2022/DHC/005793

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

Reserved on: 3rd November, 2022
Date of Pronouncement: 22nd December, 2022

\+ **CS (COMM) 304/2022 and I.A. 7312/2022, 17882/2022**

ZYDUS WELLNESS PRODUCTS LTD. ..... Plaintiff

Through: Mr. Chander Lall, Sr. Advocate with Mr. Sagar Chandra, Ms. Shubhie Wahi, Ms. Sanya Kapoor, Ms. Ananya Chug & Ms. Ankita Seth, Advocates (M:9711239881).

versus

DABUR INDIA LIMITED ..... Defendant

Through: Mr. Rajiv Nayar, Sr. Advocate with Mr. Anirudh Bhakru, Mr. Prabhu Tandon, Mr. Saurabh Seth and Ms. Kripa Pandit, Advocates. (M:9810013453)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This pronouncement has been done through hybrid mode.

I.A. 7312/2022(u/O XXXIX R 1 AND 2 CPC)

Background Facts

2. The present suit for permanent injunction restraining disparagement, misrepresentation, unfair competition, dilution, rendition of accounts, delivery up, damages, *etc* has been filed by the Plaintiff- Zydus Wellness Products Ltd. against the Defendant- Dabur India Limited. The suit has been filed seeking restraint against two commercials / video advertisements released by the Defendant for the promotion of its product 'DABUR GLUCOPLUS-C ORANGE'.

3. The Plaintiff avers that it is one of the leading companies engaged in manufacturing and marketing of wide range of consumer products. In the year 2019, the Plaintiff merged with Heinz India Pvt. Ltd. and by the scheme of amalgamation became the owner of trade marks and all intellectual property in the brands such as Nycil, Glucon-D, Complan, *etc.* The Plaintiff through its predecessor has several trade mark registrations in relation to the mark 'GLUCON-D' which are valid and subsisting as on date. It is the case of the Plaintiff that 'GLUCON-D' glucose powder was first launched in 1933 by the Plaintiff's predecessor-in-title. As per the plaint, 'GLUCON-D' is the leader in glucose powder segment in India and it had a market share of more than 58% for the year 2021. 'GLUCON-D' is sold in four flavours- regular, tangy orange, nimbu pani, and mango punch.

4. It is the case of the Plaintiff that one of the most popular variants of 'GLUCON-D' range of products of the Plaintiff is 'GLUCON-D TANGY ORANGE' which has been marketed and sold by the Plaintiff through its predecessor for decades. 'GLUCON-D TANGY ORANGE' is stated to be the market leader in the orange glucose powder drink category with market share of 72% for the period between April, 2021 till March, 2022, and 74% for the period between January, 2022 till March, 2022 in the orange glucose powder category.

5. The Plaintiff's product bearing the mark 'GLUCON-D' are claimed to have been a runaway success due to excellent promotion, high recall endorsement activities coupled with superior quality. The sales of the Plaintiff's 'GLUCON-D' product has been to the tune of Rs. 535 crores in the year 2018. The sales figures for 'GLUCON-D TANGY ORANGE'

variant for the corresponding period is Rs. 231 crores. The Plaintiff is stated to have expanded Rs. 24 crores in the sales promotion of the 'GLUCON-D' products.

6. On 27th April, 2022, the Plaintiff came across a television commercial of the Defendant in Bengali language promoting its product 'DABUR GLUCOPLUS-C ORANGE' on a Bengali news channel *(hereinafter 'impugned TVC')*. On 29th April, 2022, the Plaintiff came across a longer version of the impugned TVC which was also aired by the Defendant on the same Bengali news channel. The longer version of the impugned TVC has two extra frames. The grievance of the Plaintiff in the present suit is that the impugned TVC denigrates and disparages all orange glucose powder drinks. In particular, the TVC disparages the Plaintiff's product 'GLUCON-D TANGY ORANGE' which is the market leader in orange glucose powder drinks. The Plaintiff claims that the impugned TVC gives the impression that all the orange glucose powder drinks are entirely inefficacious in providing energy and only the Defendant's product is capable of providing energy.

Theme of the Impugned TVC

7. The storyboard of the impugned TVC launched by the Defendant as set out in the plaint is extracted below:

Frame/Visual Depiction	Dialogue & Description
	The Impugned TVC starts with a setting of Sports Day at a school.
	We see 2 mothers talking to each other. Dabur Mother is holding a bottle of 'DABUR GLUCOPLUS-C Orange' & is mixing that drink. The other Mother is holding a glass containing orange glucose powder drink & is mixing it. Thereafter she says, "*100m race is an easy thing for my daughter*."
	In response, the Dabur Mother says *"But every race is an easy thing for my daughter."*

	We see the Dabur Mother mixing the 'DABUR GLUCOPLUS-C Orange' in the bottle.
	Both their respective daughters come running towards their mothers.
	Both the mothers offer orange glucose powder drinks they have prepared to their daughters.

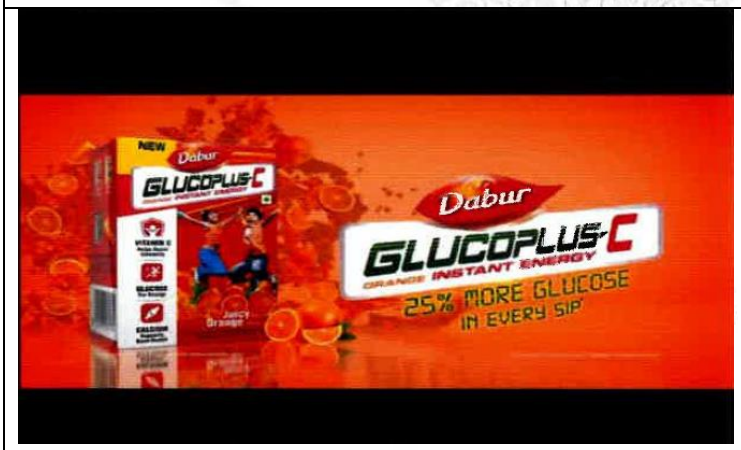
	We see the Dabur Girl having 'DABUR GLUCOPLUS-C Orange' from the bottle.
 	Even before the race is about to begin, the girl who has consumed the other orange glucose powder drink is shown wiping her face with a wrist band and an impression is sought to be conveyed that inspite consuming 'GLUCON-D Tangy Orange' of the Plaintiff the girl is still tired. While on the other hand, the Dabur Girl who had consumed the Defendant's 'DABUR GLUCOPLUS-C Orange' seems determined and being prepared for the race.

