6 of the CODEX

Guidelines, the defendant has taken into account method of preparation required for consumption according to instructions for use on label."

(x) The Defendant was not obliged to compare all parameters. It was open to the Defendant to highlight special feature characteristics of its product which would set it apart from that of other competitors.

(xi) The Plaintiffs cannot prevent the use of their trademark for the purposes of the identification of their product. There is no detriment to the distinctive characteristics of the Plaintiff's mark, as there exists a clear distinction between the Plaintiff's and the Defendant's products.

(xii) The impugned advertisement was not violative of the orders passed by the Advertising Standards Council of India ('ASCI').

(xiii) The Plaintiff's allegations with regard to the 'best ever formula' on the font size of the disclaimer in the impugned advertisement do not survive since the Defendant "in the modified advertisement uses the term 'best ever formula of COMPLAN' and the said disclaimer has been made an integral part of the advertisement. The claim of COMPLAN having '2 times the nutrients' of HORLICKS has been deleted. The modified advertisement compares the protein content between the two products only and that too on the basis of 'per serving' as has been done by both the brands in question on their packaging.

(xiv) The statement in the modified advertisement 'from now on, only COMPLAN' is just an exhortation to urge consumers to purchase the

Defendant's product. The target customers expect a certain amount of hyperbole. The said statement in the modified advertisement 'is certainly not disparaging and does not amount to rejection or denigration of plaintiffs' product'.

16. The impugned order concludes by holding that

> "The impugned modified advertisement is not misleading and there is no denigration or disparagement of plaintiffs' mark. Further, the factor compared is material, relevant, verifiable and representative feature. Consequently, present application is dismissed, but with no order as to costs."

Plaintiffs' objection in the present appeal

17. One of the grounds on which the impugned order has been assailed by the Plaintiffs is set out in Ground AA of the appeal, reads as under:

> "AA. Because the Learned Single Judge has wrongly passed the Impugned Order on the impugned advertisement which was not even a part of the present suit."

18. In referring to the modified advertisement, it is averred in paragraph 2 (y) of the Memorandum of Appeal as under:

> "y. Further, during the course of the hearings, the Respondent also filed a modified print advertisement (hereinafter referred to as "impugned advertisement") and undertook that the Respondent would publish the impugned advertisement in future and not the previous advertisement impugned in the present suit."

19. Although the modified advertisement has been referred to as 'impugned advertisement' in the appeal, the Court in the present order proposes to adopt the term 'impugned advertisement' for the advertisement that was

initially assailed in the suit and the term 'modified advertisement' for the revised draft of the impugned advertisement as submitted by learned Senior Counsel for the Defendants before the learned Single Judge at the hearing on 10th October, 2018.

20. It must be mentioned here that although the modified advertisement was handed over in the Court on 10th October 2018, and was placed on record, there was no application filed by the Plaintiffs to amend the plaint to challenge the modified advertisement.

Orders in the present appeal

21. On the day the present appeal was heard first by this Court [hereafter the Division Bench ('DB')] on 20th December, 2018, the modified advertisement was published in the newspaper. The order passed by the DB in the present appeal and the application on 20th December, 2018 reads as under:

> "Issue notice returnable on 6th February, 2019.
>
> Mr. Sagar Chandra, Advocate appearing on behalf of the respondent accepts notice.
>
> Learned counsel for the respondent had sought time to obtain instructions. Accordingly the appeal was passed over and taken for hearing in the second call.
>
> Liberty is granted to the appellant to file an application for early hearing, if required."

22. According to Mr. C.M. Lall, learned senior counsel for the Plaintiffs, on 20th December 2018, Mr. Amit Sibal, learned Senior Counsel for the

Defendant had undertaken before the DB that the modified advertisement would not be published during the pendency of the appeal. However, Mr. Sibal did not agree with the above submission. With the order itself not recording any such undertaking, it is not possible for the Court to express any opinion on such submission of Mr. Lall. In any event, the modified advertisement has not been published by the Defendant after 20th December 2018.

