

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**INTERIM APPLICATION (L) NO.808 OF 2021
IN
COMMERCIAL I.P. SUIT (L)NO. 805 OF 2021**

Hindustan Unilever Limited,
A Company incorporated under the
Companies Act, 1913, having its
Registered office at Unilever House,
B. D. Sawant Marg, Chakala,
Andheri (East), Mumbai-400099. ... Applicant (Orig.Plaintiff)

In the matter between:

1. Hindustan Unilever Limited,
A Company incorporated under the
Companies Act, 1913, having its
Registered office at Unilever House,
B. D. Sawant Marg, Chakala,
Andheri (East), Mumbai-400099.

2. Unilever Plc, A Company incorporated
under British Laws having its registered
office at Port Sunlight Wirral Merseyside
CH62 4ZD

... Plaintiffs

v/s.

USV Private Limited, a Company existing
under the Companies Act, 1956 having its
registered address at Arvind Vithal Gandhi
Chowk, B. S. D. Marg, Station Road,
Govandi (East), Mumbai-400 088.

... Defendant

COMMERCIAL INTERIM APPLICATION (L) NO. 1091 OF 2021

IN

COMMERCIAL I.P SUIT (L) NO. 1087 OF 2021

WIPRO Enterprises Private Limited

Having its registered office at

#134 C Block Doddakannelli,

Sarjapur Road, Bangalore,

Karnataka-560035

... Applicant/Original Plaintiff

In the matter of

WIPRO Enterprises Private Limited

Having its registered office at

134 C Block Doddakannelli,

Sarjapur Road, Bangalore,

Karnataka-560035

... Plaintiff

v/s.

1. USV Private Limited,

Having its registered address at

Arvind Vithal Gandhi Chowk,

B. S. D. Marg, Govandi.

Mumbai-400088

... Defendant No.1

2.The Womb Communications LLP,

Having its registered office at

101-A, Bolivian Alps, Bhakti Park,

Near IMAX Mumbai, Wadala East,

Mumbai-400037.

Also, at:

11th floor, Classic Pentagon,

Western Express Highway,

Mumbai-400099.

... Defendant No.2

Mr. Virag Tulzapurkar, Senior Advocate, Dr. Birendra Saraf, Senior Advocate, a/w Mr. Hiren Kamod, Mr. Nishad Nadkarni, Mr. Aasif Navodia and Ms. Khushboo Jhunjhunwala, i/by. Khaitan & Co., for the Applicant-Plaintiffs in IAL No.808/2021.

Mr. Nikhil Sakhardande, Senior Advocate, a/w Nitesh Jain, Siddharth Ranade, Kaazvin Kapadia & Ritika Ajitsaria i/b. Trilegal for the applicant/plaintiff in IA (L) No.1091 OF 2021.

Mr. Venkatesh Dhond, Senior Advocate, with Mr. Bimal Rajasekhar, Mr. Prithvi Singh, Mr. Rohan Seth and Ms. Shwetasree Majumdar, for the Defendant.

CORAM : A. K. MENON, J.

RESERVED ON : 9TH MARCH, 2022

PRONOUNCED ON : 16TH JUNE, 2022

P.C. :

1. In a suit assailing the advertising campaign launched by the defendant to publicize its products under the brand SEBAMED, the plaintiffs in the first suit [HUL Suit] have filed this interim application seeking (a) to restrain the defendant, its parent company and group companies and subsidiaries and servants and agents including advertising agencies from in any manner broadcasting, communicating to the public or otherwise utilizing the impugned advertising campaign including television, commercials, (TVCs) banners, warnings, hoardings and newspaper advertisements and other material in all languages. The impugned advertisements and publicity including on the internet and

to remove the same since all the aforesaid media. Thus a mandatory order is being sought as well.

2. The other reliefs sought are as follows;

(b) an injunction restraining the defendant from directly or indirectly disparaging or denigrating the plaintiffs' products viz. Lux, Dove, Pears and Rin are the plaintiffs business practices in that respect.

(c) A further injunction sought restraining the defendant from in any manner infringing the 1st plaintiff's registered marks Lux, Dove, Pears and Rin bearing the relevant registration numbers in any manner whatsoever either by visual representation, depiction spoken words or otherwise using the same in the impugned advertising campaign referred to above.

(d) Lastly, the plaintiffs seek an interim order directing the defendant and its servants and agents including broadcasters, television channels and exhibitors be ordered to deliver up for destruction the master tapes other copies of material containing the impugned campaign including the warnings, hoardings, newspaper advertisements etc.

3. In the second suit [WIPRO SUIT], the plaintiffs seek the following reliefs against the same defendants;

(a) an injunction restraining defendant nos.1 and 2, or their

servants/agents/affiliates or their advertising agencies or any other person claiming through them, from publishing/telecasting/broadcasting the advertisement campaigns at any platforms including television commercial, electronic media, newsprints, billboards in any platforms and mediums;

(b) pending disposal of suit, an injunction restraining the defendants, their Directors, proprietors, partners, subsidiaries, affiliates, franchisees, officers, employees, agents and all others in capacity of principal or agent acting for and on behalf, or anyone claiming through, or by or under them, from in any manner using directly or indirectly, by or under them, from in any manner using directly or indirectly the trademark Santoor or any other mark deceptively similar to the plaintiff's trademark Santoor, amounting to the infringement of the plaintiff's trademark.

4. The interim applications are called and taken up for final hearing. The facts of that case being very similar, both these IAs are being disposed by this common order. The submissions made by counsel on behalf of the plaintiffs in both matters are largely similar. The defence is common. According to the plaintiffs, they have made out a good case for injunction on account of disparagement and infringement of their Trademark as well as the tort of slander of goods allegedly committed by the defendant.

5. The plaintiffs in the HUL suit are FMCG (Fast Moving Consumer Goods) majors and have been in business for several years. The case of the plaintiffs in the HUL Suit as canvassed by Mr. Tulzapurkar is that they are in the business of manufacturing and sale of personal care products for almost 100 years. Numerous brands of toilet and bathing soaps and detergent soaps are being sold by the plaintiffs. A distinction must be made between toilet soaps and bathing soaps on one hand and detergent soaps on the other hand since the toilet soaps and bathing soaps cannot be substituted with the detergent soaps and vice versa. The plaintiffs' brands Lux, Dove, Pears, Hamam, Liril, Rexona, and Lifebuoy are distinctive trademarks and very popular owing to their excellent quality and efficacy in the market.

6. It is contended that Pears has 4.2% market share, Lux 11.3% and Dove 4.3%. Collectively three brands enjoy an aggregate of 19.8% of the market share. The plaintiffs have set out particulars of these brands, trademarks registered including the fact that Lux has all throughout been promoted well known celebrities internationally and in India. Names of various international film-stars who have endorsed the brand Lux has been adverted to. Likewise in India, numerous Bollywood personalities are said to have endorsed the brand. Their products have been successful in the Indian market and have been sold extensively in international market like Arabia, Brazil, Thailand and South Africa. The plaintiffs' 'Lux' mark is the most trusted brand and

several television programmes are also sponsored by Lux. The annual turnover of Lux for the years 2014-15 till 2017 is as follows;

Year	Brand	Turnover	Promotional Expenses
2016-17	Lux	205,650	10612
2016-17	Dove	63,560	8024
2016-17	Pears	65,478	7048
2016-17	Rin	15642400	846300

7. According to Mr. Tulzapurkar all these products comply with industry standards namely BIS Standard IS2888-2004 and amendments thereto. The defendant is a competitor and has been selling SEBAMED products as aforesaid and the impugned campaign initially started with a teaser film in Hindi "Sach Coming Soon" on 7th January, 2021. Three models seated at the table have stated *"that film stars, celebrities and Bollywood beauties are ready to say anything but they are scared to tell the truth and that the truth come out soon."* The said teaser was said to be initially available on the defendant's YouTube channel "SEBAMED India". It is stated that on 8th /9th January, 2021 the plaintiff was shocked to come across three audio visuals in Hindi language launched by the defendant in respect of "SEBAMED Cleansing Bar". Each advertisement specifically referred to Lux Soap, Dove Soap and Pears Soap by insinuating that use of these products is like using the detergent soap Rin. The intent and story line of these advertisements

were said to be misleading, containing falsehood but more importantly they were disparaging and denigrating the plaintiff's products. Reference is made to the various URLs wherein these offending commercials were viewed.

8. It is contended that in January the defendants were broadcasting these impugned offending advertisements on television channels such as Colors, Colors Marathi, Star Plus, NDTV India and several other regional channels. The plaintiffs are also aggrieved by the fact that the impugned advertisements were also made available online on the defendant's website amongst other social media pages. The plaintiffs are particularly aggrieved by the fact the plaintiffs' soap Lux was said to have a pH value of 10 equivalent to the plaintiffs' detergent soap Rin thereby alluding to the fact that by using Lux was equivalent to using a detergent Rin whereas SEBAMED had a "perfect pH 5.5. for sensitive skin." Screenshots of the commercial on YouTube, Facebook and Instagram have been relied upon. The plaintiffs have contended that the Times of India newspaper carried full page advertisements on its front page on 10th January, 2020. An extract of this representation was shown on TV as set out at an earlier occasion. All of this has resulted in a cause of action in favour of the plaintiffs. When this matter was heard at the ad-interim stage in an order dated 11th January, 2021, the court had at that stage found that the exparte order was justified and accordingly injunction in terms of prayer clause (a) restricted to a part

was granted.

9. Thereafter on or about 19th January, 2021, the order was recalled since there was a caveat already on record which was not noticed. As a result of further hearing on 19th January, 2021, an order came to be passed whereby the advertisement in relation to SEBAMED in comparison with Dove which was titled "*Doodh Jaise Safedi Ka Sach*" is concerned, was allowed to continue in the current form. As far as the advertisement relating to Lux titled "*Film Stars ki nahi, Science ki suno*" and "*Transparent soap ka sach*" in relation to Pears Soap, the defendant was allowed to air the advertisement without any reference to 'Rin' detergent bar or any other detergent soap. The modified advertisement was therefore permitted provided it did not refer to a washing detergent. All forms of advertisement were thus modified partly. The specific reference "pH scale appearing on the defendant's website which indicated that soaps with pH levels between 5 and 6 are "*safe*" whereas pH levels between 6 & 10 are not "*safe*" were directed to be changed. The words "*safe*" and "*not safe*" were to be substituted by "*ideal*" and "*not ideal*". These modified advertisements have been aired since and continued which is why the cause of action is said to survive. It is an ongoing advertisement campaign and hence the attempt of the plaintiff is to secure the aforesaid injunctions thereby protecting the brands in question. The plaintiffs have contended and as canvassed by Mr. Tulzapurkar that pH is not the sole determinant of

mildness and harshness. Bathing soaps cannot be compared with detergent soaps as they have entirely different compositions.