 	The race starts. Both the girls are seen running.
	Dabur Mother is happy seeing the race.
	Both the kids are running. The Dabur Girl is about to overtake the other girl.

	Dabur Girl overtakes the other girl.
	Dabur Girl is now leading the race.
 	We see the Mothers' expression change from happy to sad.
	Dabur Girl wins the race.

	Dabur Mom is happy and clapping.
	The other girl looks extremely exhausted.
	Seeing this, the mother is shown to be disheartened and asks the Dabur Mother that *"Both of them drank the same orange glucose then how did your daughter win so easily?"*
	Dabur Mother shows the Defendant's 'DABUR GLUCOPLUS-C Orange' and says *"It's not the same. My daughter drinks Dabur Gluco Plus-C"*

	The mother is seen listening to Dabur Mother.
	While the comparison is being drawn, the Dabur Mother says in the background *"This has 25% more glucose than your glucose powder, which gives more instant energy + 2 times micronutrients"*. The words *'25% more Glucose in every Sip'* alongwith the Energy Bar and *'2X More Nutrients'* and the Defendant's 'DABUR GLUCOPLUS-C Orange' are also depicted on the screen.
	In the ending scene, Dabur Mother shows the Defendant's "DABUR GLUCOPLUS-C Orange' and says *"Drink Dabur Gluco Plus-C everyday!"*.

 **[only present in the longer version of the impugned TVC]**	Dabur Mother, shows the Defendant's 'DABUR GLUCOPLUS-C Orange' and says, *"That's why my daughter does everything easily, she excels in sports, dance and singing, she is good in studies as well.*" This scene shows three versions of the Dabur Girl winning medals in three activities.
 **[only present in the longer version of the impugned TVC]**	The ending scene shows the Defendant's 'DABUR GLUCOPLUS-C Orange' with Dabur Mother saying in the background *"Mix and Drink Dabur Gluco Plus-C and get instant energy"*.

8. As is evident from the above extracted frames, the storyboard consists of two school girls participating in a 100 metres race. Mothers of both the girls give them orange drinks for consumption in preparation for the race. Mothers of both the girls are confident that their respective daughters will

win the race. The girl who consumes the Defendant's product 'DABUR GLUCOPLUS-C ORANGE' is shown as more energetic and the other girl who consumes an orange colour drink is shown as losing energy and ultimately loses the race. Mother of the girl who loses the race expresses disappointment to the mother of the winning girl who consumed the Defendant's product and asks- *'Both of them drank the same orange glucose then how did your daughter win so easily'*. In reply to which the mother of the winning girl shows a pack of the Defendant's product and says- *'It's not the same. My daughter drinks Dabur Gluco Plus-C'*. Then the features of the Defendant's product 'DABUR GLUCOPLUS-C ORANGE' are shown on the screen along with the final frame which reads:

"25% more glucose in every sip".

Submissions on behalf of the Plaintiff

9. Mr. Chander Lall, ld. Sr. Counsel appearing for the Plaintiff at the outset submits that in the impugned commercial, the product of the Plaintiff is not represented. However, he submits that the Plaintiff's product has 74% market share in relation to orange glucose energy drinks. Thus, this would be a case where the Plaintiff is entitled to make out a case of generic disparagement of the entire product category. Moreover, in view of the Plaintiff's substantial market share, the Plaintiff would be directly impacted by the commercial of the Defendant.

10. Ld. Senior Counsel submits that the Plaintiff's product has 40% glucose and the Defendant's product has 50.4% glucose. Thus, the Defendant's product admittedly has 25% more glucose. However, the same would not mean that the additional glucose content translates into higher

energy. In fact, he relies upon the contents of Plaintiff's and the Defendant's products, as also the nutritional information as depicted thereon to argue that the energy per 100 gms of Defendant's product is 365 kcal. On the other hand, energy per 100 gms of Plaintiff's product is 368 kcal. Thus, the energy being claimed to be higher in the Defendant's product is itself false.

11. He further relies upon the reply filed by the Defendant to the Plaintiff's application under Order XXXIX Rules 1 and 2 CPC to argue that even in the reply the Defendant does not claim that higher glucose content gives higher energy. The Defendant's case is that it only gives higher *'instant energy'*. Thus, the Defendant is attempting to draw up a distinction between *'higher energy'* and *'higher instant energy'*, which may not be deciphered by the consumers who view the commercial / advertisement of the Defendant.

12. It is his further submission that the commercial, in fact, depicts a weaker child consuming the Plaintiff's product who is not likely to win the race and hence, plays on the emotions of mothers in a negative manner against the Plaintiff's product. It undervalues the Plaintiff's product and even though the Defendant may claim that the overall impression is hyperbolic in nature, if it is a serious misrepresentation of fact, the same can be injuncted by a court of law. Broadly, the objections of the Plaintiff *qua* the impugned commercial are summarized as under:

i. The girl consuming the Plaintiff's product is very tired and shows lack of confidence.

ii. The disappointed look and expressions of the mother shows that the Plaintiff's product is not of the best quality.

iii. It is portrayed that the girl consuming the Defendant's product

wins the race solely because of the Defendant's product.

iv. 25% more glucose does not translate to more energy. Thus, to show that the girl consuming the Defendant's product wins the race is a misrepresentation.

13. It is the submission of the ld. Sr. Counsel that all these elements in the impugned TVC would show that the commercial is not mere puffery or hyperbole, but is an effort to show the Plaintiff's product in a bad light and lower its quality. The message is that the girl consuming the Plaintiff's product loses to the other girl because of the higher energy in the Defendant's products which is false.

14. He further submits that there is, in fact, no independent testing been done to support the representations being made in the impugned TVC. The only test report is one which claims to conduct evaluation of instant energy boosting potential of Defendant's product by estimation of ATP levels in muscle cells *in vitro*. There has been no testing done on humans to show that the Defendant's product is better. Ld. Sr. Counsel highlights the following discrepancies in the test report on record:

i. The report is an internal report of Dabur's own laboratory.

ii. The exact date of generation of the test report is not clear.

iii. The samples tested were of June, 2019 and it could have been the case that the samples were expired when they were tested.

iv. Typographical errors exist in the report. Certain errors in the test report are pointed out in the ATP levels which are mentioned in the description portion. The same do not correlate with the figures of ATP levels depicted in the table in the very same report.

v. Actual figures are not given as the values are claimed to represent 'mean of triplicates', meaning thereby the actual ATP values are not shown.

