

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

% Judgment delivered on: 13.04.2023

+ **FAO(OS)(COMM) 157/2021 and CM No. 42978/2021**

**HINDUSTAN UNILEVER LIMITED** ..... Appellant

versus

**RECKITT BENCKISER (INDIA)  
PRIVATE LIMITED** ..... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr Amit Sibal, Senior Advocate with Mr Ankur Sangal, Mr Pragya Mishra, Mr Kiratraj Sadana, Ms Trisha Nag and Mr Rishabh Sharma, Advocates.

For the Respondent : Mr Chander M. Lall, Senior Advocate with Ms Nancy Roy, Mr Prakriti Varshney, Ms Annanya Chugh and Ms Aashta Kakkar, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU  
HON'BLE MR JUSTICE AMIT MAHAJAN**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The appellant (hereafter 'HUL') has filed the present intra-court appeal impugning a judgement dated 09.11.2021 (hereafter 'the impugned judgment') passed by the learned Single Judge of this Court

in I.A. No. 8999 of 2021 in CS (Comm) No. 340 of 2021, whereby the appellant was restrained from publishing a print advertisement (hereafter '**the impugned advertisement**') and airing three YouTube videos (hereafter collectively referred to as '**the impugned videos**' and separately as '**the first impugned video**'; '**the second impugned video**'; and '**the third impugned video**'). These advertisements for the toilet cleaner sold under the tradename 'Domex', were found to be, *prima facie*, disparaging the toilet cleaner sold by the respondent (hereafter '**Reckitt**') under its trademark 'Harpic'.

2. HUL claims that the impugned advertisement and the impugned videos truthfully depict that the effect of its product lasts longer than Reckitt's product. Thus, the impugned advertisement and impugned videos are permissible and ought not to have been interdicted. Reckitt disputes the claims made by HUL and complains that the impugned advertisement and the impugned videos are misleading and disparaging.

### ***Factual Context***

3. HUL is a company incorporated in India and is engaged in the business of manufacturing, marketing and/or selling various consumer products, including food and refreshments, cosmetics, toiletries, floor cleaners, toilet cleaners, toilet soaps, washing soaps and detergents.

4. Reckitt is a company engaged in the manufacturing, packaging, sale and distribution of various fast moving consumer goods (FMCG). Reckitt's business comprises primarily of manufacturing and dealing in various consumer and healthcare products including antiseptic liquid,

toilet care products, surface care products, pharmaceuticals, insecticides and food products.

5. Reckitt states that it has been involved in the manufacturing of a well-known toilet cleaner under the trademark 'Harpic' in India, since the year 2001. Reckitt claims that Harpic is a household name in India in the category of toilet cleaners and is the most widely used toilet cleaner brand in the country. Its use dates back to its original launch in England in 1920; currently, it is sold in over forty-seven countries.

6. On 15.03.1979, Reckitt became the registered proprietor of the word mark 'HARPIC' (Registration No. 347055) under Class 3. The aforementioned trademark registration is valid and subsisting as of date. Reckitt has also obtained a registration for the shape of the bottle used for packaging 'Harpic' branded products in India. Reckitt claims that since the launch of Harpic, the shape of the bottle has become a source identifier for its product.

7. HUL also manufactures and markets a toilet cleaner sold under the trademark 'Domex'. It claims that its product Domex is superior to Reckitt's Harpic in fighting bad odour. It is the case of HUL that it has been granted a patent for using a technology that involves the use of a chemical compound called 'Saline', which enhances the malodour fighting capabilities by extending the period of its effectiveness.

8. HUL ran an advertisement campaign with the message that its product fights malodour for a longer period of time. The advertisement campaign included the impugned advertisement, the impugned videos

and a TV Commercial. The TV commercial was launched on 23.07.2021. These advertisements are the subject matter of the suit, CS (Comm) No. 340 of 2021.