10. Although the suit campaign has been modified, they are in fact the same. The original campaign incorporated a comparison with Rin detergent bar and the use of the words “not perfect” and “not safe”. The new campaign has deleted the comparison with Rin but uses the word “ideal” instead of “not perfect” and the word “not safe” has been deleted. By making reference to the original campaign in the opening screen *“LAST YEAR 8TH JAN”* the defendant is reminding consumers and the original advertisement which had the comparison between and reference to perfect pH. The slide/visual *“LAST YEAR 8TH JAN”* indirectly seeks is to ensure that people recall the original campaign. The modification thus therefore continues to denigrate and disparage the plaintiffs’ products.

11. Mr. Tulzapurkar submits that the campaign and storyboard is not even truthful and it conveys grossly misleading and false information to society in general because pH is not a determinant but indicates that 5.5 is the “perfect” pH thereby suggesting that the plaintiff’s soaps are not good. The learned counsel for the plaintiff has in support of his contentions relied upon the material placed on record as to the relevance of pH, my attention has been drawn to Exhibit ‘1’ to the affidavit dated 12th March, 2021 filed in rejoinder by one

Vijayalakshmy Malkani who has deposed on this aspect inter alia making reliance to the views expressed by one MS Clinical Research in which the author has observed that the organization has reviewed the safety and efficacy clinical study reports for Pears, Lux and Dove and the products were found to be of non-irritating formulae and can qualify as dermatologically safe for all skin types. That clinical reports have demonstrated the cleaning efficacy, skin tolerability and compatibility in regular use. BIS Standards set out guidelines for toilet soaps and bathing soaps and in neither of them reference to pH is considered a relevant parameter. This is sought to be read along with an article title *“The pH of the skin surface and its impact on the barrier function”* dated 19th July, 2006 by one M H. Schmid-Wendtner which according to Mr. Tulzapurkar reviewed article by Saba M Ali and Gil Yosipovitch. The article deals with the investigations into skin pH and refers to various scientific research papers. In the second article titled *“Guidelines for dermatologists.”* Mr. Tulzapurkar has invited my attention to the finding and recommendation that amongst body wash soap or cleanser, one that has a pH between 4.5 to 6.5 similar to normal pH of skin should be selected. In conclusion, it is stated that at the root of skin pH is a factor is the SC function (Stratum Corneum) and much remains to be learnt about the complex relation of skin pH and downstream pH dependent events.

12. Mr. Tulzapurkar further submits that there is absolutely no reason why quality of the soap or bathing bar should be related to skin pH. My attention has been drawn by the plaintiffs to a test report no.202012170085 dated 1st November, 2019 issued by Arbro Pharmaceuticals Private Limited, Certificate of Analysis a Government approved test house which analyzed the defendant's SEBAMED Cleansing Bar. The analysis shows that pH value in tap water was 5.76 and pH in a distilled water was 5.71. Thus, it is clear that even from in test report does not reveal a 5.5 pH level. Therefore to suggest that 5.5 is "Ideal" is misleading and ought not to be accepted by the court. The attempt of the defendant is to compare Apples with Oranges inasmuch, as admittedly SEBAMED is a product for sensitive skin and for persons suffering from allergies. Whereas the plaintiffs product are not. SEBAMED is directed towards a targeted consumer whereas the plaintiff's products are usable by all concerned as a matter of choice.

13. Paragraph 57 of the plaint sets out reasons for the plaintiffs alleging that the impugned campaign is false, misleading and incorrect. The comparisons are disparaging because initially the plaintiffs soap was compared to detergent bar Rin and if pH was a critical parameter it would have been explicitly provided for in the BIS Standards. The question is whether the campaign is denigrating and disparaging of the plaintiffs products and violate of the plaintiffs trademarks. In this respect, my attention has been drawn by counsel to Exhibit "Y", "Z"

and "AA". Exhibit "Y" is a study report by M S Clinical Research at the instance of the plaintiffs. It evaluates dermatological safety of products under investigation after 24 hours patch test on healthy human beings. The products are described in the study report. Further reference is made to Exhibit "Z" which is yet another a study report by the same institution. Reference is made to Exhibit "AA" which is a clinical and laboratory study titled *"The Soap Chamber Test- A new method for assessing the irritancy of soaps."* This report, after comparing 18 different soaps, one of which is the plaintiffs soap Dove with its competitors, concludes that during a 4 year period the same brands bought at different times may yield different toxicity scores and soap is a variable mixture. It finds that Ivory soap tested had become milder in the previous two years. Numerous articles, reviews and decisions have been relied upon in this behalf by both sides. Market Research Studies have also been referred to in Exhibit "CC" to the plaint and in particular with reference to the product Lux Rosalia similarly from the market research studies have been conducted for Pears and for Dove. In the case of Lux, the conclusion that sample size of 207, 98% found the soap gentle and mild and moisturizer making skin softer and smoother and did not dry out the skin. Similar reports are found in the case of Pears and Dove.

14. Mr. Tulzapurkar submitted that the entire advertising campaign

promoting 5.5 pH as “perfect” has no basis in fact because scientific data shows there is no perfect pH. There are reports on both sides indicating that 5.5 is not the correct pH of even the defendants’ product. The products were incomparable to the knowledge of the defendants and therefore, the campaign is misleading and denigrating the plaintiffs’ products. Lux and Pears are toilet soaps and the BIS Standards prescribe specifications as set out in the plaint. Dove is a bathing bar also covered by the BIS Standard, whereas BIS has no reference to pH whatsoever. pH is therefore, not required to be disclosed in the product specifications, contents or ingredients that are statutorily required to be declared. Thus, adding to the plaintiffs’ stated case that pH is not a relevant factor at all. Reference is made to page 253 of the rejoinder and the description of “healthy skin”. According to the plaintiffs, their products are toilet soaps, whereas the defendant’s product is soap-free. The indications for use of the defendant’s product SEBAMED is for those who are suffering from skin disease and soap-intolerance. Thus, it is obvious that you cannot compare a soap-free product with a soap. The unjust comparison is deliberately designed to denigrate the plaintiff’s products, which have a very long standing in the market and the plaintiffs have successfully been selling these products for many years. The attempt of the defendant is to break into the plaintiffs’ market, gain a share by assailing the quality of the plaintiffs’ products without any basis. Reference is made to Exhibit ‘S’

which deals with perfect pH for sensitive skin (see page 198/200).

15. The next submission on behalf of the plaintiffs is that the defendant is clearly desirous of discrediting reference to BIS. My attention is invited to Exhibits 'O1' to 'O3' in this respect and the BIS guideline/Rule No.150A, which requires it to be read with Schedule 'S' of the Drugs and Cosmetics Rules, 1945 which require toilet soaps and bathing bars to be described as such at items 19, 24 and 29. The BIS is statutory. There is no reference to pH at all in respect of soap, whereas for shampoo there is a BIS Standard referring to pH. Thus, it is impossible to make a comparison between a soap, a toilet bar on one hand with a specified pH factor. The market for soaps is clearly different. The plaintiff's soaps and the products sought to be assailed by the impugned advertisements meet the industry standards. All of them have a pH of between 7 to 10 and there cannot be a soap with a pH of 5.5. The defendant's product admittedly not being a soap, the comparison is wrong and deliberately so. No toilet soap, it is contended, can have a pH of 5.5 and meet the BIS Standard.

16. Mr. Tulzapurkar submitted that the entire body of law is against comparison of the incomparable. PH is not a determining factor for the product in question and SEBAMED claiming to have pH of 5.5 is also incorrect given the factual analysis that has been referred to by the plaintiff, which indicates the pH of 5.7 and more. There is absolutely

no research and analysis of how much the pH of a soap affects the skin. pH not being a determinant in respect of safety of use of a soap, the comparison on that basis is unacceptable. In fact, the plaintiffs point out that in the affidavit-in-reply in para 9, there is an admission that pH is not the only determining factor for quality. The advertisements do not convey the same version as contained in their affidavit, since it clearly assails the plaintiff's products on the basis of their pH levels. As far as the allegation of suppression of the ASCI decision is concerned, Mr. Tulzapurkar submitted that there is no question of any suppression and the allegations are baseless. Reference is made to the defendant's campaign on social media which is also found to be objectionable. It is pointed out that there are about 2,59,260 followers. All of them are being fed with the message that the plaintiff's products are not safe/ideal and/or do not have the perfect pH, whereas the defendant's does.

17. In this background, while the plaintiffs admit the pH readings of its products that the defendants have sought to convey to the public, the contention that the plaintiff's products are not safe or not perfect or not ideal has not been made out. In effect, it is contended that the meaning of 'ideal', the expression that the defendant has now chosen to adopt and on the basis of which the ad-interim order came to be modified, actually means 'perfect'. Thus, the word 'ideal' also has a synonym which is 'perfect'. Since the words 'ideal' and 'perfect' are

synonymous, it is contended that there is no real change in the campaign and the campaign is being assailed on the same basis as one which is deliberately designed to denigrate the plaintiff's products.

18. It is contended that there is also contravention of Section 29(2)(8) of the Trademarks Act. Incomparable products are being compared by misusing the registered trademarks of the plaintiffs and there is clear violation of Sections 29(8)(a), (b) and (c). Mr. Tulzapurkar submitted that any advertisement which is found to be falling foul of the provisions of Sections 29(8)(a), (b) or (c) is clearly tantamount to infringement of the trademark and hence, on that ground too, the plaintiffs are entitled to relief. It is his contention that it is not sufficient to make a small modification in the campaign and the modification made thus far is of no consequence and the plaintiffs are still entitled to all the reliefs that they seek. As long as there is a reference to pH, there cannot be any justification in continuing the campaign. Mr. Tulzapurkar further submitted that the decisions in the case of *Lakhanpal National Limited v/s. M.R.T.P Commission and Anr* will squarely apply as long as the public is led to believe what the defendant is now propagating in its advertisements. Likewise, the case of *Colgate Palmolive Company and Anr. v/s. Hindustan Unilever Ltd.* will also be applicable and it would justify the grant of the reliefs sought in the present Interim Application. My attention has also been invited to the orders passed on 21st January, 2021 in the plaintiff's

Appeal (L) bearing No.1919 of 2021 and in particular, paragraphs 2, 7, 9, 10 and 11. Likewise in the order passed in the defendant's appeal on 27th January, 2021, reference is made to paragraph 2 in support of the plaintiff's case.