Submissions on behalf of the Plaintiffs

23. A preliminary issue was raised by Mr. Lall in the present appeal that the impugned order should be set aside and matter concerning the interim injunction *qua* the modified advertisement should be remitted to the learned Single Judge on the short ground that the Plaintiffs had no opportunity to amend the pleadings to assail the modified advertisement. According to Mr Lall, the learned Single Judge ought not to have proceeded to discuss and approve the modified advertisement in the impugned order without the above step being completed.

24. It is the above submission, to which reply arguments of Mr Sibal appearing for the defendant have been heard, that will be dealt with hereafter in this order.

25. In response to a question as to why the Plaintiffs did not seek to amend the plaint to challenge the modified advertisement, even while the arguments were in progress before the learned Single Judge, Mr Lall submitted that the prayers in the suit as well as the application for interim injunction were wide enough to cover the modified advertisement as well. The prayer was to

restrain the Defendants from publishing not only the impugned advertisement but "any other advertisement of a similar nature".

26. According to Mr Lall, the Plaintiffs considered the modified advertisement as only a 'proposal' by the Defendant. Therefore, any challenge to it at that stage by the Plaintiffs would have been premature. It is only after the impugned order was pronounced by the learned Single Judge, approving not only the impugned advertisement but also the modified advertisement that the occasion arose for the Plaintiffs to challenge the modified advertisement. Mr Lall repeatedly stressed that once the Defendants undertook not to proceed to publish the impugned advertisement, as noted by the learned Single Judge in paragraph 16 of the impugned order, no further adjudication as regards the impugned advertisement was called for since in any event, the Defendant undertook not to publish it.

27. Mr. Lall submitted that insofar as the impugned order proceeded to discuss the modified advertisement, the Plaintiffs' grievance is that any attempt now to challenge the impugned advertisement before the learned Single Judge by amending the plaint and/or application for interim injunction, would be futile since the learned Single Judge had already green signalled it by listing out various reasons for the same as noted above. Mr Lall argued that on 10th October, 2018, while the learned Senior Counsel for the Defendants handed over the modified advertisement, "the goal post changed". The Defendant had "unilaterally introduced the revised advertisement."

28. Relying on the decisions in ***Makhan Lal Bangal v. Manas Bhunia (2001) 2 SCC 652*** and ***Union of India v. EID Parry (India) Ltd. (2000) 2 SCC 223*** it is submitted by Mr. Lall that in a civil proceeding it is necessary for a Court to evaluate, on the basis of the plaint and the written statement, the points on which the parties are at variance and accordingly frame issues. It is submitted that the decision of the case will depend on such issues. Questions that did not form part of the pleadings could not be decided by the Court. According to Mr. Lall, the modified advertisement was still not part of the pleadings and was not even tendered as an exhibit and, therefore, there could have been no adjudication whatsoever by the learned Single Judge on the modified advertisement.

29. In a written note submitted to the Court on 15th February 2019, Mr. Lall set out at least five grounds on which, according to him, even the modified advertisement was objectionable and was in fact "more misleading than the impugned advertisement." He submitted that the Plaintiffs may have even more objections to the modified advertisement which they were not in a position to place before the learned Single Judge for consideration.

30. In a further note of arguments dated 28th February 2019, Mr. Lall submitted that the statement made on behalf of the Defendant before the learned Single Judge on 10th October 2018 satisfied the injunction application IA 13793 of 2017 and the undertaking given by the Defendant before the learned Single Judge that it would not publish the impugned advertisement was of the Defendant's own volition. The Defendant was therefore bound by it. Further, the undertaking earlier given by the

Defendant before the learned Single Judge on 23rd November 2017 was never withdrawn by it till the passing of the impugned order.