15. Moreover, it is also not clear as to whether the representation that more glucose leads to more energy would be correct inasmuch as Dabur's product ingredients have remained the same since 2019. However, with the same ingredients in the new packaging, Dabur claims that there is more energy value.

16. The legal propositions that Mr. Lall, ld. Sr. counsel urges before the Court are:

a. Generic disparagement would not be permissible even if the product is not identified.

b. Puffery is permitted in advertising, however, serious misrepresentation of nutritional value under the garb of puffery cannot be done.

c. When there is a comparison of serious facts between two products, such comparison would not be permissible if there is misrepresentation of the facts or disparagement of the competitor's products.

d. Even if the facts are truthful, the advertisement cannot disparage the competitor's product.

17. To buttress his arguments, ld. Sr. Counsel has placed reliance upon:

i. The judgment in ***Lakhanpal National v. MRTP Commission AIR 1989 SC 1692*** to argue that by merely using cheeky language, even though the truth may be conveyed, the advertisement can be disparaging if the same misleads the

consumer. If there is falsity in substance, the mere fact that the Defendant may be scrupulously accurate would not escape from the rigours of injunction.

ii. The judgment of the Supreme Court in ***Hindustan Lever Ltd. v. Colgate Palmolive (I) Ltd. and Another (1998) 1 SCC 720*** to argue that tall claims are not permissible in advertising till the truthfulness of the claims is established. An advertisement can become actionable even if the reference is indirect and there is an allusion or a hint to competitor's product.

iii. The judgement of the Division Bench of this Court in ***Pepsi Co. v. Hindustan Coca Cola Ltd. 2003 (27) PTC 305 Del*** where the expression *'bacchon wala drink'* was used to connote and denote 'Pepsi' in a manner so as to denigrate the said product against 'Thums Up'.

iv. The judgment of the ld. Division Bench of this Court in ***Dabur India Ltd. v .M/s Colortek Meghalaya Pvt. Ltd. (2010)167 DLT 278 (DB)*** to argue that false advertisement is not permitted under the garb of free speech, there has to be factual basis for the assertion. It is the submission of the ld. Counsel that the ld. Division Bench in ***Dabur India Ltd. v .M/s Colortek Meghalaya Pvt. Ltd. ILR (2010) 4 Del. 489*** has emphasized the necessity of truthfulness in advertising while holding that the tests laid down in ***Reckitt & Colman of India Ltd. v. M.P. Ramchandran 1999 (19) PTC 741*** *qua* making untrue assertions, about his good being best in the world/better than his competitor, not to be good law.

v. The judgment of the ld. Division Bench in ***Colgate Palmolive***

Company and Anr. v. Hindustan Unilever Ltd. (2014) 206 DLT 329 (DB) to argue that advertisements are not to be read like testamentary documents. It has to be seen by the court whether there is a serious misrepresentation of facts.

vi. The judgment of the ld. Division Bench of the Bombay High Court in ***Gujarat Cooperative Milk v. Hindustan Unilever Limited (2018) 2019 (2) ABR 401*** where even a truthful representation was held to be disparaging of Kwality Wall's 'frozen dessert' products.

vii. The judgment of the ld. Division Bench of the Madras High Court in ***Gillette India Limited v. Reckitt Benckiser (India) Private Limited Manu/TN/1910/2018*** to argue that even though there can be puffery, if the competitor's products are shows in bad light, the line is crossed.

viii. The judgment of the ld. Division Bench of this Court in ***Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited, [FAO (OS) (COMM) 149/2021, decided on dated 26th September, 2022]*** to argue that competitor's product cannot be shown to be inferior. The Court further held that in case of comparative advertising, the latitude available to an advertiser is much less as against puffery or hyperbole of the advertiser in relation to one's own product.

18. Finally, reliance is placed upon the requirement of truthful and honest representation in advertising as stipulated in clauses 1.1, 1.2 & 1.5 in the ***Code for Self-Regulation of Advertising Content in India*** published by the ***Advertisement Standard Council of India (ASCI).***

Submissions on behalf of the Defendant

19. Mr. Rajiv Nayar, ld. Senior Counsel appearing on behalf of the Defendant submits that a competitor cannot be hypersensitive and ought to be able to tolerate a certain amount of exaggeration or puffery in television commercials. In the impugned TVC, there is no reference to any other competing product, hence there cannot be any denigration. He submits that the Plaintiff's drink is not even remotely referred to in the impugned TVC, unlike in other cases, where the products are sometimes even referred to by blurring and other indicators. The depiction of a girl consuming an ordinary drink and losing the race can best be described as puffery and nothing more.

20. It is submitted that it is the Defendant's case that glucose leads to instant energy. This fact is admitted by the Plaintiff on its own product's packaging at several places where the Plaintiff does a comparison with an ordinary drink and shows that glucose results in instant energy. If the fact that the glucose leads to instant energy stands admitted, then the depiction of the same in a puffed manner cannot be termed as disparaging or denigration. When the Plaintiff itself can claim that the glucose leads to instant energy in comparison with an ordinary drink, injunction being sought against the Defendant would be contrary to the Plaintiff's own stand on its own packaging.

21. It is submitted by Mr. Nayar, ld. Sr. Counsel, that two representations have been made by the Defendants in the impugned TVC which are relating to:

- 25% more glucose and
- 2X micronutrients.

On both the representations made by the Defendant, the ld. Sr. counsel contends that the same are verifiable and hence the Defendant ought not to be injuncted.

22. It is submitted by Mr. Nayar, ld. Sr. Counsel that the Defendant is entitled to amplify the special features of its own product. In the impugned TVC, the Defendant is merely showing its own superiority and highlighting its product's features. It is his submission that the Plaintiff is being hypersensitive with an intention to crush competition and further retain its monopoly. The following factors are then highlighted:

i. The ingredients of the two packaging clearly shows that glucose is 50.4% in Defendant's product and 40% in Plaintiff's product. This would translate to 25% more instant energy, which is depicted in the commercial. Thus, the Defendant is entitled to say that it gives 25% more instant energy in every sip as glucose give instant energy.

ii. The representation made by the Plaintiff itself on its packaging on three occasions is that glucose gives instant energy. Thus, the Plaintiff cannot deny the fact that more glucose leads to more energy. The print advertisement of the Plaintiff which proudly proclaims *'instant energy k liye'* also supports this contention.

iii. Insofar as the micronutrients- calcium and phosphorus are concerned, even on these two nutritional ingredients, the numbers would show that the representation made is factually correct.