19. Mr. Tulzapurkar then invited my attention to the compilation of documents tendered by the defendant during submissions as also the label of Dove relied upon by the defendant. He submits that the reliance placed by the defendant on the advertising campaign of Dove in the United States is not carried out by the plaintiff at all and there is nothing that makes reference to pH in those advertisements. There is no comparison of Dove based on the pH levels of its rival products, which were also soaps. As far as the TV commercial is concerned, Mr.Tulzapurkar submitted that it pertains to an advertisement of 1992 and bears no relevance to the current campaign. He submits that class disparagement is what the defendant is engaged in and that is not permissible. While you are entitled to puff your product, you cannot run down others products. He submits that the injury to the plaintiff is irreparable but there is no irreparable harm, loss or injury that can be caused to the defendant if the reliefs in the I.A. are granted. He further submitted that the test reports that have been relied upon by the defendants are not at all relevant and the judgment in *HUL v/s. Reckitt Benckiser* of the Delhi High Court(supra), the fact situation is different.

The injunction was granted because the message conveyed was found to be improper as recorded in para 60 of that judgment. He further submits that the word 'perfect' is the same as the word 'ideal'. The change made by the defendants in their advertising campaign makes no material difference. The new advertisement campaign is as bad as the earlier one which is being assailed in the Suit. The overall effect of the campaign is to be gauged from the manner, content and intent and that clearly indicates the defendant's intention to disparage and denigrate the plaintiff's products. The entire campaign as described in Exhibits 'Q1' to 'Q4' in the Plaint, which includes the TV commercials, banners, website posts, social media posts, print advertisements and in particular, those referred to in Exhibits R, S, T and U are all to be enjoined. They all intend to run down the plaintiffs' products by labelling them as inferior. Reference is also made to the case of *Reckitt Benckiser v/s. Hindustan Unilever Limited* and it is submitted that the impact of the advertising campaign as a whole is to be considered and in the instant case, the impact is clearly providing a justifiable cause of action for grant of the restraint order.

20. In support of his submissions, Mr. Tulzapurkar has made extensive reference to the following decisions;

*(1) Gujarat Cooperative Milk Marketing Federation Ltd. v/s. Hindustan Unilever Ltd. and Ors.*¹

¹ 2019 (2) ABR401-Appeal no.340 of 2017 in NMS(L)No.690 of 2017

- (2) *Godrej Consumer Products Limited v/s. Initiative Media Advertising & Ors.*²
- (3) *Gillette India Limited v/s. Reckitt Benckiser (India) Pvt. Ltd.*³
- (4) *Karamchand Appliances Pvt. Ltd. v/s. Sh. Adhikari Brothers and Ors.*⁴
- (5) *Lakhanpal National Limited v/s. M.R.T.P. Commission and Ors.*⁵
- (6) *Colgate Palmolive Company & Anr. v/s. Hindustan Unilever Ltd.*⁶
- (7) *Hindustan Unilever Limited v/s. Gujarat Co-operative Milk Marketing Federation Ltd. and Ors.*⁷
- (8) *Reckitt Benckiser (India) Ltd. v/s. Hindustan Unilever Ltd.*⁸
- (9) *Hindustan Unilever Limited v/s. Reckitt Benckiser India Limited*⁹
- (10) *Reckitt Benckiser (India) Ltd. v/s. Hindustan Uni Lever Ltd.*¹⁰
- (11) *Reckitt & Colman of India Ltd. v/s. Jyothy Laboratories Ltd. & Ors*¹¹

WIPRO SUIT

21. In the WIPRO Suit, submissions have been made by Mr. Sakhardande who has adopted all the arguments made on behalf of the plaintiffs in the HUL suit by Mr. Tulzapurkar. A convenience compilation has been tendered by Mr. Sakhardande who has assailed the suit campaign

² 2012(114) BOMLR2652
³ 2018 SCC OnLine Mad 1126
⁴ 2005(31) PTC1(Del)
⁵ AIR 1989 SC 1692
⁶ 2013 SCC OnLine Del 4986
⁷ MIPR 2017 (3) 50
⁸ 2014 SCC OnLine Cal 6094
⁹ 2014 SCC OnLine Del 490
¹⁰ 2013 SCC OnLine Del 1928
¹¹ 1999 SCC OnLine Cal 155

in this second suit as well, the campaign being identical to the first suit. In the second suit, the soap promoted as Santoor was said to have been pH level equivalent to Rin upon modification of the advertisement as in the first suit, comparison with Rin, “Safe” and “Unsafe” have been deleted in this case as well.

22. Mr. Sakhardande submits that pH is not a relevant criteria to determine the efficacy of a soap. Mr. Sakhardande has assailed the defendants campaign as being a comparison on the basis of unfair determinants which denigrates the market reputation of “Santoor”. He submits that Santoor and SEBAMED were compared only on the basis of pH values although pH value is not mandatory pre-requisite to be measured for toilet soaps. Advertisements are misleading and arbitrarily selects the scientific parameters for comparison. He submits that comparison is unfair and misleading. He submits that it is an infringement of the plaintiffs trademark and such infringement would only be exempt from scrutiny under section 30(1) of the Trademarks Act, 1999, if the comparison was honest and did not seek an unfair advantage and not detrimental to the trademark of “Santoor”. He has submitted that the Santoor and SEBAMED are incomparable. In addition, Mr. Sakhardande has contended that the manufacturers of toilet soaps are required to comply under BIS Act, 2016. He has invited my attention to the relevant extracts of the said Act which

intends to establish National Standards Body for the harmonious development of activities of standardisation, conformity assessment and quality assurance of goods amongst others. He submits that toilet soap is identified under IS 2888-2004. The extract of IS 2888 is produced before me in which my attention has been invited by the learned Senior Counsel to specifications of toilet soap, that it should be a thoroughly saponified, milled soap or homogenized soap or both, either white or coloured, perfumed and compressed in the form of firm smooth cakes and shall possess good cleaning and lathering properties. Mr. Sakhardande has also relied upon the Code for Self-Regulation of Advertisement Content in India to which I have made reference in this order.

23. Mr. Sakhardande has also relied upon the judgments in the case of *Hindustan Unilever Ltd. v/s. Reckitt Benckiser (India Ltd.)*¹² He has also relied upon the fact that the defendant has relied upon a research article on titled 'Sensitive Skin' and some other articles which defines sensitive skin as a "Sensory reaction triggered by contactors and/or environmental factors, usually without a visible clinical manifestation." This he submits is indication of conditions which are not normal and hence require special attention so as may not be suitable for use with such indications. Mr. Sakhardande has also relied upon IS 13498 :1997 for bathing bars which also indicates soaps and other

¹² 2013 SCC OnLine Cal 17896

surface active agents. Bathing bars also contains soap or fatty acids and do not require disclosure of pH of any level. The packing and marking requirements under clause 6 do not contain pH as one of the necessary ingredients to be discloses for marking. Thus, there is substance in the submission on behalf of the plaintiff that pH need not be disclosed statutorily. Voluntarily of course there is no bar in disclosing pH. Admittedly there is no BIS Standard for SEBAMED since it is imported and not manufactured in India, at least till the time IA was heard and in that respect, Mr. Sakhardande submits that comparison of the defendants product with that of the plaintiff's disparages the plaintiffs' product as seen on social media including instagram.

24. Relying upon the guidelines of Drugs and Cosmetics Rules, 1945, Mr. Sakhardande invited my attention to Chapter IV, Part XV(A) and guideline 150-B which provides an application for grant of approval for testing Drugs/Cosmetics. He submits that pH is not one of the aspects that required to be tested. He has also taken me through the guidelines of the Bureau of Indian Standards Act, 2016 and submits that these are the standards that the plaintiffs as Indian manufacturers are required to follow. None of these require the plaintiffs products to disclose its pH value or meet any pH value. He relies upon the definition of saponification as the process of making soap and highlights the fact that for imported cosmetics, the Drugs and

Cosmetics Rules, 1945 provided in Rule no.129-G that no cosmetic shall be imported unless it complies with the specifications prescribed under Schedule S or Schedule Q or any other standards applicable to it.

25. Mr. Sakhardande also highlighted the fact that SEBAMED being a cleansing bar is not regulated in India under Rule 129-G and Schedule S, and hence it does not need to comply with BIS standards or possess those properties. It was targeted towards sensitive skin and recommended that it will be used on medical advice. Essentially SEBAMED also refers to the product backed by scientific evidence of pH values, however, the packaging mentions that it is a product meant for “Normal to Oily skin”. According to Mr. Sakhardande, the defendants have described the product SEBAMED as a “Cleansing bar” on the packaging and that in my view is not material in view of the defendant’s consistent stand that it is a “Cleansing bar”.

26. Mr. Sakhardande relied upon the following judgments;

(1) *Hindustan Unilever Ltd. v/s. Reckitt Benckiser (India) Ltd.*¹³

(2) *Havells India Ltd. v/s. Amritanshu Khaitan & Ors.*¹⁴

(3) *Reckitt Benckiser India Private Limited v/s. Hindustan Unilever Limited*¹⁵

(4) *Reckitt Benckiser Health Care (India) Pvt. v/s. Emami Ltd. & Ors.*¹⁶

¹³ 2013 SCC OnLine Cal 17896

¹⁴ 2015 SCC OnLine Del 8115

¹⁵ 2021 SCC OnLine Del 4896

¹⁶ 2015 SCC OnLine Cal 1873

Submissions on behalf of the Defendant

27. As and by way of a concession and at which the very outset, Mr. Dhond submitted that the modified campaign can continue to be aired during the pendency of the suit and that the original advertising campaign will not now be aired in. This however, was not acceptable to either Mr. Tulzapurkar and Mr. Sakhardande and hence, the submissions on behalf of the defendants proceeded. The applications in both suits are opposed by Mr. Dhond on behalf of the defendants who submits that the case which the plaintiffs in the HUL Suit approached the court and what is now being canvassed were different. Initially the plaintiffs complained of the language used in the campaign alleging that the words used to describe the plaintiffs products are false and that unlike products have been sought to be complained of, alleging malice on behalf of the defendants. Mr. Dhond submits that the plaintiff did not approach the court contending that pH was not a relevant factor at all. On the other hand, it is the defendant's case that pH is significantly relevant and without getting into any hyper technical clarifications on classification, Mr. Dhond admitted that there is no soap in SEBAMED although it is the plaintiffs case that SEBAMED is being imported as a soap. He brought out the distinctions between the categories as toilet soaps, bathing bars and cleansing bars. The plaintiffs' products Pears and Lux he submitted were soaps, whereas Dove was a bathing bar. SEBAMED is a cleansing bar and this

is what the plaintiff has canvassed.