31. In the circumstances, according to Mr. Lall, the learned Single Judge could not have passed any order on the modified advertisement since

> "(i) the Plaintiff had concluded his arguments on the impugned advertisement,
>
> (ii) the Plaintiff did not have any pleadings on the revised advertisement,
>
> (iii) the revised document could not be taken on record and relied upon as it was not filed in accordance with the prescribed procedure."

32. Mr. Lall referred to the decision of the Bombay High Court in ***R.R. Oomerbhoy Pvt. Ltd. v. Court Receiver, High Court, Bombay 2003 (27) PTC 580*** which had been followed by the learned Single Judge of this Court in ***Marico Ltd. v. Mukesh Kumar 2018 SCC Online Del 10823***. He also referred to the observations of the Division Bench of the Calcutta High Court in ***Hindustan Unilever Limited v. Procter & Gamble Home Products Limited 2011 (1) CHN 204***.

33. In support of the submission that the learned Single Judge ought not to have ruled on the modified advertisement at the stage when arguments on the injunction application were virtually concluded, Mr. Lall referred to the decisions in ***Eveready Industries India Ltd. v. Gillette India Limited 2012 Indlaw CAL 1438, Reckitt Benckiser Healthcare (India) Pvt. Limited v. Emami Limited 2015 SCC Online Cal 1873***.

Submissions on behalf of the Defendant

34. In reply Mr. Amit Sibal, learned Senior Counsel appearing for the Defendant submitted as under:

(i) Once an undertaking was given by the Defendant that it would not publish the impugned advertisement in future but only the modified advertisement, and the order dated 10th October 2018 took the modified advertisement on record, the learned Single Judge, while basing his judgment on the impugned advertisement, was bound to take the modified advertisement into account while deciding the application for interim injunction. There was no impropriety in doing so and this was within the bounds of the law as explained in ***Wander Ltd. v. Antox India (P) Ltd. 1991-PTC-1.***

(ii) The Plaintiffs were put on notice of the undertaking and were served with the modified advertisement on 10th October 2018 itself. The Plaintiffs also heard the arguments of the Defendant both on the impugned advertisement as well as the modified advertisement and had full opportunity to respond thereto in the course of arguments.

(iii) In the rejoinder/written submissions of the Plaintiffs, a reference was made to an aspect of the modified advertisement and, therefore, there was no element of surprise as far as the Plaintiffs were concerned.

(iv) For the purpose of interim injunction, the pleadings and material on record did not require any amendment. The nature of the modifications was

such that it was within the scope of the submissions made in the plaint and the prayers sought by the Plaintiffs. It was for this reason perhaps the Plaintiff did not, for the purposes of the arguments in the interim injunction, seek to amend the pleadings. Referring to the decision in ***Rajesh Kumar Aggarwal v. K.K. Modi (2006) 4 SCC 385***, Mr. Sibal submitted that amendments were only required to decide the real controversy between the parties; reduction by concession of the scope of controversy did not merit amendment, especially at the interim stage. Even in the memorandum of appeal, no plea was raised by the Plaintiffs that they had made an application to amend the pleadings which was declined by the learned Single Judge. There was no reason why the Plaintiffs could not have amended the pleadings even after the impugned order.

(v) Whether the pleadings need to be amended for the purposes of the interim injunction, and whether they need to be amended for purposes of trial in the suit, are two separate questions. The answer to the first had to be in the negative. This did not mean that the Plaintiffs were estopped from amending the pleadings for the purposes of trial of the suit. If the Plaintiffs were so advised, they could still amend the pleadings in accordance with law.