23. Considering that the Plaintiff's product is not named, the only allegation can be of generic disparagement. Even on that aspect, if the comparison is truthful, there can be no injunction. Reliance is placed by ld. Sr. Counsel on the following judgments:

i. The judgment of the ld. Division Bench of this Court in ***Dabur India Ltd. v. M/s Colortek Meghalaya Pvt. Ltd. & Ors***. ***ILR (2010) IV DELHI 489*** to argue that even if the Plaintiff, which is the market leader, is targeted, the Defendant is entitled to do so, as it promotes and protects commercial speech. Further, unless and until there is a direct reference, disparagement cannot be alleged.

ii. The judgment of a ld. Single judge of this Court in ***Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd. 2006 (36) PTC 307 (Del.)*** to argue that so long as there is no endeavour to rubbish the Plaintiff's product, injunction ought not to be granted.

iii. The judgment of a ld. Single judge of this Court in ***Havells India Ltd. and Ors. v. Amritanshu Khaitan and Ors. MIPR 2015(1) 0295*** wherein a table had been advertised by the Defendant comparing the `lumens' characteristic of competing products. The statement made in the advertisement was *'switch to the brightest LEDs'*. It is submitted by the ld. Sr. Counsel that this judgment is an authority on the proposition that even if one of the features is highlighted which is unfavorable to the competitor, it would not be misleading. Since glucose is synonymous to instant energy, the statement *'25% more glucose in every sip'* would be factually correct and would not

even be puffery, let alone denigration.

iv. The judgment of a ld. Single judge of this Court in ***Marico Limited v. Adani Wilmar Ltd. MIPR 2013 (2)2037*** to argue that so long as the advertisement is by and large truthful, the commercial should be permitted to be aired and advertisers should be given enough room to play around in the grey area. It is only if the facts are totally unsubstantiated and have no basis in reason and logic that the courts should intervene.

24. In conclusion, Mr. Nayar, ld. Sr. Counsel submits that the comparative advertisement has to be acceptable so long as there is no disparagement or denigration. The market forces would have to decide and the Plaintiff cannot stop other parties from entering the market. The Defendant has less than 10% of the market share whereas the Plaintiff has 74% of the market share and under the garb of this suit cannot seek to perpetuate a monopoly.

25. Mr. Anirudh Bakhru, ld. Counsel, in addition, submits that if a puffed-up statement is made, it in itself is a statement of exaggeration, since it is not a factual representation at all, the consumer cannot be held to have been misrepresented. Ld. counsel, cites the ***Colgate Palmolive Company v. Hindustan Unilever Ltd. (2014) 206 DLT 329 (DB)*** judgment of the Division Bench of this Court to argue this point. As far as the increased energy value of the Defendant's product on the new packaging while the ingredients having remained the same since 2019, is concerned, it is submitted by ld. Counsel that certain ingredients which were originally not being considered for the purpose of calculation of energy value have now been permitted by the FSSAI to be considered leading to increase in the

energy value of the Defendant's product. Mr. Bakhru, ld. Counsel further highlights one fact that in the translation of the impugned TVC from Bengali to English, the word 'more' has been added. It is his submission that the word 'more' is missing in the original Bengali advertisement and the translation is slightly erroneous.

Analysis

26. The grievance of the Plaintiff in the present suit is two-fold. One, that the comparison being made in the impugned TVC is that of the Defendant's product 'DABUR GLUCOPLUS-C ORANGE' with the Plaintiff's product 'GLUCON-D TANGY ORANGE'. Secondly, that the comparison in the impugned TVC is misleading, misrepresentative and also disparaging of all orange glucose powder drinks including the Plaintiff's product 'GLUCON-D TANGY ORANGE' which is the market leader. It is the case of the Plaintiff that it would be directly impacted by the commercial of the Defendant. The submissions on behalf of the Plaintiff can be summarised as under:

- That the Plaintiff's product 'GLUCON-D TANGY ORANGE' holds 74% of market share in orange glucose powder category. Thus, though the Plaintiff's product is not depicted in the impugned TVC, any viewer / consumer would immediately connect the comparison, as being made, with the Plaintiff's 'GLUCON-D TANGY ORANGE' product.
- That the expressions of various actors, including mothers and the two girls participating in the race, show that the product of the Plaintiff is not effective in comparison with the Defendant's product. The expression of the mother shows disappointment resulting in

denigration of the Plaintiff's product.

- That the expression *"25% more glucose in every sip*" is also a comparison with the Plaintiff's product as it is only the glucose content of the Plaintiff's product which is closest to the said claim.
- That though there is more glucose in Defendant's product, the same does not result in higher energy and, thus, the statement is misleading. 25% more glucose does not translate to 25% more energy. There is no factual basis for the said claim and the lab report on record backing the claim is full of errors and is inconclusive.
- Puffery is permitted in advertising, however, serious misrepresentation of nutritional value under the garb of puffery cannot be done.

27. On the other hand, the submissions on behalf of the Defendant are as under:

- That the Defendant has not made any reference to the Plaintiff's product in the impugned TVC.
- No viewer would infer that there is a comparison in the commercial of the Defendant. The Defendant is at best portraying its own product and puffing it up. At best the commercial is a hyperbole or puffery.
- Commercials and advertisements being creative in nature, the freedom of the creator and creativity cannot be stifled.
- Competitor cannot be hypersensitive with an intention to crush competition and ought to be able to tolerate a certain amount of exaggeration or puffery in television commercials.
- The impugned TVC is factually correct and is not misleading. By the

Plaintiff's own admission, the Defendant's product has 25% more glucose than the Plaintiff's product. This would translate into 25% more instant energy, which is depicted in the commercial.

28. In the light of the submissions made by both the parties the following question is to be determined by this Court:

Whether the impugned TVC is identifiable with the Plaintiff's product and if so, whether it is disparaging?