28. Mr. Dhond has tendered a set of photographs of Pears which also describes the product as a bathing bar. Therefore according to Mr. Dhond all these expressions bathing bar / cleansing bar and soap are interchangeable. There is no watertight compartment in which these can be kept. Furthermore, he submitted that although the plaintiff has sought to distance themselves from the advertisement campaign of Unilever PLC it cannot avoid the obvious references to the advertising campaign abroad since Unilever PLC is plaintiff no.2 in the present suit. This he contends puts paid to the plaintiffs attempt to distance itself from the advertising campaign comparing Dove with other competitive products in the United States/U.K. pH refers to concentration of Hydrogen ions in a product, it is indicative of the alkaline or acidic nature of a product. The pH of the human body and the soap must match and it is therefore relevant to refer to pH in relation to use on human skin. Body pH viz. skin pH is normally 5.5. it is actually between 4 to 6 and therefore pH is not irrelevant. Mr. Dhond submits that today the modified ads merely state the facts as they are.

29. According to Mr. Dhond truth is a complete answer to the allegations of the plaintiffs. What the defendants advertising campaign states is the true since the plaintiffs admit the pH value of its products. Once

the plaintiffs admit the pH value of Lux, Dove and Pears and Santoor there is no merit in the contention that the impugned campaign is meant to denigrate or disparage the plaintiffs products. My attention is invited to the averments in the HUL plaint and in the order dated 19th January, 2021 and in particular paragraph 6 and 7 of that order. The plaintiffs case is that pH is not the sole determinative factor but not that it is irrelevant. The pH of the plaintiffs product Dove is a statement of fact which the defendants had carried in its advertisement. Referring to the plaint and the reproduction of the different components of the campaign as reproduced in the plaint, Mr. Dhond submits that the portion "*kiske jitna*" appearing at page no.175 of the plaint has now been replaced with "*kitna*". As far as the contents of page 176 are concerned, the same has deleted entirely and the next frame is represented in page 177. Page 178 continues as it is whereas the next page 179 is deleted entirely. Pages 180 and 181 then continue. The use of the opening screen "*LAST YEAR 8TH JAN*" referring to the campaign of January 2020 Mr. Dhond submits that it has been modified suitably. Mr. Dhond submitted that the modified advertisement as set out in Exhibit "Q3" has not been changed. Mr. Dhond then made reference to the difference in the two campaigns post the ad-interim order and the order of the Appeal Court. In the case of each product of the plaintiff viz. Dove as aforesaid followed by Pears and Lux.

30. Mr. Dhond further submitted that the plaint itself makes various references to pH and it is obvious that pH is a very relevant factor. He has invited my attention to the various averments the plaint in this respect particular in paragraph 57 of the plaint which extensively deals with the aspect of pH levels in the various products. It is evident that throughout paragraph 57 the plaintiffs have focused on the aspect of pH and cannot now seek to contend that pH is not a relevant factor at all. pH is very much relevant to the product in question and is an important factor to be taken into consideration when using skin care products. Mr. Dhond further submitted that in the context of skin and in particular sensitive skin pH of the soap is a relevant criteria and there is a scientific literature to establish that pH of the soap can cause an effect on skin more alkaline the soap the greater the potential to cause allergy. My attention has been drawn to the order of the Division Bench on the aspect of pH and Mr. Dhond submits that there is no material to deny the relevancy of pH in reference to skin care products. While the defendant concedes that pH is not the sole criteria for assessing the quality and safety of a soap. It is definitely an important factor and this cannot be overlooked and this is the reason why the plaint in paragraphs 57 onwards deals extensively with the effect of pH on skin.

31. Mr. Dhond also contended that reference and reliance to the order

passed by ASCI is of no avail and mildness is not synonymous with the aspect of pH. The correctness of referring to pH is evident from the plaint itself and the admissions of the plaintiffs in respect of the pH of each of their products. Mr. Dhond submitted that as observed in the case of *Havells India* (supra) truth is a complete answer and it is for the defendant to decide which of the features of its product are required to be highlighted. The truth is that the pH of SEBAMED is 5.5 that of Dove is 7, Lux and Pears are 10. Santoor which is the product of the plaintiff in the companion suit also reflects a pH of 10 and so does Rin. While SEBAMED he submits, appeals to persons with sensitive skin, others may also buy it but effectively it is targeted those with sensitive skin so as to enable them to reap benefits of the ideal pH of the product.

32. In any event it is contended that the expression “unsafe” has been dropped from campaign so has reference to Rin. Therefore the present version of the advertisement cannot be objected to. Whereas the plaintiff is using glamour to sell its products, the defendant is using science. Mr. Dhond then sought to deal with the judgments cited on behalf of the plaintiffs and proceeded to distinguish these judgments particular reference to decision of the Calcutta High Court in case of *Reckitt & Colman v/s. Jyothy Laboratories* (supra). Mr. Dhond submitted that it is not a comparison of identifiable parameters but a comparison of results and that the comment is on the suitability of a

product and that is different on the other parameters which could be used to compare products. The defendant is not using any tricky language. The case of *Lakhanpal National*(supra) is sought to be distinguished on that basis. He submitted that the facts situation in *Gujarat Marketing Co-operative v/s. Hindustan Unilever* (supra) was very different. The facts do not bear any similarity to the case at hand. Mr. Dhond further submitted that if there is a prima facie case of justification that the defendant has made out, the court ought not to grant any injunction. He further submits that the defendant is entitled to certain amount of hyperbole after having deleted reference to Rin detergent bar and discontinued use of the expressed “not safe”. He submits that this is not a case of a comparison of apples with oranges.

33. Mr. Dhond therefore submitted that no relief ought to be granted to the plaintiffs in the IA and that the modifications made can continued on the understanding that the original advertising campaign will not be aired. Mr. Dhond adopted the aforesaid submissions in the WIPRO Suit as well.

34. Rejoining in support of the plaintiff’s case, Dr. Saraf submitted that when one assesses the suit campaign as a whole and considers the flavour of the story line and its effect, one will realize that the focus of the advertisement is only to attribute negative facts to the plaintiffs products. The defendants endeavour has been to beat down

competition and one takes into account the defendant's intention, they did not make any concessions, they did not voluntarily delete any of the offending portion on the contrary. In the course of hearing of the appeal, the defendants were forced to make further concessions and this Dr. Saraf submits is an admission of malice and disparagement. In particular he reiterates the aspect where the defendant's campaign refers to the previous year's launch of the TVCs by using the words "*ek saal pehle*". The concession made was to delete reference "*ek saal*" in the new advertisement. This is clearly indicative of the malicious intent with which the campaign was initially launched. However, that said even the current version of the advertising campaign is equally disparaging as was the first. The expression of negative connotation is evident. Focus is on the aspect that you are likely to harm your skin by using the plaintiffs products. The focus is not really on the defendants product which is shown to be a better option but premised on the basic thrust of the advertising campaign that the plaintiffs products are not suitable for your skin. According to Dr. Saraf, all the advertisements be it in the TV Series, banners, hoardings, and the websites and as a social media posts are all negative in their reference to the plaintiffs products. The advertising campaign essentially seeks to run down the plaintiffs products. The truth argument also it is contended has no merit since analysis of the documents will show that the claim of the defendants pH of 5.5 is also not correct. My attention is invited to sample

photographs of the various packages of Dove and SEBAMED which is stated to be part of the analytical report at Exhibit 7 to the affidavit in rejoinder of Vijayalakshmy Malkani dated 12th March, 2021 filed on behalf of the plaintiffs.

35. Referring to the convenience compilation filed on behalf of the defendants, Dr. Saraf invited my attention to a report dated 2nd September, 2005 in "*Skin Pharmacology and Physiology*" a Journal apparently issued by the Departments of Dermatology and Allergology of two Universities in Bonn and Munich in Germany made reference to the fact that potentiometric measurements carried out revealed skin pH measures between 4.2 and 5.6. Thus, it is not as if 5.5 is the ideal or perfect or safe pH. The measurements carried out by the Universities clearly provide for a range between 4.2 to 5.6. Dr. Saraf submits that it is seen that the defendant is clearly being manipulative since there is no static value that can be attributed to skin pH. Mr. Sakhardande likewise reiterated his case in the WIPRO Suit.

CONCLUSIONS.

36. The defendant has already filed their written statements in the suit and they have denied the plaintiffs claim. Brief reference is to be made to the written statement to record the basis of the defence as canvassed during the hearing of this IA. It is the defendant's case that the defendant is also a reputed pharmaceutical company marketing his

products in 65 countries. A total income for the year 2019–2020 was INR 33.073 million. Its products command a high reputation and goodwill amongst the medical practitioners, trade and consuming public and their products are sold all over the country and are exported to many foreign countries. Reference is made to several products of regular use including drugs and pharma products. Sebapharma GmbH & Co. KG is renowned German Company and the defendant and its members are widely publicized including thereto official website. Sebapharma has exclusively owned trademark of the defendant registered under Classes 3 and 5. The defendant claims that it has an enviable reputation and goodwill in the market. The defendant's bathing soap SEBAMED is considered the world's leading skin care brand from Germany developed in 1967 when the first commercial soap free cleaning bar with pH value of 5.5 which according to the defendant protects the natural protective layer of skin. SEBAMED claimed to provide comprehensive skin care solution is available in different iterations such as SEBAMED Age Defence, SEBAMED Clear Face and Baby SEBAMED. They are all tested on sensitive skin and not tested on animals.

37. It is the defendant's case that their products have been developed by dermatologist and it does not alter the skin's pH levels. They are free from soap alkali and harsh chemicals are tailored to the needs of

sensitive and problematic skin. It also believed to avoid all ingredients which are known to trigger allergies and irritation. According to the defendant, the suit is misconceived and an abuse of process. It has been initiated by the plaintiff to prevent the defendant from making “legitimate and truthful advertisement” which shows accurate pH levels of plaintiffs and defendants products. The comparison is necessary but plaintiffs are trying to stifle competition and honest criticism.

38. It is contended that the plaintiffs have also advertised products in comparison with its competitors. In these advertisements Dove is compared to other products in an attempt to demonstrate that the others were harsh. Reference was made to pH value of Dove in comparison with that of other products and in a manner such that Dove was milder. These advertisement campaigns have allegedly been suppressed by the plaintiffs. It is the case of the defendant’s that their claim in relation to pH is correct. The defendant’s product has a pH value of 5.5, the pH of the plaintiffs’ products is higher and that of Lux and Pears are equivalent to the pH of Rin whereas the perfect pH or ideal pH level is 5.5.

39. The defendant has contended that its advertisement is truthful and accurate. He states that the facts inasmuch as two or three bathing

soap brands of the plaintiffs have the same pH as that of the plaintiffs' popular detergent Rin. The plaintiffs have also used similar comparison of washing detergent and bathing soaps using pH levels as a reference point in its own advertisement which the plaintiffs have suppressed.

40. The Advertising Standards Council of India ("ASCI") had on 24th August, 2016 concluded that pH cannot be the sole determinant of mildness of the soap. It is contended that the decision of ASCI was in relation to the plaintiffs advertisement for Dove soap bearing the tag line "*Harsh nahi, gentle chuniye*" which displayed forearm-controlled application of litmus paper on soaps. It is therefore contended that the plaintiffs cannot complain about the current campaign by the order passed by the ASCI.