(vi) In practice, in intellectual property suits it is not unusual for the Defendants to come up with the modified advertisement to meet any of the objections of the Plaintiffs to either the advertisement or the product packaging before the Court. If such suggestions and modifications would require a formal amendment to be made to the pleadings before being

considered by the Court, this would delay the resolution of the disputes interminably. The Defendants in an IPR action would be reluctant to make such suggestions and even the Court would hesitate to invite suggestions from the parties as it would precipitate amendment of the pleadings and the consequent delays. Referring to the decisions in ***Dabur India Ltd. v. Wipro Ltd. 2006 (32) PTC 677, Eveready Industries India Ltd. v. Gillette India Limited*** (*supra*), ***Colgate Palmolive Company Limited v. Patel 2005 (31) PTC 583 (Del)*** it is pointed out that the practice of the Court taking note of the offer by a Defendant to modify an advertisement under challenge is not unusual.

(vii) The substantial part of the impugned order of the Single Judge deals with the impugned advertisement. It is only from para 51 onwards that there is a discussion on the modified advertisement. Apart from three aspects in the impugned advertisement which have been either deleted or altered in the modified advertisement, the two versions are almost identical in content and presentation and both stand covered by the prayer clause both in the suit as well as the application for interim injunction. The findings of the learned Single Judge in the impugned order on the substance of the *lis* between the parties *qua* the original impugned advertisement were common to the modified advertisement as well. At this stage to set aside the impugned order of the learned Single Judge only because there was no formal amendment to the pleadings, would be 'throwing out the baby with the bath water' and lead to miscarriage of justice. Further, it would interminably result in delay the resolution of the dispute.

Analysis and reasons

35. The above submissions have been considered. The reasons that weigh with the Court in rejecting the contention of the Plaintiffs as raised in ground AA of the appeal are as follows:

(a) The Plaintiffs were put on notice from 10th October 2018 itself that the Defendant was no longer going to publish the impugned advertisement. Para 16 of the impugned order records the offer of the Defendant not to continue with the impugned advertisement, which in any event it undertook not to publish on 23rd November 2017 itself. This undertaking was given in the presence of the learned Senior Counsel for the Plaintiffs. There was no element of surprise here. The modified advertisement was in fact placed on record by the learned Single Judge on 10th October 2018 itself.

(b) The Plaintiffs seem to be making mutually contradictory claims. On the one hand, the Plaintiffs state that the modified advertisement is covered by the prayer clause both in the suit as well as the application for interim injunction and, therefore, there was no need to amend the pleadings for that purpose. On the other hand, it is contended that without such amendment of the pleadings, the learned Single Judge ought not to have proceeded to express any opinion on the modified advertisement. If indeed the modified advertisement also is covered by the prayers already made both in the suit as well as the application for interim injunction, then nothing precluded the learned Single Judge from proceeding to examine and discuss the modified advertisement in the impugned order. The learned Single Judge certainly could not have ignored the modified advertisement particularly in view of

the undertaking given by the Defendant before the Court that it would, after 10th October 2018, publish only the modified advertisement and not the impugned advertisement.

(c) For the purposes of interim injunction, it is not unusual for the Courts to act on concessions or modifications suggested by a Defendant defending itself in a suit for injunction in the context of intellectual property rights. The essential grievance that the Plaintiffs here had *qua* the impugned advertisement continues vis-a-vis the modified advertisement as well. IN this context the following observations of the Supreme Court in ***J. Jermons v. Aliammal (1999) 7 SCC 382*** are relevant:

> "31. It may be noted here that there is a fundamental difference between a case of raising additional ground based on the pleadings and the material available on record and a case of taking a new plea not borne out by the pleadings. In the former case no amendment of pleadings is required whereas in the latter it is necessary to amend the pleadings. The court/Rent Controller in its discretion, with a view to do complete justice between the parties, may allow a party either to raise additional ground or take a new plea, as the case may be, if the circumstances so justify like a plea based on subsequent events. Whereas in the former situation, the case can be disposed of on the material on record but in the latter case the pleadings will have to be amended and for that reason the parties have to be given reasonable opportunity to file further pleadings and adduce necessary evidence."

