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

% Reserved on: 8th January, 2020
Decided on: 14th May, 2020

\+ **CS(COMM) 464/2019**

HORLICKS LIMITED & ANR. .....Plaintiffs
Represented by: Mr.Sudhir Chandra Sr. Advocate with Mr.Ankur Sangal, Mr.Ajay Bhargava, Ms. Sucheta Roy and Ms.Richa Bhargava, Advocates.

versus

ZYDUS WELLNESS PRODUCTS LIMITED ..... Defendant
Represented by: Mr.Amit Sibal Sr. Advocate with Mr.Sagar Chandra, Mr. Ankit Rustagi, Mr.Raghu Vinayak Sinha, Mr.Vinay Tripathi and Mr.Siddhant Nath, Advocates.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

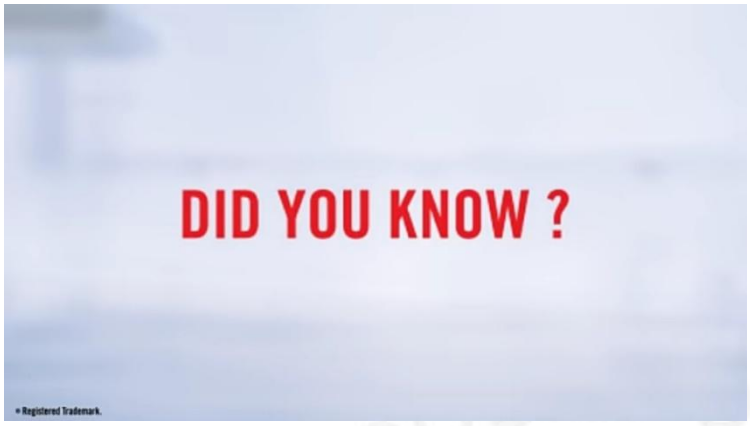
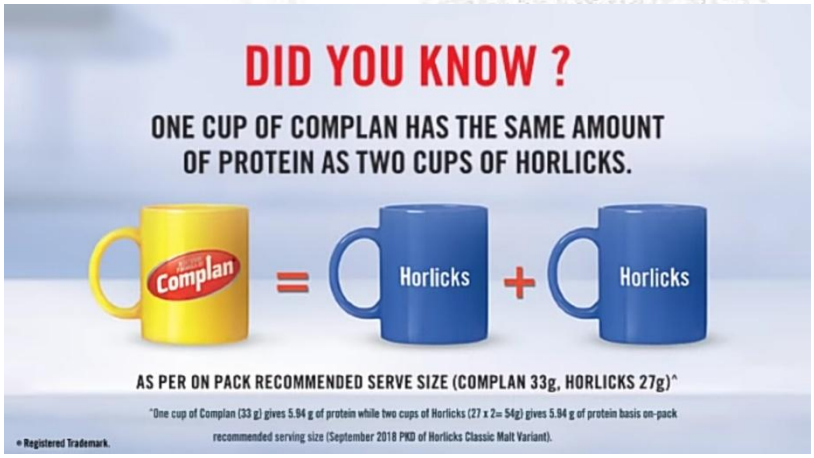
I.A. 11755/2019 (under Order XXXIX Rule 1 and 2 CPC)