29. The entire plaint proceeds on the presumption that the intention and the effect of the impugned commercial is to denigrate the Plaintiff's product 'GLUCON-D TANGY ORANGE' and, by implication, that the said product is inefficacious. The relevant paragraphs of the plaint are as under:

> *"18. It is submitted that the said Impugned TVCs make claims which are not only false and misleading but are in fact not even material, relevant, verifiable and/or representative.* ***It is further submitted that a bare viewing of the Impugned TVCs makes it clear that the Defendant is specifically trying to denigrate the Plaintiff's product 'GLUCON-D Tangy Orange' by implication that 'GLUCON-D Tangy Orange' is absolutely inefficacious.*** *It is submitted that though the Impugned TVCs are made on near-identical lines, there is a difference in the last two frames of the Impugned TVCs. It is submitted that for the reference of this Hon'ble Court, the storyboards of the Impugned TVCs have been reproduced in Paragraph No. 28 and 30 respectively of the Plaint and have also been filed along with the documents.*
>
> *19. In this regard, it is submitted that the Defendant's Impugned TVCs, seeks to give the impression that all orange glucose powder drinks, a category in which the Plaintiff is the market*

> *leader, are entirely inefficacious in providing energy and only the Defendant's product 'DABUR GLUCOPLUS-C Orange' is capable of providing energy..."*

30. Some of the notable features of the Defendant's impugned TVC relevant for the purpose of the present analysis are:

a) There is no direct or indirect visual reference or allusion to any other orange glucose powder drink in the impugned TVC.

b) In the second frame of the commercial itself, the depiction of the generic orange coloured drink is in a glass. There is no packaging, no mark, no logo, no container which is shown in the entire advertisement except for the Defendant's.

c) In fact, the portrayal of the other orange drink being stirred by the mother showing the generic orange drink is so fleeting that it is not even visible on a single view of the impugned TVC.

31. The highlight of the impugned TVC is the mixing of the Defendant's 'DABUR GLUCOPLUS-C ORANGE' drink by one of the mothers. The entire focus is on the Defendant's product. At that stage of the commercial, a viewer cannot decipher that the commercial is, in fact, a comparative advertisement. The impugned commercial seems like an exaggerated focused commercial on 'DABUR GLUCOPLUS-C ORANGE' drink. Moreover, there is no still or image even highlighting or showing the girl consuming the generic orange drink as is the case where the girl consuming the Defendant's product, which is prominently shown. The comparison of the two girls is surely visible in the whole commercial but it is not clear to the viewer as to what has been consumed by the second girl who loses the race. The disappointment of the mother of the girl losing the race is obvious

and is highlighted in the commercial. It is only towards the end of the commercial it becomes apparent that both the girls had consumed orange glucose when one of the mothers asks- *"Both of them drank the same orange glucose then how did your daughter win so easily?"* To this, the other mother replies- *"It's not the same. My daughter drinks Dabur Gluco Plus-C"*. The caption *"25% more glucose in every sip"* appears at the end of the impugned TVC.

32. The first question that needs to be considered by the Court is whether this commercial can be identified as a comparison with the Plaintiff's 'GLUCON-D TANGY ORANGE' product. In its reply to the injunction application, the Defendant has admitted that the generic orange glucose powder drink depicted in the impugned TVC was 'GLUCON-D TANGY ORANGE' manufactured by the Plaintiff and it is on that basis that the impugned TVC was prepared. It is, however, clear from viewing of the commercial that there is no direct or indirect comparison between the Plaintiff's and the Defendant's product visible to the viewer. The Defendant has, however, used the Plaintiff's product as a standard for comparison and for preparing the commercial in question. Would these facts be sufficient to classify the impugned commercial as generic disparagement is the question before the Court or would it be necessary for the viewer / consumer to identify the Plaintiff's product or at least the product category by viewing of the commercial.

33. The Court has repeatedly viewed the impugned TVC and has also borne in mind the plea of the Plaintiff that it is a market leader in this category. In the opinion of this Court, the viewing of a television commercial is not to be considered on the benchmark of repeated views, as

is done by the Court during hearings and otherwise. Commercials are viewed for short fleeting periods and the impact has to be seen as a whole in the short time period in which it is viewed. Would an ordinary viewer i.e., purchaser of an orange glucose powder drink consider the impugned commercial as a comparative disparaging advertisement or not would be the question? In order to answer this question, it is not sufficient that the Plaintiff has a very high market share in the product category or that the Plaintiff's product has been used as a benchmark for comparison and preparing the commercial.

34. The term 'comparative advertising' has been defined in Article 2 of the Advertising Directive of the EEC as *"any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor"*. This definition has been affirmed and relied upon by a ld. Single Judge of this Court in ***Havells India Ltd. v. Amritanshu Khaitan MIPR 2015(1) 0295.*** In the case of ***Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd. 2006 (36) PTC 307 (Del.)*** a ld. Single Judge of this Court has defined comparative advertising as an advertisement where a party advertises its goods or services by comparing them with the goods and services of another party. This is generally done by either projecting that the advertiser's product is of the same or superior quality to that of the compared product or by denigrating the quality of the compared product.

35. Thus, there has to be either express or implied reference to a competitor or its goods or a product category. A mere fleeting allusion to some unidentifiable product or product category cannot constitute `comparative advertising'. For an advertisement to be classified as comparative advertisement, there ought to be some attributes of a product

which are depicted in the commercial such as the container, coloured packaging, mark, logo identifying the Plaintiff's product directly or indirectly. Even if such elements are absent, for the Plaintiff to claim generic disparagement, there ought to be some indicators of identification of the product category at least.

36. In the case at hand, the glass which is shown in the hand of the mother giving the generic orange drink is not identifiable in any manner with the Plaintiff or even with an orange energy drink. It could even be an orange soft drink, orange crush, orange squash, orange mocktail, orange juice, *etc.*, Even on careful repeated watching of the impugned TVC by the Court, it is not clear as to what is the drink being stirred in the glass. It seems to be an orange-coloured drink which is put into a transparent glass and nothing more. However, in the conversation between the mothers after the race finishes, the category of the generic product being depicted has some reference when one of the mothers asks *"Both of them drank the same* ***orange glucose*** *then how did your daughter win so easily?"* Thus, the impugned TVC identifies 'orange glucose' as the product category towards which the advertisement in question is directed. Therefore, the impugned TVC can be classified as 'comparative advertising' to the broad orange glucose product category.

37. In view of this finding, the next question that needs to be probed by the Court is whether the impugned advertisement is disparaging in nature. For the purpose of examining disparagement, comparative advertising can be categorised in the following categories:

i. Where there is a direct comparison with a competitor's product.

ii. Where there is a comparison with a specific product which can

be deciphered due to some references such as a similar mark, a similar logo, similar packaging, similar container, *etc*.

iii. Comparison with a product of related category with no direct reference.

iv. Where there is a general comparison without an identified product category as a whole.