41. It is contended that reliance placed upon the order passed by ASCI is not appropriate and that cannot be used as a precedent in the present set of facts. ASCI had held that the pH cannot be the sole determinant of mildness of the soap. Moreover, ASCI is a self-regulatory voluntary organization and a decision of ASCI cannot set a precedent. In fact it is contended that the plaintiffs are themselves not followed the ASCI directions and continued to advertise their products with reference to pH values using litmus as a reference point. The defendant has

contended that it has a fundamental right to commercial speech under Article 19(1)(a) and cannot be prevented other than by virtue of Article 19(2) of the Constitution. The allegations that the defendant is launched the impugned advertising campaign to belittle the plaintiffs product is denied. The pH level of bathing bars are a relevant factor to enable consumers to choose between products. The allegations that the defendant's advertisement is false, disparaging, denigrating and impermissible in law are denied. The allegation that the defendant's advertisement suggests that the plaintiffs' products are harsh and harmful on the skin are also denied. The defendants have also denied that it has conveyed to the consumer that pH is the sole determinative factor for the quality of soap or that they have suggested that a pH value of greater than 5.5 which is not safe. The defendant has denied that their advertisements are misleading or disparaging. The defendant has also denied the valuation of damages claimed by the plaintiff. According to the defendant, all the advertisements are permissible in law.

42. In the instant case, there is no doubt that the plaintiff's products are sought to be compared with the defendants. It is not merely references the look of the soap or its colour, shape or size but direct reference is made to the plaintiff's products 'Lux' 'Pears' and 'Dove'. A comparison of Lux, Pears and Dove is made with the defendant's product SEBAMED. The question is whether the contents of the

advertisement disparages the plaintiff's products and the aspect of disparagement needs to be considered since the identity of the plaintiff's products allegedly being disparaged is not in doubt and hence I am required to render a finding on that aspect.

43. I have heard extensive arguments of both sides in these two IAs. Let me deal with some of the law cited in the first instance. In *Gujarat Co-operative Milk Marketing Federation v/s. Hindustan Unilever Ltd. & Ors.* (Appeal no.240/2017) (*supra*) a Division Bench of this court considered a challenge to grant of injunction by the single Judge restraining the appellant from communicating to the public or otherwise publishing two TVCs. The court held that the appellant could make false claims to puff their product but could not air advertisements disparaging the products of competitors. In that case the single Judge found the TVCs were disparaging frozen desserts marketed by the plaintiff. The finding of the learned single Judge was upheld. The court relied upon the various other pronouncements including in the case of *Godrej Consumer Products Limited v/s. Initiative Media Advertising & Anr.* (*supra*) in which the Single Judge held that advertisement campaigns on the visual media has an immediate impact on the viewers and possibly on the purchaser's mind particularly when a well-known cine star is endorsing it. The defendant had not denied that its campaign points out the deleterious effects of a particular dental powder. The balance of convenience was

found to be in favour of the plaintiff. It was found that in not granting injunction would cause irreparable injury to the plaintiff. The court also made reference to *Reckitt Benckiser (India) Ltd. v/s. Hindustan Lever Limited*¹⁷, wherein the plaintiff had sue to restrain the defendant from promoting its soap “LIFEBUOY” allegedly disparaging the plaintiff’s soap “DETTOL” albeit without naming “DETTOL” in the advertisement. An orange colour soap similar to that of Dettol was shown. The court found that the indications in the photograph to the orange colour soap bar, the contours of which the overall shape of the soap all found to be indicative of the soap being Dettol. Notwithstanding the fact that the brand name, logo or the sword device did not appear in the orange soap bar. The court found that there is no misgivings that the bar of soap that was being referred to in the advertisement was the plaintiff’s product. The court found that there was no doubt that there is any ordinary antiseptic soap with the combination of colour, shape, design and packaging.

44. In *Annamalayar Agencies v/s. VVS & Sons Pvt. Ltd. & Ors.*¹⁸, the Madras High Court considered the advertisement pertaining to the plaintiff’s product “Parachute Coconut Oil” marketed in a blue bottle and the defendant’s product “VVD Gold Coconut Oil” is in a green bottle. The model while holding both these bottles disapprovingly puts

¹⁷ 2008(38) PTC 139

¹⁸ 2008 (38) PTC 37 (Mad)

down the blue bottle holding up the green bottle. The Single Judge held that the message conveyed by the advertisement that the unnamed blue bottle does not contain pure and natural coconut oil but the defendant's product did. The green bottle was found to be disparaging the plaintiffs' product.

45. In *Reckitt & Colman of India Ltd. v/s. M.P. Ramchandran and Anr.*¹⁹, the Calcutta High Court considered the advertisement of blue bottle which was sought to be disparaged by the defendant's product "Ujala". The court observed that in a suit of the nature at hand, one has to look whether the advertisement puffed the product of the advertiser or in the garb of doing so contended that the competitors product was inferior. The court found that the defendant's product also being blue, the advertisement proceeded to depict any inferior product. The court found that it was difficult to proceed on the basis that the defendant was not referring to blue bottle in the advertisement. It can be deduced from the Amul judgment is the fact that if the basic ingredients of disparagement are to be found, the injunction can be granted and that is what we need to ascertain in the present case. In *Godrej Consumer Products (supra)*, the court had also observed that the intent of the commercial, manner of the commercial, its storyline and the messages sought to be conveyed must also be kept in mind when deciding the question of disparagement. The court found that

¹⁹ 1999(19) PTC 741

the manner of the commercial should not amount to denigrating the product of the competitor, if it did, then it amounted to disparagement. Those observations are made in the case of two competing mosquito repellent vaporizers.

46. In *Gillete India* (supra) a Division Bench of the Calcutta High Court while considering appeals against an order and decree passed by a single Judge found that the suit dealt with manufacturers of competitive depilatories. The product in fact were different inasmuch as Gillete products was a 'Razor' whereas the respondents was a 'Cream'. The grievance before a single Judge was the contention that the defendant denigrated and disparaged the product "Veet" manufactured by the respondent. The court considered numerous decisions of the Delhi High Court, various judicial pronouncements including that of the Supreme Court in *Tata Press Ltd. v/s. Mahanagar Telephone Nigam Limited* holding that advertisements and such a commercial speech has two facets. The public at large, the court found is benefited by the information made available in the advertisement. That in a democratic economy free flow of commercial information is indispensable and the economic system in a democracy would be handicapped without there being freedom of commercial speech. The extent of commercial speech may have deeper interest in the advertisement than the businessman who is behind the publication. For example, it was observed that as and by way of an advertisement

giving information regarding a lifesaving drug may have more importance to general public than to the advertiser. The Supreme Court held commercial speech to be a part of the freedom of speech under Article 19(1)(a) of the Constitution. In the present case, the defendant has taken up a plea that it had only published the truth about the plaintiffs' products. The defendant denies any element of slander in the advertisement campaign.

47. In my view there is only one aspect that has to be considered in the facts of the present case viz. whether by making reference to the plaintiff's products, the suit campaign is disparaging or denigrating the plaintiffs' soaps. It must be borne in mind that the defendant claims that its product SEBAMED is not a soap. Thus, there is an admission on a crucial one inasmuch as the defendant's product SEBAMED is not a soap whereas all of the plaintiff's products referred to in the suit campaign are soaps. Quite apart from that fact in some cases, bathing bars, cleansing bars are referred to a soaps and vice versa, it is also to be borne in mind that the test to be applied is how an ordinary member of the public would respond to the advertisement in India while advertisers seek to attract viewers using catchy phrases, visuals, freedom of commercial speech can be subjected to reasonable restrictions. The right to freedom of speech (including commercial speech) offers no protection against defamation, slander, libel, denigration or disparagement. In *Reckitt & Colman of India v/s.*

M.P.Ramchadran (supra) the Calcutta High Court set out the following criteria;

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

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

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

(iv) He however, cannot, while saying 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.

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

48. The court also found that in a disparagement suit, the court would have to examine whether the object of the advertisement is to highlight the benefits of the products of the advertiser in comparison to those of others or to denigrate the products of others, which would amount to

defamation. Considering the balance of convenience, the court would have to weigh the competing interests of the applicant seeking the injunction and the party opposing injunction. The impact of social media was also considered. Observing that watching television and surfing the internet are part of the daily routine in every household and advertisements have a great impact on consumers, the court also found that while the novelty of advertisement may attract the potential buyers, derogatory references to goods and services on others may also leave a negative impression. The court inter alia observed whether or not the contents of the advertisement is true or not would be adjudicated upon trial and the disputes regarding acidity levels or alkalinity levels of the products cannot be decided at an interlocutory stage.

49. In the present case, I do not find the need to delve into in depth examination of the pH values of the plaintiff's soap since they appear to have been admitted. The question is now to consider whether in the face of plaintiffs having admitted pH values of Lux, Dove and Pears, whether campaign continues to be disparaging, denigrating the plaintiffs' products. That brings us to the relevance of pH in the instant case on whether the defendant's products can be said to be actually better and safer for human skin, based on its pH value of 5.5. On this aspect, material placed before the court does not appear to establish the defendant's case of a an exact 5.5 pH. If that is so, would it be correct

to compare the rival products on the basis of pH value alone?

50. If the suit campaign merely made reference to the apparent higher pH in general without reference to specific brands, the complexion of the suit campaign would be different. It is the nature of the commercial and in the manner in which the advertisement has been created as part of the defendant's exercise of freedom of commercial speech that has to be considered. In *Karamchand Appliances Pvt. Ltd.* (supra), the court considered Black's Law Dictionary meaning of the expressions "*disparagement and disparagement of goods*". Those relevant extracts of definitions can be usefully reproduced.

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.

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."

51. The court observed that whether or not goods of a trader or manufacturer are disparaged would depend upon the facts of each case and there cannot be a cut and dried formula to be applied generally. The court should be conscious that the disparagement may

be brazen, clear and direct but could also to be clever, mischievous or covert. The court should examine whether or not the rival parties advertisement detracts or discredits the reputation of another's products. The court referred to a large number of cases including *Reckitt & Colman of India v/s. M.P. Ramchandran & Anr.* (supra) [1999 (19) PTC 741] and they found merit in the case inter alia holding that while comparative advertising is permissible it should not disparage or denigrate the products of the competitor.

52. In *Lakhanpal National Limited* (supra), the Supreme Court considered the question of an unfair trade practice under the Monopolies and Restrictive Trade Practices Act, 1969. That case pertained to batteries known as "Novino" and the Court observed that the key would be to examine whether there are false or misleading statements made and the impact of such representations on the common man and whether it could cause a common man to lead to or draw a conclusion. That exercise could also be undertaken in the present case.