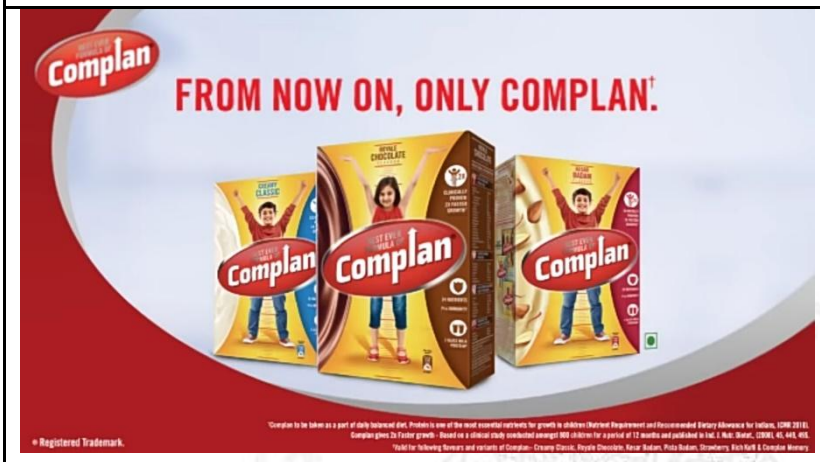
1. Plaintiffs have filed the present suit against the defendant inter alia seeking prayer of permanent injunction and restraining the defendant, its Directors, Partners, agents etc. from telecasting or otherwise communicating to the public the impugned advertisement which amounts to intentional and deliberate disparagement of the plaintiffs' health food drink HORLICK by the defendant through its television commercial (TVC).

2. Case of the plaintiffs is that the plaintiffs are renowned corporations and plaintiff No.1 adopted the trademark HORLICKS in the year 1943 which is registered in its favour in various classes. Plaintiff No.2 under

license from plaintiff No.1 has extensively marketed and sold HORLICKS in India since the past many decades. Plaintiffs' product HORLICKS is being sold in many countries around the world in different formulation in order to cater the needs of the varying consumers and its drink HORLICKS is seen as a complete health drink amongst the consumers. Plaintiffs' product HORLICKS has 23 essential nutrients, that is, Protein, Fat, Carbohydrate, Vitamin B12, Folic Acid, Vitamin B2, Vitamin B6, Vitamin C, Vitamin A, Vitamin B1, Naicin, Vitamin D, Vitamin E, Iodine, Calcium, Iron, Zinc, Phosphorus, Sodium, Potassium, Chloride, Selenium and Copper. According to the plaintiffs' it has carefully selected the said ingredients for the overall growth and development of the child's body and mind and it has been proven that supplementation of the child's nutrient with HORLICKS improves micronutrient status and promotes physical and mental development in children.

3. The defendant is a company incorporated in India and as a competitor of the plaintiffs' is manufacturing and selling a nutritional drink under the trademark COMPLAN. There have been frivolous litigations between the parties with regard to the advertisements relating to the products HORLICKS and COMPLAN before various forums. Around July, 2019 plaintiffs came to know that the defendant had launched a TV commercial disparaging the plaintiffs' product HORLICKS, the impugned TVC is being telecasted in various languages including English, Bengali and Tamil in various television channels. The story board of the impugned TVC (English version) is as follows:

Frame 1  	Contents of Frame 1 Voice Over: Did you know?
Frame 2:  	Contents of Frame 2: Voice Over: One cup of Complan has the same amount of protein as two cups of Horlicks. Super: One Cup of Complan has the same amount of Protein as two cups of Horlicks As per on pack recommended Serve Size [Complan33g, Horlicks 27g]

Frame 3	Contents of Frame 3:
	Voice Over: From Now on only Complan. Disclaimers: One Cup of Complan [33g] gives 5.94 g of protein while two cups of Horlicks [27 x 2=54g] give 5.94g of protein basis on-Pack recommended serving size [September 2018 PKD of Horlicks Classic Malt Variant]. Complan to be taken as part of daily balanced diet. Protein is one of the most essential nutrients for growth in children [Nutrient Requirement and Recommended Dietary Allowance

	for Indians, ICMR 2010]. Complan Gives 2x Faster Growth – Based on clinical study conducted amongst 800 children for Period of 12 months and published in Ind. J. Nutr. Dietet., [2018, 45, 449, 495. Valid for following flavors and variants of Complan:- Creamy Classic, Royal Chocolate, Kesar Badam, PistaBadam, Strawberry, Richi Kulfi and Complan Memory. *Registered Trademark.