38. Numerous decisions relating to comparative advertising and disparagement have been cited by the parties. Broad principles have been laid down repeatedly in these decisions. Principles of comparative advertising laid down in these decisions would have to be applied depending upon the category of comparative advertising in which a particular case would fall.

39. Disparagement is an act of belittling someone's goods or services with a remark that is misleading. The law relating to disparaging advertisements is now well settled. It is open for a person to exaggerate and highlight the qualities and features of his own goods, but it is not open for a person to belittle and disparage the goods of another. There is a plethora of judgments which have been cited before this Court by ld. Sr. Counsels for both the parties. In the case of ***Pepsi Co. v. Hindustan Coca Cola 2003 (27) PTC 305 (Del.)*** a ld. Division Bench of this Court held that the following factors are required to be considered while deciding the question of disparagement:

i. Intent of the commercial;

ii. Manner of the commercial;

iii. Story line of the commercial and the message sought to be conveyed by the commercial.

40. In ***Dabur India v. Colortek Meghalaya (2010)167 DLT 278 (DB)*** the said principles were amplified/ restated by another ld. Division Bench of this Court in the following terms:

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

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

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

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

41. It is on the basis of the above principles that this Court needs to ascertain whether the impugned TVC is disparaging or not. Generic disparagement is recognised as disparagement under the law, however, in almost all cases where generic disparagement has been held to be objectionable there has been some reference or some usage or depiction which has clearly led to the conclusion that it is the aggrieved party's product or the entire product category is being referred to. For example:

- In one of the earliest decisions recognising generic disparagement, ***Karamchand Appliances Pvt. Ltd. v. Sh. Adhikari Brothers and Ors.***

2005 (31) PTC 1 (Del) in the impugned advertisement, the *'All Out Pluggy'* device was clearly identifiable.

- In ***Dabur India v. Colgate Palmolive India Ltd. MANU/DE/0657/2004*** the advertisement in question explicitly identified the product category *'Lal Dant Manjan'* powder.
- In ***Dabur India Limited v. Emami Limited 2004 (75) DRJ 356***, the impugned advertisement identified the product *'Chayawanprash'* and asks the viewers to *"FORGET Chayawanprash IN SUMMERS, EAT Amritprash INSTEAD"*.
- In ***Godrej Consumer Products Limited v. Initiative Media Advertising 2012 Vol. 114(4) Bom. LR 2652*** in the advertisement, the label / device was clearly recognisable and identifiable as belonging to the Plaintiff therein.
- In ***Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Ltd. MANU/MH/1197/2017*** the product, *'Frozen Dessert'* was identified in the advertisement.
- In ***Dabur India v. Emami Ltd. 2004 (75) DRJ 356*** the entire class of Chayawanprash was identified in the advertisement.

42. It is usual for advertisers and companies marketing and selling products to portray their products as being superior. In the process of depicting superiority, a generic comparison ought to be permitted and creativity cannot be stifled. A television commercial is not to be analysed in a hyper critical manner. A commercial would have to be viewed as a whole from the view of an ordinary consumer or viewer. The message being portrayed in the commercial would have to be seen and if the message is not derogatory, no objection can be raised.

43. In the opinion of the Court, cases where there is a direct comparison and denigration of the competitor's product would fall in a completely different category as against those cases where there are allusions or indirect references. Allegations of disparagement in cases where comparison is alleged with an unrelated category as a whole is also objectionable. However, in the case of generic comparison with a product of related / same category without any direct reference to any competitor, the freedom for advertisers would be greater than those cases falling in other categories. This is because in order to portray a particular product as being superior or better than existing products, a generic comparison highlighting the strength of its own product without launching a negative campaign against its competitors ought to be permissible failing which the strength of the advertisement could itself be considerably diluted. The purpose of advertising any product is for marketing the attributes of that product. Such attributes could be unilateral or relative in a generic manner. It cannot be said that every generic comparison would be referencing to the market leader which would, in the opinion of the Court, be curtailing freedom of advertising to a considerable extent. Mere allusions, in the absence of a decipherable comparison would not be sufficient to make out a case of generic disparagement. An advertiser ought to have the freedom to make advertisements with generic comparison highlighting the features of its own product and if the same is done without an allusion to any market leader, objection cannot be raised unless representation being made is absolutely false or misleading.

44. Viewed from this perspective, the following decisions of the ld. Division Benches of this Court are relevant in the present factual matrix:

I. In ***Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. and Ors.***

(supra), the products concerned were 'GOOD KNIGHT NATURALS' and 'ODOMOS'. There was no overt or direct reference to 'ODOMOS' in the entire commercial. The content of the commercial showed that the competing product was causing rashes, allergy and was sticky, which was a serious depiction. However, the ld. Division Bench held that there was nothing in the advertisement to suggest that the commercial denigrated the products of the Appellant therein. The observation of the ld. Division Bench are as under:

> *"5. The submission of the Appellant is that its product Odomos is an extremely popular mosquito repellant cream and it enjoys over 80% of the market share all over the country and in some parts of the country it enjoys a 100% market share. The sales of the Appellant's product run into crores of rupees and the advertisement and promotion expenses also run into crores of rupees.*
>
> *6. It is averred that the commercial of the Respondents' product was telecast on a news channel on 8th October, 2009. We are told that it has appeared on several occasions thereafter. According to the Appellant, the commercial disparages its product and, therefore, the Respondent should be injuncted from further telecasting it.* ***It is submitted that even though there is no direct or overt reference to the Appellant's product, since the Appellant's product enjoys a huge market share, the commercial is obviously targeting it. Serious objection was taken to the suggestion in the commercial that the Appellant's product causes rashes, allergy and is sticky.***
>
> *Xxx*

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

19. Having said this, we are of the opinion after having gone through the commercial not only in its text (as reproduced above) but also having watched it on a DVD that there is absolutely nothing to suggest that the product of the Appellant is targeted either overtly or covertly. There is also nothing to suggest that the commercial denigrates or disparages the Appellant's product either overtly or covertly. There is also no hint whatsoever of any malice involved in the commercial in respect of the Appellant's product - indeed, there is no requirement of showing malice.