53. In *Colgate Palmolive Company* (supra), the Division Bench of the Delhi High Court discussed the law on disparagement. Both Mr. Tulzapurkar and Mr. Dhond have referred to relied upon different portions. On behalf of the plaintiffs, my attention is invited to paragraph 28 which deals with the decision of the Chancery Division in the case of *De Beers Abrasive Products Ltd. v/s. International*

*General Electric Co. of New York Ltd.*²⁰ wherein the court considered the fact of false advertising and observed that the law permits any trader to puff his own goods even though puffing involves denigration of rival goods. However, if the advertisement says that *“the goods of one manufacturer are better than that of the other because the others product is absolute rubbish”* the statement is actionable. On the other hand, if the statement is to the effect that the goods in question are the best in the world, it would not be actionable. The Supreme Court found that as long as claims made in an advertisement are only puffery, it would not justify interference and if a party chooses to use a hyperbole which may not be description of goods, the ordinary persons would take it *“with a large pinch of salt.”*

54. Yet in another case of *Hindustan Unilever Limited v/s. Gujarat Co-operative Milk Marketing Federation Ltd.* (Division Bench) (supra), this court held that generic disparagement of a rival product without specifically identifying or pin pointing rival product is equally objectionable. This case pertains to the Frozen Dessert v/s. Ice Cream controversy. Useful reference can also be made to an extract from the decision of the Madras High Court in *Annamalayar Agencies* (supra) which is reproduced below for ease of reference;

“ (1) A manufacturer of a disparaged product which though not identified by name can complain of and seek to injunct such disparagement.

²⁰ 1975 (2) ALL ER 599

(2) Generic disparagement of a rival product without specifically identifying or pinpointing the rival product is equally objectionable.

(3) Advertisement campaign on visual media has an immediate impact on the viewers and possible purchasers' mind particularly a well-known cinema star is endorsing it.

(4) There must be a dividing line between statements that are actionable and those which are not.

(5) When a claim of superiority over a rival product is made and until the same is proved by a panel of experts, an order of interim nature should operate against those advertisements.

(6) Advertiser has a right, to boast of its technological superiority in comparison with a product of a competitor, however while doing so, he cannot disparage the goods of the competitor.

(7) If the Defendants highlight its better future while comparing its product with that of the Plaintiff in an advertisement, no possible objection can be raised thereto.

(8) Courts will injunct an advertiser from publishing an article if the dominant purpose is to injure the reputation of the Plaintiff.

(9) The factors to be kept in mind to decide the question of disparagement are (1) intent of the commercial (2) manner of the commercial (3) story line of the commercial, and (4) the message sought to be conveyed by the commercial.

10) The degree of disparagement must be such that it would tantamount to or almost tantamount to defamation.

(11) An advertiser can say that his product is better than that of his rival, but he cannot say that the rival's product is inferior to his product."

55. Of particular relevance to the present case is the observation of the learned Single Judge in paragraph 23 which is reproduced below for ease of reference;

"23. Any campaign to educate the members of the public by placing before them the true and correct facts/ingredients used in a product should always be welcomed. However, no manufacturer can place misleading information before the consumers qua the product of his rivals and thereby disparage/discredit/belittle such product including influencing the consumer not to buy the same in the garb of educating and/or bringing the correct facts before the members of the public, as is done in the present case by Defendant No.1. Apart from educating the consumers qua the difference in products by mentioning the correct facts and following the legal route, action can also be taken against the manufacturers of products, if they are found violating Section 53 of the FSSA, 2006 as alleged by the Defendant No.1. The aforesaid excuse /reason given by Defendant No.1 therefore lacks justification and is rejected."

56. Both sides have placed reliance upon the dictionary meaning of "perfect" v/s. "ideal". On behalf of the plaintiffs it is contended that they are one and the same. On behalf of defendant, it is contended that they are different since "perfect" has now been given up for the use of the word "ideal". To my mind, this is an indication that apparently there is

no justification the defendant has provided for describing its product which is admittedly not a Soap “ideal” for human skin in comparison with the plaintiffs’ soaps.

57. On the aspect of trade mark, Calcutta High Court has in the case of *Reckitt Benckiser (India) Ltd. v/s. Hindustan Unilever Ltd. [2014 SCC OnLine Cal 6094]* (supra) observed that suits between two companies were objecting advertisement by each other. There was an attempt to denigrate the product of the other and that the Trade Marks Act prohibits one registered mark taking unfair advantage of another mark holder by any advertisement detrimental to its distinctive character and reputation. The defendant has however sought to distinguish the judgment in its application of the facts in the present case. The Division Bench having considered the decision of single Judge observed that there is nothing on law to permit a serious comparison by a trader of his product with the product of another and that comparison should not be more than a “puff”.

58. In *Reckitt & Colman of India Ltd. v/s. Jyothy Laboratories Ltd. & Ors.* (supra), the Division Bench of Calcutta High Court observed on the aspect of balance of convenience that the offending advertisement if continued, which cause damages to reputation and goodwill of the other, such that it would be irreparable loss and impossible of quantification. On the other hand, the defendant’s claim on

constitutional right of freedom of speech cannot be unrestricted. In that case, however, I find that they were only asking for postponement of the advertisement of the product in a particular way till the interlocutory application was disposed. The order of injunction came to be vacated and the appeal court restored the order specially since the injunction sought was only disposing the advertisement in a particular way till the interlocutory application was disposed. In the present case we are at the stage of interim application itself and I find that Mr. Dhond has on behalf of the defendant sought to distinguish this judgment on facts.

59. In *Reckitt Benckiser (India) Ltd. v/s. Hindustan Uni Lever Ltd.* (supra), (2013) SCC Online Del 1928, a single Judge of the Delhi High Court was dealing with test reports of Lifebuoy and Dettol soaps and observed that the television commercial should be construed and tested from the perspective of an ordinary person of average intelligence and user of the product and therefore technicalities in the reports establishing the efficiency of the two products would not suffice and that advertisers would have to tread much more carefully when creating comparative advertisements for television.

60. In *Hindustan Unilever Limited v/s. Reckitt Benckiser India Limited*, [2014 SCC OnLine Del 490] (supra), the Division Bench of the Delhi High Court observed that the arguments of the petitioner therein on the basis of test reports was of little relevance. The depiction in the

case of Reckitt’s soap described as “ordinary antiseptic soap” is bad for the skin. On the other hand, the plaintiff produced certain Exhibits to show that other oval shaped, orange coloured and green wrapper packaged soaps exist, it made no attempt to correlate the shapes and colour with specific products nor the defendant’s witness to do so and the plaintiff could not complain of being targeted by the impugned advertisement. In the instant case, this aspect will not arise since there is clearly identification of the plaintiff’s products in the advertisement itself.

61. Mr. Dhond has relied upon the following judgments;

(1) *Havells India Ltd. & Anr. v/s. Amritanshu Khaitan & Ors.*²¹

(2) *Horlicks Ltd. & Anr. v/s. Heinz India Private Limited*²²

(3) *Horlicks Ltd. & Anr. v/s. Heinz India Pvt. Ltd.*²³

(4) *Dabur India Ltd. v/s. M/s. Colortek Meghalaya Pvt. Ltd.*²⁴

(5) *Dabur India Ltd. v/s. M/s. Colortek Meghalaya Pvt. Ltd.*²⁵

(6) *Puro Wellness Pvt. Ltd. v/s. Tata Chemicals Ltd.*²⁶

(7) *Skol Breweries Limited v/s. Fortune Alcobrew Pvt. Limited and Ors.*²⁷

62. Apart from the judgments Mr. Dhond on behalf of the defendants has

²¹ 2015 SCC OnLine Del 8115

²² CS(COMM)808/2017 (dt.17/12/2018)

²³ FAO(OS)(COMM)309/2018 (DT.15/3/2019)

²⁴ 2009 SCC OnLine Del 3940

²⁵ 2010 SCC OnLine Del 391

²⁶ 2019 (178) DRJ 130(DB)

²⁷ 2012 Vol.114(4) Bom. L.R. 2313

relied upon, my attention is also invited to several online articles some of which are follows;

“Impact of Water Exposure and Temperature Changes on Skin Barrier Function.”

In a convenience compilation, further articles titled below have been arrayed as;

- “1) Evaluation of pH of bathing soaps and shampoos for skin and hair care;*
- 2) The effect of detergents on skin pH and its consequences;*
- 3) Cleansing of sensitive skin; with determination of the pH of the skin following use of soap and a soap substitute;*
- 4) Dermatologically controlled in-use test of SEBAMED soap free washing bar in a daily care unit;*
- 5) Skin pH and Cutaneous Microflora;*
- 6) The pH of the skin surface and its impact on the barrier function;*
- 7) Skin pH : From basic science to basic skin care;*
- 8) The concept of the Acid Mantle of the skin : Its relevance for the choice of skin cleansers;*
- 9) The pH of commercially available rinse-off products in Sri Lanka and their effect on skin pH;*
- 10) Effect of pH Changes in a specific detergent Multicomponent Emulsion on the water content of stratum corneum; and*

11) Syndets in the treatment of Atopic Eczema.”

63. Lastly, reliance is placed on the registration certificate under the Drugs and Cosmetics Rules, 1945, for the purposes of import of cosmetics by the defendant and the registration certificate issued to the defendant's principal M/s. Sebapharma GmbH & Co.KG, dated 3rd September, 2019. In my view, for the purposes of the present IA, it may not be appropriate to delve into the detailed scientific studies some of which are conflicting in nature and evaluation of these must be left to the trial of the suit. That having been said in an order dated 21st January, 2021, the Division Bench while disposing Commercial Appeal (L) no.1919 of 2021 observed that the only controversy before the court that was use of the words “ideal” and “not ideal” in the suit campaign. The court observed thus;

“Prima facie, at this ad-interim stage, it is fairly clear to our mind that pH factor of a toilet or bathing soap is an important and relevant aspect and it is quite legitimate to make it a talking point for recommending one's product to the purchasing public. The Respondent has relied on literature available in public domain in that behalf. Indian Journal of Dermatology has published an article under the title ‘Evaluation of pH of Bathing Soaps and Shampoos for Skin and Hair Care’. The article makes a point in its extract as a background fact that normal healthy skin has potential of hydrogen (pH) range of 5.4–5.9 and a normal bacterial flora, and use of

a soap with high pH causes an increase in skin pH, which in turn causes an increase in dehydrative effect, irritability and alteration in the bacterial flora. It describes in its extract of results that majority of soaps have a pH within the range of 9-10, whilst majority of shampoos have a pH within the range of 6-7. The article further goes on to state that the use of skin cleansing agents with a pH of about 5.5 may be of relevance in prevention and treatment of certain skin diseases, which are caused due to increase in dehydrative effect, irritability and propionibacterial count. There is also another scientific article under the title 'The Effect of Detergents on Skin pH and Its Consequences'. Even this article claims that the normal pH range of human skin is said to be between 5.4 and 5.9 and that skin surface pH increases upon regular use of a conventional soap and decreases again after change to an acidic cleanser of pH 5.5 and vice versa. Having regard to this and the other material produced by the Respondent in its short reply, submitted for an ad interim hearing before the learned Single Judge, it is safe to conclude at least at this threshold prima facie stage that the position taken by the Respondent in its advertisements is in keeping with the scientific opinion and may be said to be an important piece of information for the purchasing public. There is, thus, nothing wrong, at least this much could be said at this threshold stage, in the Respondent comparing the pH of the two products and claiming its product to be ideal for sensitive skin."