9. On 26.07.2021, Reckitt instituted the aforementioned suit claiming that the TV Commercial, impugned advertisement and the impugned videos were disparaging its product (toilet cleaner) sold under the brand name 'Harpic'. Reckitt also filed an application seeking an interim relief restraining HUL from publishing or telecasting the impugned advertisement and the impugned videos. The said application was disposed of by the impugned judgment dated 09.11.2021. The learned Single Judge held that, *prima facie*, the impugned videos seek to denigrate and malign HUL's product as they depict Reckitt's Harpic bottle as an ordinary toilet cleaner. The learned Single Judge also noted that the shape of the bottle was a registered trademark of Reckitt and, accordingly, restrained HUL from broadcasting the impugned videos in any form till HUL removes all reference to Reckitt's product 'Harpic' or the bottle in question. Insofar as the impugned advertisement is concerned, the learned Single Judge also restrained HUL from publishing the same. The learned Single Judge noted that the impugned advertisement was premised on the basis that HUL's product was technically superior to that of Reckitt's. However, the onus to establish that the said message was truthful rested on HUL. The said question was a matter of trial and at the interim stage, without any evidence being led, it was not possible to accept that HUL's product was superior to that of Reckitt. However, as far as the TV

Commercial is concerned, the learned Single Judge did not find the same to be offending. The learned Single Judge held that the advertiser had enough room to play and that Reckitt ought not to be hypersensitive.

10. Both the parties assailed the impugned judgment. Reckitt filed an appeal to the limited extent that the learned Single Judge had not interdicted broadcast of the TV Commercial. The said appeal<sup>1</sup> was disposed of by a judgment dated 26.09.2022. This Court found that the learned Single Judge had erred in drawing a *prima facie* conclusion that the TV Commercial did not denigrate Reckitt's product. Accordingly, this Court restrained HUL from airing the TV Commercial.

11. The present appeal is confined to the impugned advertisement (published in a newspaper) and the impugned videos (three videos broadcasted on the internet website, YouTube).

### ***Submissions***

12. Mr. Amit Sibal, learned senior counsel appearing for HUL, contended that the learned Single Judge had erred in assuming that the impugned videos denigrated any product. He submitted that there was no ground to draw any such assumption. He submitted that the storyline of the impugned videos merely promoted HUL's product sold under the brand name 'Domex' and did not disparage any other product. He submitted that the learned Single Judge had erred in assuming that the generic shape of the toilet cleaner bottle, as shown in the impugned

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<sup>1</sup> *Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited: FAO(OS)(COMM) 149/2021* decided on 26.09.2022

videos, was depicting Reckitt's product. He submitted that a side-by-side comparison of the generic shape of a toilet cleaner bottle and the bottle of Harpic would show that they are not identical. He also submitted that the impugned videos contained a disclaimer stating that the ordinary toilet cleaner was one that did not use water repellent technology. He also contested Reckitt's claim that it had a registration in respect of the shape of the bottle. He referred to the documents furnished, which reflect the trademark status as filed by Reckitt and submitted that the registration to obtain a trademark was in respect of the device marks as depicted on the bottle and not the shape of the bottle. He also submitted that there were various other similar products, which were sold in bottles that were broadly corresponding to the shape of the toilet cleaner bottle shown in the impugned videos as a representation of an ordinary toilet cleaner. He submitted that therefore, Reckitt's claim that the bottle of an ordinary toilet cleaner, as shown in the impugned videos, in fact, identified its product Harpic, is erroneous.

13. Mr. Sibal further submitted that comparative advertisement was permissible. He also referred to the decisions in *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd.*<sup>2</sup>; *Havells India Ltd. & Anr. v. Amritanshu Khaitan & Ors.*<sup>3</sup>; *Dabur India Ltd. v. M/s Colortek Meghalaya Pvt. Ltd.*<sup>4</sup>; *M/s Kaleesuwari Refinery Pvt. Ltd. v. M/s M.K. Agrotech Pvt. Ltd.*<sup>5</sup>; *Reckit Benckiser (India) Limited v. Naga Limited*

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<sup>2</sup> 2013 SCC OnLine Del 4986

<sup>3</sup> 2015 SCC OnLine Del 8115

<sup>4</sup> 2010 SCC OnLine Del 391

<sup>5</sup> 2016 SCC OnLine Mad 2966

*& Ors.*<sup>6</sup>; and *Dabur India Ltd. v. Emami Limited*<sup>7</sup>. He submitted that in the present case, HUL had produced test reports, which established that HUL's product had better odour fighting ability. He submitted that the learned Single Judge had erred in disregarding the said test report.