20. ***Learned Counsel for the Appellant submitted before us that since his client has over 80% of the market share in the country and a 100% market share in some States, the obvious target of the commercial is the product of the Appellant. In our opinion, this argument cannot be accepted.***

The sub-text of this argument is an intention to create a monopoly in the market or to entrench a monopoly that the Appellant claims it already has. *If this argument were to be accepted, then no other mosquito repellant cream manufacturer would be able to advertise its product, because in doing so, it would necessarily mean that the Appellant's product is being targeted. All that we are required to ascertain is whether the commercial denigrates the Appellant's product or not.* ***There is nothing in the commercial to suggest a negative content or that there is a disparagement of the Appellant's product. The commercial merely gives the virtues of the product of the Respondents, namely, that it has certain ingredients which perhaps no other mosquito repellant cream has, such as tulsi, lavender and milk protein. While comparing its product with any other product, any advertiser would naturally highlight its positive points but this cannot be negatively construed to mean that there is a disparagement of a rival product. That being so, whether the Appellant's product is targeted or not becomes irrelevant.***

Xxx

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

> *(a) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.*
>
> *(b) He can also say that his goods are better than his competitors', even though such statement is untrue.*
>
> *(c) For the purpose of saying that his goods are the best in the world or his*

goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.

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

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

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

II. In ***Colgate Palmolive Company and Ors. v. Hindustan Unilever Ltd. (supra)*** the competing products were 'COLGATE' & 'PEPSODENT'. In this case, the commercial clearly depicted 'COLGATE' and made a direct comparison with 'PEPSODENT'. Customer's imagination was not needed to see as to in what manner the comparison was being made with what product in the said case. 'PEPSODENT' claimed to have 130% germ attack power in comparison with 'COLGATE'. This was held to be not merely hyperbole and relying upon ***Lakhanpal National v. M.R.T.P Commission (1989) 3 SCC 251*** it was held that the same was an unfair trade practice. The observation of the ld. Division Bench is as under:

> *"58. In our view, even if, we assume that the representation that Pepsodent is more effective in combating germs, 4 hours after brushing, in comparison with Colgate ST, is correct even then, prima facie, the advertisement would be disparaging as it also conveys the message that Colgate is ineffective and lacks the requisite quality to maintain oral hygiene and combat tooth decay and its usage, as depicted by the Colgate child, would result in the user ending up with a tooth related ailment. As explained in Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. & Anr. (supra) a trader 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. In our view, this is precisely what the impugned print advertisement conveys by its advertisement theme and the visual*

story."

III. The most recent decision of the ld. Division Bench of this Court in ***Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited (supra)*** dealt with a case where toilet cleaners 'HARPIC' and 'DOMEX' were being compared in an advertisement. A perusal of the storyboard in the said case would show that there was a direct reference to 'HARPIC' product and it was suggested that 'HARPIC' does not address the problem of bad odour. The actual 'HARPIC' product was also shown in the said commercial. The commercial also depicted a child who is expressing displeasure by asking *"Toilet se badbu nahi aayengi?"* to enquire about the bad odour which would emanate if 'HARPIC' is used. In the said decision, the ld. Division Bench has held as under:

> *"33.* ***On a plain viewing, it is clear that the message sent by the advertiser is that Harpic does not address the problem of bad odour****. The astonished expression of the child and his gesture of holding his nose while asking the question whether the toilet will not stink and the mother of the child getting concerned and worried, sends out a clear message that if you use Harpic, the toilet will continue to stink because the mother, who is otherwise regularly using Harpic, has not been able to address the problem of foul odour persisting in their toilet. The latter part of the impugned TVC-1 then shows a toilet bowl with discolouration possibly reflecting bad odour and the voice over saying "Kyoki toilet ki badbu se ladne ke lie DOMEX me hai fresh guard technology". The remaining part of the impugned TVC-1 is about the product Domex and its quality to combat bad odour for a longer period of time.*

> *34.* ***The impugned TVC-1 not only projects a message that Domex fights odour for a longer period of time, it also sends a clear message that Harpic does not address the problem of foul smell that emanates from toilets. The manner in which the impugned TVC-1 is structured, first, sends a message that Harpic only cleans without addressing the problem of bad odour and thereafter, sends the message that whoever chooses Harpic would have to live with their toilets smelling foul. This is a message that disparages Reckitt's product and, in our view, cannot be permitted.***
>
> *35. The finding of the learned Single Judge that the impugned TVC-1 does not denigrate Reckitt's product is erroneous and cannot be sustained. The latitude available in advertising is wide but does not extend to denigrating the product of one's competitor.*
>
> *36. By an order dated 01.12.2021 passed by this Court, HUL was restrained from airing the impugned TVC-1. We make the said order absolute. The same shall continue till disposal of the suit."*

The facts in ***Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited (supra)*** are clearly distinguishable from the facts the present case as there is no direct comparison with the Plaintiff's product in the case at hand. No image of the Plaintiff's product has been used and the qualities being attributed to 'HARPIC' are also completely derogatory in the said case. Moreover, nowhere in the impugned TVC the Plaintiff's or for that reason any product is being adversely commented upon as was the scenario before the ld. Division Bench. In the impugned TVC, only the features of the Defendant's product are highlighted. Even the ld. Division Bench in ***Reckitt***

Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited (supra) has highlighted the difference between embellishing one's own product and calling the competitor's products as bad or inferior. The relevant portion of the said judgment reads as under:

> *24.* ***In a comparative advertisement, it is open for an advertiser to embellish the qualities of its products and its claims but it is not open for him to claim that the goods of his competitors are bad, undesirable or inferior. As an illustration, in a comparative advertisement, it is open for an advertiser to say his goods are of a good quality but it is not open for an advertiser to send a message that the quality of the goods of his competitor is bad.*** *As observed by the Chancery Division in the case of De Beers Abrasive Products Ltd. and Others v. International General Electric Co. of New York Ltd. and Another, it is open for a person to claim that he is the best seller in the world or a best seller in the street but it is not open for him to denigrate the services of another. Thus, it is not open for an advertiser to say "my goods are better than X's, because X's are absolutely rubbish". Puffery and Hyperbole to some extent have an element of untruthfulness. If a tailoring shop claims that he provides the best tailored suits in the city, the same may be untruthful. However, it is apparent to anyone who reads or hears this statement that it is puffery. Such statements or taglines are neither held out nor understood as a representation of unimpeachable fact. It is obvious that the person availing services from the tailoring shop, as mentioned above, cannot maintain an action of misrepresentation. However, when it*