4. It is the case of the plaintiffs' that the manner and storyline of the impugned TVC clearly shows the intention of the defendant behind the launch and is telecasting the same to denigrate the plaintiffs' product HORLICKS. Though in law the defendant may be entitled to puff its product but it is not allowed to denigrate the product of other parties. The malafide intention of the defendant in telecasting the impugned TVC can be traced back to a prior litigation between the parties which started in the year 2004 and the latest of it being in the year 2017 when plaintiffs came across a

print advertisement of the defendant published in the newspaper wherein defendant compared one cup of its product COMPLAN with two cups of the plaintiffs' product HORLICKS. Aggrieved by the action of the defendant, plaintiffs filed a suit being CS (Comm) No.808/2017 wherein the learned Single Judge of this Court granted an ex-parte ad-interim order restraining the defendant from publishing the said advertisement based on the statement given by the defendant. The application was finally heard and dismissed however, for the reason the defendant made various amendments in the aforesaid print advertisement, including addition of a super, that is, 'as per on pack recommended serve size (COMPLAN 33g. HORLICKS 27g)'.

5. Though the plaintiffs never consented to the modified advertisement however, in view of the undertaking of the defendant not to publish the print advertisement except the modified advertisement, the defendant was not restrained from publishing the modified advertisement. An appeal has been filed by the plaintiffs against the order dated 17th December, 2018. The appeal filed by the plaintiffs against the order dated 17th December, 2018 before the Division Bench of this Court is still pending.

6. Learned counsel for the plaintiffs contends that the television is a very powerful medium of communication and the same cannot be compared with the print media. Though in the impugned TVC the disclaimer as mentioned in the print media of recommended serve has been given however, the TVC being of six seconds duration the same is not discernable. Internationally and nationally comparison between the product is in the same size or the same measurement and a comparison other than of the same size would be misleading. Despite the fact that the serve size of the plaintiffs and defendant is different, the cup size in the advertisement is made the same

thereby creating confusion in the mind of the customers. Thus the TVC advertisement is not true and gives a misleading message to the public in general. The message given by the advertisement is that the defendant's product is double that of the plaintiffs. Further despite the plaintiffs health drink having number of other nutrients a misleading advertisement has been issued only pointing out towards protein content despite the fact that the two drinks are not protein supplements but total health drinks. The injunction granted in favour of the plaintiffs vis-a-vis the print media was vacated on account of the defendant adding to its advertisement "as per on pack recommended serve size (Complan 33g, Horlicks 27g)". However, in the broadcast there is no voiceover qua the serve size. The clip being six seconds there is hardly any time for any person to note this disclaimer written on the advertisement. The defendant is violating the general principles and disparaging the products of the plaintiffs by the advertisement which is false, misleading, unfair and deceptive. While deciding the interim injunction application, this Court is required to see the intent of the commercial besides the medium of advertisement and in case the advertisement is being done by a malafide intention the same is liable to be injuncted. Though a comparative advertisement is legal and permissible however, the comparison cannot be false as the same has the likelihood of causing confusion in the mind of the consumer who may be mislead. Reliance is placed on the decisions reported as 167 (2010) DLT 278 *Dabur India vs. Colortek Meghalaya Pvt. Ltd. and Ors.*, MANU/TN/1910/2018 *Gillette India Limited vs. Reckitt Benckiser (India) Pvt. Ltd.*, and 2015 (62) PTC 64 (Del) *Havells India Ltd. vs. Amritanshu Khaitan & Ors.*

7. Learned counsel for the defendant on the other hand contends that an overall impression of the impugned advertisement is required to be seen. The intent and effect of the impugned advertisement being to educate the consumers with respect to the protein content in one cup of COMPLAN as per the recommended serve size of 33 grams being equal to two cups of HORLICKS as per the recommended cup size 27 grams as provided in their respective packages, the impugned advertisement is neither misleading nor disparaging nor defamatory and is factually correct.