14. Insofar as the impugned advertisement is concerned, he submitted that the impugned advertisement explains that the FreshGuard technology used in Domex works to fight off bad smell for a longer period of time. He submitted that the intent of the impugned advertisement was to put forth the said claim, which was neither untrue nor disparaging.

15. Mr. Chander M. Lall, learned senior counsel appearing for Reckitt, referred to the impugned advertisement and submitted that the same depicted that the side of the toilet bowl, which was cleaned by Harpic, was smelly and emanating bad odour. Thus, this is a clear case of disparagement. He submitted that HUL's claim that its product is superior, is untrue. He submitted that HUL's claim is based entirely on the use of a chemical compound called 'Saline', which makes the hard surface of the toilet bowl hydrophobic. He submitted that it overlooks the effect that the toilet bowls are made of ceramic and have a smooth surface, which in any case, makes it hydrophobic. He submitted that even if the odour causing liquid does not stick to the side of the toilet bowl, it would collect in the water body below and the same would not reduce the smell. He submitted that the odour in the toilet bowl is not

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<sup>6</sup> 2003 SCC OnLine Del 365

<sup>7</sup> 2019 SCC OnLine Del 9022

caused by the odour causing liquid (urine) alone but by faecal matter as well; and HUL's product does not have any additional advantage in that regard. He also submitted that HUL's claim that it uses a patented technology was also misleading as several of the claims regarding anti-microbial effect were rejected by the Patent Office. Further, the claim that HUL's product is effective for a longer period of time was also rejected. He submitted that the test methodology used did not take into account that even if the odour causing liquids did not stick to the hard surface on account of HUL's toilet cleaner making it more hydrophobic, the odour causing liquid would collect in the water body at the bottom of the toilet bowl. He also contended that Reckitt used caused third party laboratories to conduct tests and the results of the malodour intensity, and the faecal stain repellent test conducted, showed that there was no difference between HUL's product (Domex) and Reckitt's product (Harpic). He submitted that both the products were effective in cleaning germs at the time of usage but were ineffective after subsequent wash cycles.

16. He submitted that the impugned advertisement and the impugned videos must be viewed not in the context of literal truth but by the honesty of the message that they convey. He also submitted that in the present case, the message conveyed by the impugned advertisement and the impugned videos, is untruthful.



### *Reasons and Conclusion*

17. This Court had, in the connected appeal<sup>1</sup>, briefly noted the law of disparaging advertisements. This Court had noted that in *Tata Press Ltd. v. Mahanagar Telephone Nigam Limited & Ors.*<sup>8</sup>, the Supreme Court had authoritatively held that commercial speech was a facet of freedom of speech and expression, which was guaranteed under Article 19(1)(a) of the Constitution of India. Thus, it was entitled to be protected; but the protection cannot extend to misrepresentation or where the advertisements are contrary to law.

18. In the case of *M/s Colortek Meghalaya*<sup>4</sup>, this Court had referred to various earlier decisions of the Supreme Court and had set out the principles to be borne in mind while considering whether an advertisement is required to be protected. The relevant extract of the decision reads as under:

“14. On the basis of the law laid down by the Supreme Court, the guiding principles for us should be the following:

- (i) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.
- (ii) An advertisement must not be false, misleading, unfair or deceptive.
- (iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.

To this extent, in our opinion, the protection of Article 19(1)(a) of the Constitution is available. However, if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive

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<sup>8</sup> (1995) 5 SCC 139

advertisement, it would certainly not have the benefit of any protection.”

19. In *Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.*<sup>9</sup>, the Calcutta High Court had summarized the law in the context of comparative advertisements as under:

“11. From the law discussed above it appears to me that the law on subject is as follows:

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 deformation 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.”