> *comes to statements made by an advertiser in respect of the goods of his competitors and other persons, the latitude available to an advertiser is restricted. Whilst it is open for the tailoring shop to state that it provides the best tailored suit in the city; it is not open for it to advertise that the other tailoring shops in the street lack the necessary skill and their suits are ill tailored.*
>
> *25.* ***A comparative advertisement would always involve the statement that the goods of the advertiser are better in some aspects than that of the competitor. But there is line that an advertiser cannot cross. He cannot disparage or defame the goods of his competitor.***
>
> *26. There may be cases where certain features of an advertiser's product may be demonstrably better than the features of his competitor. In such cases, it is permissible for an advertiser to advertise and highlight these features. The message must clearly be to highlight the superior features of his product while ensuring that the product of his competitor is not disparaged or defamed.*

45. An analysis of the above three Division Bench judgments of this Court shows that in the case of a commercial which has no direct or overt reference to a competitor's product, there cannot be a presumption that the product of the Plaintiff is being targeted. The ld. Division Bench observes in ***Dabur India Ltd. v Colortek (supra)*** that where there is no overt or covert reference, merely on the basis of market share it cannot be presumed that the advertisement is directed towards the market leader. In the opinion of this

Court, the reasoning and rationale in ***Dabur India Ltd. v. Colortek (Supra)*** fully applies to the facts of the present case. In fact, in ***Dabur India Ltd. v. Colortek (Supra)*** the allegation of qualities being attributed to the competitor's product of causing rashes, allergy and stickiness were far more derogatory than the portrayal in the impugned TVC.

46. Applying the ratio of the judgments discussed above, this Court is of the view that the impugned TVC merely highlights the qualities of the Defendant's product and it does not disparage any orange glucose powder drink. Disparagement cannot be a far-fetched inference. In the impugned commercial, the mother asks a probing question as to how when her daughter drank the same orange glucose, the other lady's daughter won the race. This is being interpreted by the Plaintiff as a comparison as it leads to an inference that 'DABUR GLUCOPLUS-C ORANGE' is more effective, hence, superior and the other products including the Plaintiff's product are ineffective, hence, inferior – thus disparaging. The Plaintiff's case is that the gestures of disappointment and frustration on the face of the mother whose daughter lost the race is sufficient to infer disparagement. This, in the opinion of the Court, is far-fetched. It would not be proper for the Court to flip the coin to conclude - *'mine is better'* as *'yours is bad'*. The comparison being made in the impugned TVC might be unfavourable to the Plaintiff, but it cannot be held to be disparaging. The intent and the overall effect of the advertisement in question seems to be to promote the Defendant's product and not to denigrate the Plaintiff's or any other manufacturer's product.

47. The next argument of the Plaintiff that there is a serious misrepresentation of fact also does not hold ground. The admitted position is that the Defendant's product does have 25% more glucose than the

Plaintiff's product. The impugned advertisement is by and large truthful and there is no falsity involved. Therefore, there is no serious misrepresentation of fact on part of the Defendant in the impugned TVC. The argument of the Plaintiff that more glucose does not translate into higher energy also does not hold ground for two reasons. First, the storyboard of the advertisement merely shows *"25% more glucose in every sip"*. This is not misrepresentative considering the contents of the Defendant's drink. Second, as far as the claims of *'instant energy'* is concerned, the Plaintiff's own product packaging, and its advertisements which have been placed on record, show that the Plaintiff's own stand is that glucose gives instant energy. The Plaintiff cannot take a different stand for its own product and Defendant's product. Moreover, the storyboard shows that in the impugned TVC it has been said *"this has 25% more glucose than your glucose powder, which gives **more** instant energy + 2 times micronutrients"*, however, it was brought to the attention of the Court that the impugned TVC, which is Bengali, does not use the phrase *'gives **more** instant energy'* and merely claims that it *'gives instant energy'*. Thus, the overall message sought to be conveyed by the Defendant vide the impugned TVC is that its product has 25% more glucose which gives instant energy.

48. In the absence of any disparaging uttering, still or image in the impugned TVC, this Court is unable to arrive at a conclusion merely on the basis of the market share of the Plaintiff that the Plaintiff's product is being disparaged or there is any generic disparagement. The impugned TVC when viewed from the perspective of an ordinary viewer does not give the impression of denigration or disparagement but one where the Defendant's product is being self-promoted. Moreover, the intelligence of an ordinary

viewer also ought not to be ignored while judging such commercials. The ld. Division Bench in ***Dabur India v. Colortek (supra)*** has pointed out that market forces, nature and quality of the products would ultimately be the deciding factors for a consumer to make a choice. It cannot be ignored that the consumers are cognizant of the fact that advertisements are one sided commentary put out by the manufacturers and sellers for the promotion of their own products and are inherently biased in nature. While deciding a disparagement suit, the overall impact of the commercial has to be considered and in the absence of any derogatory remarks, mere use of some expressions cannot lead to an injunction.

49. Under these facts and circumstances, the prayer for interim injunction is not liable to be granted.

50. Accordingly, ***I.A. 7312/2022*** is dismissed.

CS (COMM) 304/2022 & I.A. 17882/2022(u/O VIII R 10 CPC)

51. No written statement has been field in the suit. The Defendant prays that the reply to the injunction application ought to be read as the written statement. However, since this is a suit under the Commercial Courts Act, 2015 such a course of action would not be permissible. Considering the nature of the issues raised, and the fact that the Plaintiff is pressing for damages, the following issues are framed:

i. Whether the impugned commercial disparages or denigrates the Plaintiff's product 'GLUCON-D TANGY ORANGE' or the product category of the Plaintiff's product? OPP

ii. Whether the Plaintiff is entitled to a decree of damages? OPP

iii. Costs.

52. The Plaintiff is permitted to lead its evidence in the matter by filing its

list of witnesses and affidavit in evidence. Though, the written statement is not filed, the Defendant is entitled to cross-examine the witnesses of the Plaintiff. Since the application seeking interim injunction has been rejected today, it is directed that the evidence shall be recorded by a Local Commissioner.

53. List before the Joint Registrar for filing of affidavit in evidence on 31st January, 2023.

54. List before the Roster Bench on 28th February, 2023 for passing directions relating to the trial.

PRATHIBA M. SINGH
JUDGE

DECEMBER 22, 2022
dj/sk