64. The Division Bench also observed that there is a scientific basis for contending that the appellants products are not ideal for sensitive skin. However, we are now at the interim stage at the disposal of the IA and it is not just the two articles that were placed before the Division Bench that have to be taken into consideration, large number of articles and reviews, including of some persons sponsored by the plaintiff have been pressed into service.

65. The Delhi High Court has in the case of *Havells India Ltd. & Anr. v/s. Amritanshu Khaitan & Ors. (supra)*, construed comparative advertising and observed that a certain amount of disparagement is implicit and that failure to point out a competitor's advantages is not necessarily dishonest. Competitors may compare but cannot mislead. Reliance is also placed on the decision of the English Court in *Barclays Bank Plc v s. RBS Advanta*²⁸. The court eventually observed that, "*it was open to an advertiser to highlight a special feature/ characteristic of its product which sets it apart from its competitors and to make a comparison as long as it is true.*" Whereas Mr. Dhond laid emphasis on this aspect, nothing before this court suggests that the claim of the defendant should have pH of 5.5 is true. That can be established only at the trial.

66. In *Horlicks Ltd. (supra)*, the impugned advertisement was one

²⁸ (1996) R.P.C. 307

promoting a competitor “Complan”. The advertisement was modified to some extent. It provided a visual comparison of the protein content. In that case, the two products were actually competing with each other. In the present case, the defendant’s product is not a Soap but a “Cleansing bar” and meant to use for sensitive skin and those with soap intolerance. While the defendant has relied upon the judgment in *Horlicks (supra)* that has in turn relied upon the Delhi High Court decision in *Havells India Ltd. [2015 SCC OnLine Del 8115] (supra)* and has set out, in its opinion, that comparative advertisement is legal based on the Advertising Standards Council of India Code.

67. Chapter IV of that Code is relevant for our purposes and is reproduced below;

“CHAPTER IV

To ensure that advertisements observe fairness in competition such that the consumer’s need to be informed on choice in the marketplace and the Canons of generally accepted competitive behavior 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 interests 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 comparisons 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 it is compared.

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

68. In paragraph 28 of *Havells* (supra), the court held that comparative advertising can be resorted to with regard to like products and can be allowed provided the following conditions are met;

(i) goods or services meeting the same needs or intended for the same purpose;

(ii) one or more material, relevant, verifiable and representative features (which may include price); and

(iii) products with the same designation of origin (where applicable).

There are numerous other decisions that have been cited for the purposes of the IA many of which are not relevant. The High Court then observed that competitors can compare but cannot mislead.

Misleading advertising is also been considered as defined under Article

2(2) of the European Union Council Directive 84/450 to mean *“any advertising which is in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its, deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.”*

69. I am inclined to hold that given the defendant’s declaration and admission that its product SEBAMED is not a soap the comparison with the plaintiffs’ soap is not appropriate. These are not products which meet the same end or intended for the same purpose as admitted by the defendant itself. The modification of the advertisement deleting reference to Rin makes no difference. The modified campaign can be continues to compare the soaps with a cleansing bar which does not contain soap. If the defendant had contended that its product did not contain soap and all soaps in general are not suitable for sensitive skin but its own product SEBAMED was, it was a different matter altogether but viewing the campaign as a whole, one sees that it is not case where the defendant had significantly puffed its own product SEBAMED which is admittedly recommended for sensitive skin and subject to the condition of obtaining medical advice.

70. Mr. Dhond had also submitted that the plaintiffs have themselves launched an overseas campaign in the past comparing Dove Beauty

Bar with other products viz. Ivory and Alpha Keri, Natural Care Soap and Camay and also Jergens Mild and Palmolive, Cuticura and Neutrogena. These campaigns are admittedly with comparable products but Dove did not claim to be in an exclusive category from the other soaps used in the comparative advertisement. All were soaps. Mr. Dhond also submitted that in case of Pears, it is shown as a “bathing bar” and not a “soap”. Elsewhere on website of the plaintiff it is shown as a “hand soap”. Relying upon the decision of the Division Bench in the Commercial Appeal (L) no.1919 of 2021, Mr. Dhond had submitted that there is no case for granting an injunction in the present set of circumstances because the advertising campaign has modified and the defendant would continue that campaign as modified pending the hearing of the suit. The defendants will also not make reference to “*ek saal pehle*” alluding to the original campaign. Thus, Mr. Dhond submitted that if the campaign is modified it will meet the ends of justice. I am unable to agree.

71. I find that the comparison in the campaign is clearly amongst the incomparable. The Indian Journal of Dermatology referred to by the Division Bench and as canvassed by Mr. Dhond, provides for a normal healthy skin which has a pH range of 5.4 to 5.9. It refers to the fact that use of soap with high pH which would cause an increase in skin pH irritability and alteration in bacterial flora. The majority of soaps and shampoos do not disclose their pH but the effect remain statutorily

which is not liable to be disclosed. It is evident from the material placed before the court by Mr. Sakhardande, the learned Senior Counsel, appearing on behalf of the plaintiff in the companion suit. In the introduction in this very Article of September October 2014, the authors have recorded that use of skin cleansing agents with the pH of about 5.5 may be of relevance in the prevention and treatment of skin diseases. It is pertaining to a note on the defendant's product SEBAMED that it is not marketed as a soap and indeed it is a soap free. It proclaimed declaration of a pH of 5.5 is a fact that is yet to be proved. pH is not a selling point for any toilet soap. All toilet soaps are thus found to be having a higher pH. The studies are consistent on this aspect and indeed the study recorded by the Indian Journal of Dermatology (supra) did find that majority of the samples of soap commonly used by the population having pH of between 9.01 and 11. Only two samples had pH corresponding to that of a skin pH. The difference is attributed probably due to greater accuracy of the pH meter used in the study when compared to pH paper. The conclusion is that soaps and shampoos have commonly used a pH outside the range of normal skin and hair pH values by use. On recommending a soap to patients specially those who have sensitive skin and acne prone skin, due consideration is given to the pH factor and it is suggested that manufacturers may give a thought to pH of soaps and shampoos manufactured by them so that their products will be more skin and

hair friendly. The fact that skin pH is generally found to be between 5.4 and 5.9 is seen in other reports as well but all of these referred to samples taken abroad including in Canada and elsewhere overseas in different conditions. None of these studies relied upon in the course of hearing are studies carried out locally in India.

72. An article supporting the use of Soap Free Washing Bars by the Department of Dermatology *Horst-Schmitt Kliniken Wesbaden, Germany*, refers to SEBAMED as a soap-free washing bar. In India it is referred to as a Cleansing bar. Be that as it may, the entire body of research that has been placed before the court are all indicative of the fact that SEBAMED is for sensitive skin for persons who are reactive to soap and furthermore the use of SEBAMED is advised under medical supervision.

73. Another review article by Saba M. Ali and Gil Yosipovitch records skin pH varying between 4 to 6. The defendant's product has been clearly demarcated for restricted use on sensitive skin and subject to medical advice. It is admittedly soap-free. It is not produced by using the saponification process which has been highlighted by Mr. Sakhardande. The process for production of SEBAMED is not saponification as in soaps. In these circumstances, I thought it fit to consider the descriptions on the package of SEBAMED. It is described thus;

CLEANSING BAR

For normal to oily skin

Soap-free
Safeguards the skin with vitamins
and moisturizing amino acids

The declaration of the side of the package reads as follows;

“Soap and alkali-free seabamed Cleansing Bar gently cleanses deep into the pores. An effective moisturizing complex, containing essential skin-related amino acids, vitamins and lecithin, promotes the moisturize retaining capacity of your skin. The pH value of 5.5 maintains the balance of the acid mantle’s hydro-lipid system and its protective barrier function against damaging environmental influences. **If you have a skin disease or soap intolerance, consult your doctor to use this product as a therapy supportive skin care.**” (Emphasis supplied)

The above label indicates that even if you have a skin disease or suffer from soap intolerance, you must consult a doctor prior to using the bar. This is an indication that the bar may not be “Safe” or “Ideal” as claimed the in the campaign and medical advice prior to use is recommended.

74. The report by the Bonn & Munich University records that skin pH is affected by a great number of endogenous factors example being skin moisturizer, sweat, sebum, anatomic site, genetic pre-disposition and age. That apart other factors like use of detergents, application of cosmetic products, dressings as well as tropical antibiotics may influence skin pH. Skin was reported to be acidic by nature. That was determined by Heuss in 1892 and numerous studies have confirmed

this observation. The report also shows that the overall evaluation of the publications which generally recognized the fact that surface pH value of human skin based on the forearm of a healthy adult white male is around 5.4 to 5.9. We are not in the instant case concerned with the human skin of the nature that the said reviewers tested the products concerned on. The neutral point it is clearly shown is 7 and the maximum values of acidic and alkaline ranges are 0 to 14. Thus, on a balance, if a neutral position is taken, the pH value appears to be 7. Furthermore, there are numerous external factors which are said to affect skin surface pH one of the most important one being skin cleansing. pH may rise for a few hours after cleansing the skin with an alkaline soap. pH could reach 10.5 and 11. If synthetic detergents treated at the same pH as skin and even tap water, would lead to a rise in the skin surface pH probably for a shorter period of time. Furthermore, the temporary pH changes are limited to uppermost layers of the skin. All in all, I do not see how the version of the defendants that 5.5 is the ideal pH for the human skin can be used to compare SEBAMED a soap-free product used under medical advice for treatment of sensitive skin with soaps available off the shelf and usable generally.

75. Notwithstanding the unavoidable references that I have made to some reviews and data canvassed by both sides. I am of the view that we

are concerned with ascertaining whether or not suit campaign disparages or denigrates the products of the plaintiffs, reference to opinions of experts and scientists on skin pH, soap pH, cleansing bar pH need not be gone into. Courts are not equipped with the wherewithal for analyzing and deciding on the basis of scientific data at this interim stage. The fate of the IA is to be decided on the basis of comparisons made in the suit campaign viewed from the point of view of a common man, a consumer of ordinary disposition and average intelligence.