8. Comparison of the products "per serve size" is an accepted method of comparison when both parties choose to recommend the serve size. The reason why per serving size is provided with the products is due to its effectiveness and safety and is a prudent industry practice in respect of food products as lesser quantity than the serve size will not serve the purpose and an excess quantity of the health drink may be detrimental to health. Learned counsel for the defendant in this regard relies upon various decisions of Advertising Standards Council of India.

9. It is further stated that contention of learned counsel for the plaintiffs that the comparison ought to be after inclusion of the milk in the two product is incorrect for the reason the protein content in the different varieties of milk may be different and further the plaintiffs own packaging recommends consumption of their product on a per serve basis along with either milk or water and admittedly water has no protein. In comparative advertisement a party is allowed the creative latitude and the plaintiffs should not be hypersensitive. Further the impugned advertisement cannot be read as a testamentary provision in a Will or a clause in an agreement but the overall impact has to be looked into and the overall impact of the TVC is not

disparaging and is based on correct facts. Creative latitude is permissible to the advertiser and if there is some basis of comparison than this Court will not interfere. The Court will also not interfere unless it is a grossest case of abuse.

10. Contention of learned counsel for the plaintiffs that plaintiffs' product has 23 nutrients and there should be comparison with all the ingredients is incorrect for the reason an advertiser can highlight a special feature/ characteristic of its product and there is no requirement in law that comparison of all the contents should be displayed. Plaintiffs having not made out either a prima facie case nor the balance of convenience lying in favour of the plaintiffs as the defendant's impugned advertisement is being broadcasted since May, 2019 no injunction be granted to the plaintiffs. Reliance is placed on the decisions reported as *Havells India Ltd.* (supra), *Dabur India Ltd.* (supra), 2013 (54) PTC 515 (Del) *Marico Limited vs. Adani Wilmar Ltd.*, 2014 (57) PTC 47 (Del) (DB) *Colgate Palmolive Co. & Anr. vs. Hindustan Unilever Ltd.*

11. In *Dabur India* (supra) The Division of this Court culled out the principles governing disparagement in the advertisements and held:

> *14. On the basis of the law laid down by the Supreme Court, the guiding principles for us should be the following:*
>
> *(i) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.*
>
> *(ii) An advertisement must not be false, misleading, unfair or deceptive.*
>
> *(iii) Of course, there would be some grey areas but these need not necessarily be taken as serious*

representations of fact but only as glorifying one's product.

To this extent, in our opinion, the protection of Article 19(1)(a) of the Constitution is available. However, if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection.

15. There is one other decision that we think would give some guidance and that is Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr. MANU/DE/0896/2003 : 2003 (27) PTC 305 (Del.) (DB). In this decision, a Division Bench of this Court held that while boasting about one's product is permissible, disparaging a rival product is not. The fourth guiding principle for us, therefore, is: (iv) While glorifying its product, an advertiser may not denigrate or disparage a rival product. Similarly, in Halsbury's Laws of England (Fourth Edition Reissue, Volume 28) it is stated in paragraph 278 that "[It] is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product." This view was followed, amongst others, in Dabur India Ltd. v. Wipro Limited, Bangalore MANU/DE/1151/2006 : 2006 (32) PTC 677 (Del). "[It] is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to that of the defendant."

16. In Pepsi Co. it was also held that certain factors have to be kept in mind while deciding the question of disparagement. These factors are: (i) Intent of the commercial, (ii) Manner of the commercial, and (iii) Story line of the commercial and the message sought to be conveyed. While we generally agree with these factors, we would like to amplify or restate them in the following terms:

(1) The intent of the advertisement - this can be understood from its story line and the message sought to be conveyed.

(2) The overall effect of the advertisement - does it promote the advertiser's product or does it disparage or denigrate a rival product?

In this context it must be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavourable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.

(3) The manner of advertising - is the comparison by and large truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible.