20. In *Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited*<sup>1</sup>, this Court had referred to the above principles as elucidated by the Calcutta High Court in the case of *M.P. Ramchandran*<sup>9</sup> and had clarified that the principles as set out in sub-paragraphs (I) and (II) are applicable in cases where the advertisement involved puffery and

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<sup>9</sup> 1998 SCC OnLine Cal 422

hyperbole; they do not hold good in cases where statements are held out as representations of fact. This Court had observed that puffery and exaggerated opinions are for attracting the attention of the targeted customers. Such statements are neither held out as binding representations or warranties, nor perceived as representation of facts. Insofar as puffery and hyperbole is concerned, they were not required to be tested on the anvil of accuracy or the truth. The creativeness of the advertiser, which finds expression in puffery and hyperbole, are not restricted even though such exaggerated statements are not true.

21. In the case of *Colgate Palmolive Company*<sup>2</sup>, this Court had observed that in a comparative advertisement, a certain amount of disparagement is implicit. Puffery and hyperbole in the context of a comparative advertisement would, to some extent, reflect the competitor's goods in a bad light. However, as long as the advertisements are limited to puffery and hyperbole – as contrasted with the statements of fact, which are accepted as such – they are not actionable. It is now settled law that while it is open for a person to exaggerate its claims relating to his goods, it is not open for him to denigrate or disparage the goods of another person.

22. It is also settled law that honest comparative advertisements are permissible. This implies that not only the statements of fact made in the advertisements are accurate and true but that the overall message delivered by the said statements of facts is also not misleading. Obviously, this would have to be determined from the standpoint of the customer viewing the said advertisement.

23. The impugned advertisement and the impugned videos are required to be examined bearing the aforesaid principles in mind.

***The impugned advertisement***

24. It is relevant to refer to the impugned advertisement; the same is set out below:



25. A plain reading of the aforesaid impugned advertisement clearly indicates that HUL's intention is to compare its product 'Domex FreshGuard' with that of 'Harpic Power Plus 10x Max Clean'. The message advertised is that Domex fights bad smell for a longer period of time. HUL claims that this is on account of the revolutionary FreshGuard technology. The text in the advertisement is reproduced below for ready reference:

“Leaves and petals are known to keep fluids from settling on their surface. And now, your toilet bowl will have that ability too. All you need is Domex FreshGuard to coat it with a transparent hydrophobic layer. So any fluids that could potentially cause bad smell are instantly repelled. Leaving your toilet fresh for upto 100 flushes.”

26. The footnote at the bottom right of the advertisement reads as under:

“based on independent lab test on simulated toilet use, 2021, Harpic Power Plus 10x Max Clean does not have FreshGuard technology.”

27. HUL claims that its product Domex FreshGuard includes a compound called ‘Saline’, which makes the hard surface, such as that of the toilet bowl, hydrophobic. Resultantly, fluids that cause bad smell do not stick to the surface of the toilet bowl. It is also claimed that its product continues to be effective in this regard for upto 100 flushes.

28. The image of the toilet bowl in the impugned advertisement indicates that the side of the toilet bowl, which is treated with HUL’s product Domex is clean (represented by the blue color) and flowers emanating out from that side of the toilet bowl depict a pleasant smell. However, the side of the toilet bowl which is not treated with Domex is shown as unclean. Green fumes representing a foul smell are shown as emanating from the side of the toilet bowl where the toilet cleaner without FreshGuard technology is used.

29. The overall message of the impugned advertisement is loud and clear: if one uses Harpic to clean the toilet, the toilet bowl will emanate a foul smell but if one uses Domex, then the toilet would smell pleasant.

HUL attributes this to the use of FreshGuard technology (which uses ‘Saline’ as one of the active ingredients in the product).