(d) Therefore, for the purpose of interim injunction it was not necessary for the pleadings to be amended. In this context reference may also be made to the decision in ***Ram Sarup Gupta v. Bishun Narain Inter College (1987) 2 SCC 555*** where it was observed as under:

> "6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

(e) The decisions in ***R.R. Oomerbhoy Pvt. Ltd. v. Court Receiver, High Court, Bombay*** (*supra*) and ***Hindustan Unilever Limited v. Procter & Gamble Home Products Limited*** (*supra*), relied upon by Mr. Lall, are distinguishable on facts and not particularly helpful to the Plaintiffs.

(f) There are several examples of changes proposed to an offending advertisement by a Defendant in order to overcome the objections of the Plaintiffs. In ***Dabur India Ltd. v. Wipro Limited, Bangalore*** (*supra*), the controversy arose with the Defendant airing a TV commercial where in the first view frame, a woman was shown holding a bottle of honey (which was in fact the Plaintiff's bottle without label) with a voice over to the effect that the bottle was purchased two years ago but has remained the same ('*jaisi ki vaisi*'). In comparison the other woman who purchased the Defendant's product consumed it almost immediately. The Court came to the conclusion that the advertisement *per se* was not objectionable and was not disparaging of the Plaintiff's product and yet it took note of statement made by counsel for the Defendant that "his client is prepared to delete the reference to the two-year period for which the honey was not consumed and replace it with an unspecified period." In fact, the Court noted that the counsel for the Plaintiffs therein was not amenable to the proposed concession. The Court nevertheless directed that the Defendant would be bound by the said statement "and is now free to air the commercial 'Wipro Sanjeevani Honey' with the above modification". Clearly the above changes that the Defendant undertook to make to the advertisement did not require any amendment to the pleadings for the Court to pass the above order.

(g) Therefore, the observations in ***Makhan Lal Bangal v. Manas Bhunia*** (*supra*), relied upon by the Plaintiffs, would not *stricto sensu* apply to the facts of the present case. Likewise, in ***Colgate Palmolive Company Limited v. Patel*** (*supra*) the decision turned on an offer made by the Defendant themselves to make changes rule out the possibility of confusion or

deception in the colour scheme in the advertisement for the two competing products.

(h) In the present cases, what in effect has transpired is that three elements of the impugned advertisement which were found objectionable by the Plaintiffs were sought to be addressed by the Defendant in the modified advertisement. What was left unaltered was the essential feature of the impugned advertisement which was to compare the protein content of the two competing products i.e. HORLICKS of the Plaintiffs with COMPLAN of the Defendant. The finding of the learned Single Judge on this aspect holds good for the impugned as well as the modified advertisement.

(i) The Court does not accept the plea of learned Senior Counsel for the Plaintiffs that the Plaintiffs have been deprived of an opportunity of voicing objections to the modified advertisement. For the purpose of interim injunction there was sufficient opportunity for the Plaintiffs to raise their objections. It was not disputed that before the learned Single Judge from 10th October 2018 onwards, when the modified advertisement was tendered and placed on record, the Senior counsel for the Defendant advanced arguments with reference to the modified advertisement. There is a reference to the modified advertisement in the rejoinder submissions of the Plaintiffs before the learned Single Judge.

36. The Court clarifies that for the purpose of the suit, however, the present order would not preclude the Plaintiffs from seeking to amend the plaint to incorporate the objections to the modified advertisement as well. Here, the

Court takes note of the submission of Mr. Lall that the prayer clause both in the suit as well as the application for interim injunction covers the modified advertisement as well and, therefore, there would be no need to amend the prayer clause in the suit as such.

37. For all of the aforementioned reasons, the Court negatives the objection raised by the Plaintiffs that the learned Single Judge could not have examined or adjudicated on the modified advertisement and, therefore, for that reason the impugned order should be set aside and the case remitted to the learned Single Judge. Having rejected the aforementioned objections of the Plaintiffs as raised in ground 'AA' of the appeal, the Court now sets down the appeal for further hearing on merits.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

MARCH 15, 2019
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