17. In our opinion, it is also important to keep in mind the medium of the advertisement. An advertisement in the electronic media would have a far greater impact than an advertisement in the print media. In D.N. Prasad v. Principal Secretary MANU/AP/0050/2005:2005 Cri LJ 1901 the Andhra Pradesh High Court observed that a telecast reaches persons of all categories, irrespective of age, literacy and their capacity to understand or withstand. The Court noted that the impact of a telecast on the society is phenomenal. Similarly, it was observed in Pepsi Co. that a vast majority of viewers of commercial advertisements on the electronic media are influenced by visual advertisements "as these have a far reaching influence on the psyche of the people ..." Therefore, an advertiser has to virtually walk on a tight rope while telecasting a commercial and repeatedly ask himself the questions: Can the commercial be understood to mean a denigration of the rival product or

not? What impact would the commercial have on the mind of a viewer? No clear-cut answer can be given to these questions and it is for this reason that this Court has taken a view that each case has to be decided on its own facts. (See Reckitt Benckiser (India) Ltd. v. Cavinkare Pvt. Ltd. MANU/DE/9840/2007: ILR (2007) Delhi 368, paragraph 17). Consequently, this Court has been called upon to decide the same issue time and time again resulting in the same and very large number of decisions being cited.

18. On balance, and by way of a conclusion, we feel that notwithstanding the impact that a telecast may have, since commercial speech is protected and an advertisement is commercial speech, an advertiser must be given enough room to play around in (the grey areas) in the advertisement brought out by it. A plaintiff (such as the Appellant before us) ought not to be hyper-sensitive as brought out in Dabur India. This is because market forces, the economic climate, the nature and quality of a product would ultimately be the deciding factors for a consumer to make a choice. It is possible that aggressive or catchy advertising may cause a partial or temporary damage to the plaintiff, but ultimately the consumer would be the final adjudicator to decide what is best for him or her.

19.... ... ...

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23. Finally, we may mention that Reckitt and Colman of India Ltd. v. M.P. Ramchandran and Anr. 1999 (19) PTC 741 was referred to for the following propositions relating to comparative advertising:

> *(a) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.*

(b) He can also say that his goods are better than his competitors', even though such statement is untrue.

(c) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.

(d) He however, cannot, while saying that his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible.

(e) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

These propositions have been accepted by learned Single Judges of this Court in several cases, but in view of the law laid down by the Supreme Court in Tata Press that false, misleading, unfair or deceptive advertising is not protected commercial speech, we are of the opinion that propositions (a) and (b) above and the first part of proposition (c) are not good law. While hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if does so, the advertiser must have some reasonable factual basis for the assertion made. It is not possible, therefore, for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival.

12. The Division Bench of High Court of Madras in *Gillette India Ltd.* (supra) besides laying down the principles to ascertain whether an advertisement is disparaging or not, also noted the distinction between an advertisement in the electronic audio visual media and the print media. It was held that the advertisement in the electronic audio visual media leaves an impression in the minds of the viewer and has a far greater impact. It was held:

> *96. Whether an advertisement is disparaging or not would depend on several factors, for which each advertisement would have to be judged on its own merits, on consideration of the overall impact of the picture that is portrayed, the language used, the histrionics, the gesticulations, the movements, acrobatics, catch phrases, hilarity or other catchy screen shots. While humour, hilarity or even ridiculing to highlight the advantages of one's own product may be permissible, ridiculing services and products of another would amount to disparagement.*
>
> *97. To decide whether an advertisement is disparaging, the Court has to consider (i) the intent of the commercial advertisement; (ii) the message sought to be conveyed; and (iii) the mode and manner of conveying the message. Condemning the goods and services of a competitor or ridiculing the same or showing the same as substandard would amount to disparagement.*
>
> *98. Of course, as stated above, mere puffing up of one's products or services in comparison to those of others would not constitute disparagement. It may be permissible for an advertiser to compare the technology or the formula of the products of others in an attempt to impress upon viewers the superiority of the goods and articles advertised over those of others. In the process, an advertiser may even brand the technology and/or formula*

applied by others as obsolete compared to the more modern technology or formula of the advertiser, but without denigrating or disparaging the products of others.