30. There can be little doubt that the impugned advertisement is disparaging to Reckitt’s product. It mentions Harpic in particular and claims that Domex fights bad smell for a longer period of time. Apart from that, it shows that the toilet bowl cleaned with Domex emanates fragrance while that cleaned with the use of Harpic emanates a foul smell. As stated above, an advertiser can indulge in puffery and hyperbole to reflect its product in a good light. However, it is not open for an advertiser to claim that the product of its competitor is bad, substandard or its use would be detrimental to the interest or well-being of the customers. In the present case, the advertisement denigrates Reckitt’s product by reflecting that the toilet bowl cleaned by the use of the said product would result in the same remaining unclean and emanating a foul smell.





31. The impugned advertisement is also untruthful, at least to the extent that it reflects that the toilet cleaned by its product would emanate fragrance, while the one cleaned by Harpic would emanate a foul smell. As stated above, HUL’s claim rests on the use of ‘Saline’, which according to HUL has hydrophobic qualities. It is not HUL’s case that the use of ‘Saline’ would keep the toilet fragrant; it merely states that the liquid causing bad odour would be repelled as the use of ‘Saline’ on the sides of the toilet bowl would not allow liquids with foul odour (referring to urine) to stick on the side of the bowl.

32. In the aforesaid view, we find no infirmity with the decision of the learned Single Judge in interdicting HUL from publishing the impugned advertisement on the ground that it, *prima facie*, denigrates and disparages Reckitt’s product Harpic.

***The impugned videos***

33. The still images from the impugned videos are set out below:

First Impugned Video tilted “Domex Fresh Guard Demo Video”	
<p>How long does your toilet cleaner fight bad smell?</p>	<p><i>How long does your toilet cleaner</i></p>
<p>How long does your toilet cleaner fight bad smell?</p>	<p><i>Fight bad smell?</i></p>
<p>Let's pour some odour causing fluids in a clean toilet and find out.</p>	<p><i>Let's pour</i></p>

	<p><i>Some odour causing fluids in a clean toilet and find out</i></p>
	<p><i>As you can see</i></p>
	<p><i>Ordinary toilet cleaners cannot fight odour causing fluids</i></p>
	<p><i>Whereas Domex FreshGuard does not let these fluids stick for up to 100 flushes.</i></p>






	<p><i>Keeping your toilet fresh</i></p>
	<p><i>Keeping your toilet fresh</i></p>
	<p><i>Domex Fresh Guard</i></p>
	<p><i>Fight bad smell for up to 100 flushes</i></p>

<p>Second Impugned Video titled</p> <p>“Domex Fights Bad Smell For Long”</p>	
	<p><i>VO: Aapka toilet cleaner kab tak badboo se ladhata hai?</i></p>
	<p><i>VO: Domex Ladhe 100 flush tak!</i></p>
	<p><i>Disclaimer: Toilet cleaner, bina water-repellent technology ke sandharbha main Simulated toilet per</i></p>

	<p><i>kiye gaye swatantra lab test par aadharit, 2021</i></p>
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<p>Third Impugned Video titled  “Domex Freshgaurd Helps Skip Bad Smell”</p>	
	<p><i>VO: kya sadharan toilet cleaner badbu nahi skip kar pa raha hai?</i></p>

	<p><i>Disclaimer: toilet cleaner, bina water repellent technology ke sandharbh main</i></p>
	<p><i>VO : Chune Domex FreshGuard</i></p>
	<p><i>Disclaimer : simulated toilet use per kiye gaye swartantra lab test per aadharit, 2021</i></p>

34. The first impugned video indicates a test where some odour causing fluid is poured on the side of the toilet bowl which is cleaned with an ordinary toilet cleaner. The bad odour causing fluid sticks on the side walls of the toilet bowl. The message is that “ordinary toilet cleaners cannot fight odour causing fluids”. However, when the odour causing fluid is poured on the side of the toilet bowl cleaned by using Domex, it does not stick to the sides and the statement is that “Domex FreshGuard does not let these fluids stick for up to 100 flushes”. Reckitt objects to the first video inasmuch as the ordinary toilet cleaner – which is shown as ineffective in dealing with odour causing fluids – is




represented by a bottle which Reckitt claims is its trademark. Thus, the inference that would be drawn by a customer viewing the first impugned video is that Harpic is ineffective and cannot fight odour causing fluids. The toilet bowl cleaned by Harpic would permit odour causing fluids to stick to the sides of the toilet bowl.