76. Thus claiming to be a distinctive product, I am of the view that the defendant's product is not comparable to soaps and in this light, when we consider the suit campaign I find that it is not an inadvertent or incidental comparison. The comparison is with specific products of a plaintiff whose popularity has not been questioned. The product of the plaintiff in the second suit being "Santoor" is sought to be presented as being inferior and not ideal and not substitute for sensitive skin. The defendant has adopted common arguments of both the plaintiffs. Thus, the limited scope of these IA as to ascertain whether the suit campaign is tends to denigrate or disparage the plaintiffs product. This is not a case where the parties have sought to disparage each other's products which are direct competitors. There have been several instances such as the 'Cola wars' where rival competitors had mounted campaigns promoting competitive products, both Colas.

77. In the instant case, all these cases cited before me, the comparisons were mainly between competitive products. The element of competition in the facts of the present case is limited inasmuch as considering the selling price of these products. It is admitted that the defendant's product is launching at a premium price, approximately @ Rs.100/-. The plaintiff's products are cheaper, they are produced locally. SEBAMED is imported from Germany registered under the Drugs and Cosmetics Rules, 1945. Considering the overall nature of the advertisements, there is a clear attempt to disparage the plaintiff's products, initially by comparing it with Rin which is a detergent, the impression then created was that bathing with any of the soaps of the plaintiff in these two suits was equivalent to bathing bar with Rin. Thus, creating an impression in the mind of the common man that the plaintiff's soaps are to be avoided unless they wish to bathe with a detergent. This since has been modified the campaign as it was launched clearly assailed the plaintiff's products as "unsafe". The plaintiff has contended that they have reputation to protect their marks which are valuable and they have been marketed for many years. Comparison of their product with a detergent also required by the plaintiff was clearly in a disparaging that is has been sought to be cured by making modifications deleting reference to Rin and deleting certain portions of advertisement referring to "safe/unsafe" replacing with "ideal" "not ideal". But even the current campaign describing the

SEBAMED is alluding to the plaintiff's soaps as being "not ideal". In fact if SEBAMED is not a soap, then all soaps in the market are sought to be treated as not ideal.

78. Alternatively it could imply that all soaps other than the plaintiffs are better than the plaintiffs. Such a comparison is acceptable however it ignores one important factor and that is whether or not they were comparable. In this behalf, the guidelines provided by ASCI in Chapter IV clearly set out that the advertisement containing comparison with other manufacturers are factual, accurate and capable of substantiation. There should be no likelihood of consumer being misled. The advertisement should not unfairly denigrate or discredit other products directly or by implication which in the present case the defendant has clearly done. To my mind the final changes in the advertisements made at over time by virtue of the during the pendency of this interim application make no difference to the substantial case of the plaintiff seeks to oppose the campaign as a whole. The campaign convey the same message "Do not use the plaintiffs soaps but use SEBAMED instead because it is "ideal". According to the defendant and apparently soaps are not suitable for sensitive skin. Whether or not the soap is suitable will be known by one who uses the soap and that irritation will also be known only upon using the soap. These are aspects which clearly indicate that SEBAMED not being a soap, being

reportedly alkali free, claims that it is ideal for use on sensitive skin. Once that fact is admitted as it undoubtedly has been in view of the admission that it is soap-free, there is no real contest on the aspect that this comparison was and continues to be an unreasonable one.

79. I am of the view that the suit campaign is certainly disparaging and denigrating the plaintiffs' products considering the manner in which the advertisement has been created. That part it appears to be in breach of the Code of self-regulation issued by ASCI. Television commercials would have immense impact on the minds of the consumer. Hoardings websites may only be viewed for seconds. In fact as the common person passes by a hoarding she/he may not even read the entire hoarding. So also the website and banners may not be read its entirety but a television commercial is a more engaging form of communication. It is common knowledge that commercials are inserted at the beginning, during or just after popular television broadcasts be it cricket or 'soap' operas. The viewer is more likely to be directly engaged in watching the commercial from start to finish while awaiting the broadcast content to resume.

80. The parties have provided copies of the TVCs. References are specifically made to the qualities of the milk like whiteness of Dove, the transparency of Pears, Celebrity usage of Lux through these advertisements. I am of the view that the attempt to disparage these

products is not merely in the storyboard but also considering the intonation of the voice overs of the persons featured in the TVCs. There is a clear unmistakable underlying message “*Do not use the plaintiffs’ products since they are not “ideal” but use the defendant instead.*” The advertising does not convey the fact that several reviews relied upon by the defendant themselves have disclosed that pH of most soaps is between 9.01 to 11. The defendant’s product appears to be marketed as an alternative to soap itself. Thus every form of soap is sought to be ruled out for use on sensitive skin. If that would be the true advertisement of the suit campaign, there would have been no occasion of pick and choose individual products of the plaintiffs in the two suits.

81. It is for the court to sit in judgment as to the defendants use of the commercial speech and as we have noticed the freedom of commercial speech is not uncontrolled or unrestricted. Thus, when one focuses on the TVCs in particular and the manner of description of the plaintiffs products in comparison with the defendant’s the intonation of the pictured presenters plays an important part and in the facts of the case it is clearly disparaging the plaintiffs products. It is not a bonafide scientific comparison. The suit campaign seeks to compare pH values of incomparable products and undoubtedly seeks to attribute to the plaintiffs products inferiority of quality and lack of reduced beneficial results or to complete lack of benefits of using the plaintiffs products.

82. I am not for the purpose of the present interim application inclined to focus on the material sought to be placed comparing pH values. Some of these reports may have been prepared under different circumstances for example the participants in the tests are not necessarily in this country. Some reports have made differentiate between soaps with persons of a different gender and age. The use of water of the appropriate temperature and how cold or lukewarm water may be preferred to hot water are other aspects that the varying reports have referred to. These are not the aspects that the court is required to consider at this stage at all and hence on first principles I find that the comparison sought to be made and the message said to be conveyed in these advertisements are between products which cannot be compared, thus offering no justification. The suit campaign on the basis of products that are incomparable is clearly intended to disparage the plaintiffs products. There also appears to be prima facie the case of infringement, however, that is not something that can be gone into at this interim stage. For the purposes of the IA, the reliefs sought herein, I am of the view that the comparison between incomparable products justifies grant of reliefs. The facts situation in various other judgments cited before me were of comparable apart from being violative of ASCI guidelines, I have no doubt in my mind that advertisements in suit campaign unfairly seeks to discredit products of the plaintiffs and therefore the plaintiffs deserves protection.

83. It is also pertinent to note that on behalf of the plaintiffs, Dr. Saraf has sought to distinguish the comparative advertisement in the case of *Colgate v/s. Hindustan Unilever, Havells India, Horlicks* which did not directly show the product of the plaintiff. It would not be appropriate to consider why in those cases injunctions were not granted and why some were granted since the facts differ considerably. In my view, the plaintiffs in these two suits have succeeded in making a strong prima facie case. The balance of convenience is clearly favouring the plaintiffs and it is evident from the fact that the defendant is a new entrant in the market and that the plaintiffs' products have been around for a long time and sales figures have sought to establish this. The defendant also recognizes the plaintiffs reputation in the market and popularity of the plaintiffs' products and thus, the impugned campaign targeting successful and popular products of the plaintiffs in my view is likely to cause irreparable loss and damage to the plaintiffs reputation and products thus, inviting an appropriate orders pending the hearing and final disposal of the suit. Having come to the conclusion that the impugned campaign is denigrating and disparaging the plaintiffs' products in my view the impugned campaign also amounts to infringement of the plaintiffs' trade marks in the manner contemplated in Section 29(8)(c) and therefore the plaintiffs are entitled to appropriate relief.

84. The IAs are therefore disposed as follows;

IA (L) No.808 of 2021 in Commercial IP Suit (L)no.805 of 2021

(i) *The defendants its parent subsidiaries, group companies, affiliated entities and directors, servants and agents including the advertising agencies engaged are restrained by an order of injunction from in any manner broadcasting or telecasting and or otherwise communicating to the public the impugned campaign including without limitation the hoardings, television commercials, banners, including on social media howsoever described, including via the internet, the suit campaign and from disparaging or denigrating the plaintiffs' products Lux, Dove, Pears and Rin, pending the hearing and final disposal of the suit.*

(ii) *Pending the hearing and final disposal of the suit, the defendants its subsidiaries, servants and agents are directed to deliver up for destruction the master copies and other copies used for broadcasting communicating to the public the impugned campaign including without limitation the television commercials, banners, including on social media howsoever described, through the means of the internet, disparaging or denigrating the plaintiffs' products Lux, Dove, Pears and Rin, and confirm discontinuation of use of the impugned suit campaign on oath within a period of four weeks from today.*

(iii) IA is also allowed in terms of prayer clause (c) which reads thus;

"That pending hearing and final disposal of the present suit,

the defendant, its parent company, group companies, subsidiaries, directors, servants, officers, employees, representatives, agents, advertising agencies and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions be restrained by an order and injunction of this Court from in any manner whatsoever infringing the plaintiff no.1's LUX Marks bearing registration Nos.87117, 1199650 and 2920182 and/or the plaintiff no.1's DOVE Marks bearing registration Nos.247934, 602155 and 1843035 and/or the plaintiff No.2's PEARS Mark bearing registration no.129552 and/or the Plaintiff No.1's RIN Marks bearing registration numbers 214094, 1065244 either by visual representation, depiction or by spoken words or in any other manner whatsoever or by usage of marks similar thereto and/or depictions of shapes and/or contours identical or similar to those of the Plaintiff's products being subject matter of the aforementioned registrations and from depicting or reproducing or substantially reproducing the same in the Impugned Campaign including without limitation the Impugned TVCs, Impugned Banners, Impugned Warnings, Impugned Hoardings of the newspaper ads or any material comprising all or any part of the above or any other

content.”

IA(L) No.1091 of 2021 in Commercial IP Suit (L) No.1087 of 2021

(i) Pending the hearing and disposal of the suit, defendants and their servants and agents are restrained from publishing broadcasting, telecasting the impugned advertisement in relation to the plaintiffs’ products “Santoor” in a platform including via TVCs, websites, electric media, newsprint and howsoever described.

(ii) IA is allowed in terms of prayer clause A-1, which reads thus;

“Pending disposal of the suit, pass an order of temporary injunction restraining the defendants, their directors, proprietors, partners, subsidiaries, affiliates, franchisees, officers, employees, agents and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under them, from in any manner using directly or indirectly the trademark Santoor or any other mark deceptively similar to the plaintiffs’ trademark, Santoor, amounting to the infringement of the plaintiffs’ trademark.”

At this stage, Mr. Rajashekhar for the defendant seeks stay of the operation of this order. Accordingly, operation of the orders in both the above IAs shall remain stayed for four weeks.

(A. K. MENON, J.)