99. A judgment is a precedent for the issue of law which is raised and decided and not for what might logically be deduced from the decision arrived at in the facts and circumstances of a particular case, and that too for the purpose of granting interim injunction. Words and sentences in a judgment cannot also be read like the provisions of a statute enacted by Parliament or even statutory Rules and in no case can the same be read out of context. Moreover, while the judgments of the Supreme Court are binding on this Court and while judicial discipline demands that this Court should follow judgments of Benches of this Court of co-ordinate strength, judgments rendered by other High Courts can only have persuasive value.

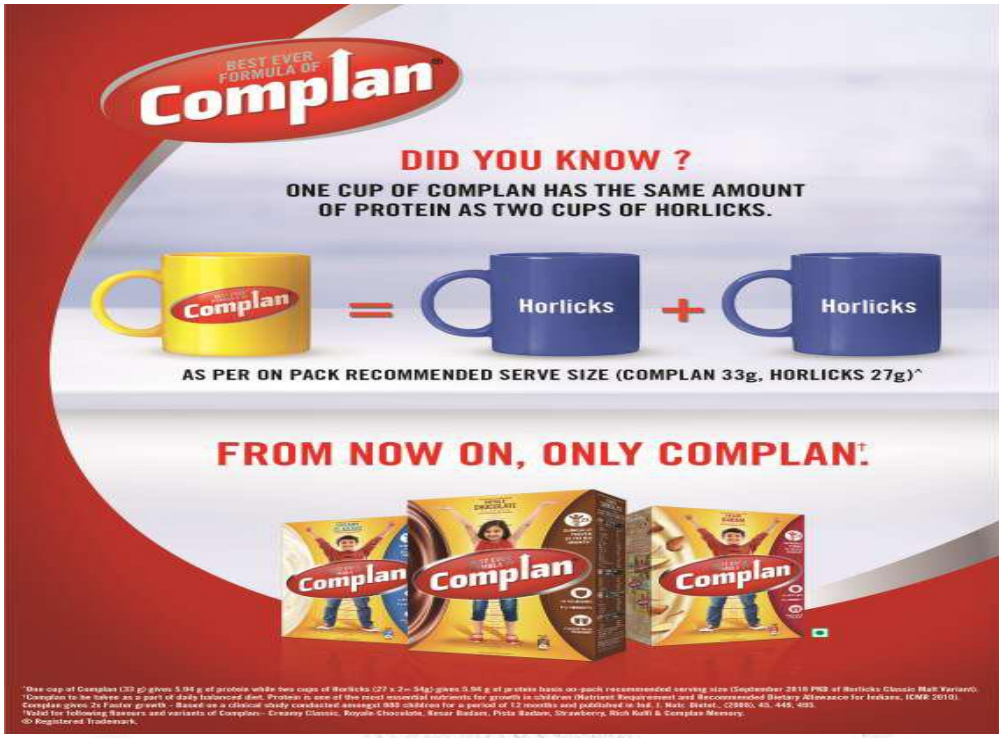
100. Advertisements in the electronic audio visual media leave an indelible impression in the minds of viewers. This medium of advertisement has a far greater impact on its viewers than a print advertisement, as noted by the Delhi High Court in Glaxo Smithkline Consumer Health care Limited and others vs., Heinz India Private Limited and another, supra. A catchy phrase, a well enacted skit or story line, or even distinctive sounds or distinctive collocation of colors make a lasting impact and more so, when viewed repeatedly.

13. As held in the various decisions, intent of the advertisement is understood from its storylines and message sought to be conveyed is the factor to be kept in mind, while deciding the question of disparagement. Further the comparison should not be untrue, misleading or false and can be

based on one particular quality and the defendant need not highlight the difference on all the parameters.

14. Before adverting to the applicability of the law as noted above on the facts of this case, it would be appropriate to note about the earlier legal proceeding between the parties. The plaintiff had earlier filed a suit being CS (Comm) No.808/2017 when the defendant had brought out an advertisement in the print media which the plaintiffs herein claim to be disparaging and an ad-interim ex-parte injunction was granted, however, the said interim injunction was vacated by this Court on hearing the parties vide order dated 17th December, 2018 against which the plaintiffs herein have already preferred an appeal. The said decision was based on the revised advertisement of the defendant which statement of the learned counsel for the defendant was noted in para 16 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. The modified advertisement is reproduced herein below:-*



15. Since the comparison of the defendant was based on the serve size recommended by the parties, the modified advertisement clarified that the comparison was based on the recommended serve size which was noted in the middle of the print advertisement and though in smaller letters than the main advertisement but clearly visible. The main grievance of the plaintiff in respect of the advertisement in the electronic medium is that the TVC is for six seconds and the voiceover does not clarify the disclaimer added in the print advertisement, that is, 'as per on pack recommended serve size (COMPLAN 33g. HORLICKS 27g)' and six second is too less a time for anyone to be able to notice this disclaimer on the TVC.

16. Learned counsel for the defendant has in extenso argued that per serve recommended by a party is a recognized method of comparison and in this regard has placed on record number of orders of the Advertising Standard

Council of India and that the same is also prescribed under Section 3 of the Food Safety and Standard Packaging and Labeling Regulation, 2011.

17. In the decision of Havells India (supra) it was held:

> *26. In the opinion of this Court, Comparative advertising is legal and permissible as it is in the interest of vigorous competition and public enlightenment. In fact, Chapter IV of the ASCI Code, relied upon by the plaintiffs, itself specifically deals with Comparative Advertising. The relevant portion of the ASCI Code reads as under:-*
>
> *"CHAPTER IV*
>
> *To ensure that Advertisements observe fairness in competition such that the Consumer's need to be informed on choice in the Market-Place and the Canons of generally accepted competitive behaviour in Business are both served.*
>
> *1. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interest of vigorous competition and public enlightenment provided:*
>
> *(a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.*
> *(b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case*
> *(c) The comparison are factual, accurate and capable of substantiation.*
> *(d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which is compared.*

(e) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication. "

18. There can be no dispute about the fact that comparison based on the recommended serve size by the parties can be done in a commercial advertisement, however, the meet of the matter is whether the disclaimer as put in the print advertisement is visible and audible in the impugned electronic medium. This Court finds that on playing the TVC, there is no voiceover with regard to the disclaimer in reference to the serve size nor is the time sufficient to read the said disclaimer. In view of this fact the present advertisement in the electronic media would be clearly disparaging as on a bare looking at the advertisement a viewer only sees a comparison of one cup of COMPLAN with two cups of HORLICKS with no reference to the serve size. Further as noted in *Gillette India Ltd.* (supra) the electronic medium is a very powerful medium of communication and leaves an indelible mark on the mind of the viewer this Court finds that prima facie in view of no voiceover qua the disclaimer qua the serve size being there and the visual advertisement being for six seconds only giving insufficient time to note the disclaimer, the plaintiffs have made out a prima face case in their favour and in case no interim injunction is granted the plaintiffs would suffer an irreparable loss. Claim of the defendant is that since the TVC is running since May, 2019, the balance of convenience does not lie in favour of the plaintiffs. The said argument defies the fact that TV viewership is continuous and on daily basis and hence every new person who views the advertisement would be clearly misled. Consequently, till the disposal of

the suit the defendant is restrained from advertising the impugned TVC in its present form.

19. Application is disposed of.

(MUKTA GUPTA)

MAY 14, 2020
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