35. Reckitt's objection to the second impugned video is also to a similar effect. The same also shows the bottle of an ordinary cleaner (which Reckitt claims as its trademark) and mentions that an ordinary cleaner is effective only till one flush whereas HUL's product continues to be effective in combating bad odour till 100 flushes. The message of the third impugned video is that ordinary toilet cleaners are unable to combat bad odour and therefore, the customers should choose Domex FreshGuard. The Ordinary toilet cleaner is represented by a bottle which Reckitt claims as its trademark.

36. If it is accepted that Reckitt's product Harpic is depicted as an ordinary toilet cleaner, it would follow that the first and the third impugned videos are disparaging its product Harpic. Insofar as the second impugned video is concerned, the message is that Domex combats bad odour for use up to 100 flushes. But Reckitt's product does so only till the first flush.

37. In view of the above, the principal question to be addressed is whether Reckitt's claim that the impugned videos reflect its product as an ordinary toilet cleaner, is justified.

38. The learned Single Judge had referred to certain registered trademarks of Reckitt and concluded that the bottle of the ordinary toilet cleaner depicts Harpic. The trademarks referred to by the learned Single Judge are set out below:

Trade Mark	Class	Registration No.	Date of Registration
	3	3491010	22.02.2017
<p><b>Goods:</b></p> <p>Preparations for cleaning toilets, preparations for cleaning fabrics, scouring preparations, cleaning preparations, soap (disinfectant), all being goods included in class 3.</p>			
	5	3491007	22.02.2017
<p><b>Goods:</b></p> <p>Disinfectant, Pharmaceutical preparations, Medicinal Preparations, Antiseptic Preparations, Anti Bacterial Preparations, Veterinary and Sanitary preparations, Medicated toiletries, all being goods included in class 5.</p>			
Harpic Bottle & Cap	3	3491009	22.02.2017
			
<p><b>Goods:</b></p> <p>[Class: 3] Preparations for cleaning toilets, preparations for cleaning fabrics, scouring preparations, cleaning preparations, soap (disinfectant), all being goods included in class 3</p>			

39. HUL contends that the said conclusion is erroneous. As noted above, Mr. Sibal contested the claim that the shape of the bottle is the registered trademark of Reckitt. He also contended that there are several other manufacturers who sell toilet cleaners in bottles which look similar to the shape of the bottle used by Harpic. He also urged that an angular nozzle is a common feature of the toilet cleaner bottles as they are useful for application under the rim of the toilet bowls. He contended that if this feature is ignored, there would be no similarity between the shape of the bottle depicting an ordinary toilet cleaner as used in the impugned videos and the bottle used by Reckitt.

40. The contentions advanced by Mr. Sibal are not persuasive. We are unable to accept that Reckitt's claim that the shape of the bottle as depicted in the impugned videos is deceptively similar to its trademark, is required to be rejected. Mr. Lall had pointed out that at least in two orders – an order dated 31.10.2017 in *Reckitt Benckiser (India) Private Limited v. Jyothy Laboratories Limited*<sup>10</sup> and an order dated 19.11.2020 in *Reckitt Benckiser (India) Pvt. Ltd. v. Mr. Alok Jain & Anr.*<sup>11</sup> – this Court had, *prima facie*, accepted that Reckitt is the registered proprietor of the trademark in respect of the shape of the Harpic bottle. Mr. Sibal also did not dispute the same. However, he contended that the orders relied upon by Reckitt are orders that were passed at an interim stage, prior to the defendants filing any pleadings. He submitted that the suit filed by one of the defendants, Jyothy

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<sup>10</sup> CS(COMM) 747/2017

<sup>11</sup> CS(COMM) 508/2020

Laboratories Limited was settled and therefore, no final findings were rendered by this Court.

41. In the present case, the learned Single Judge has, *prima facie*, found that the shape of the Harpic bottle was the registered trademark of Reckitt. We do not find any reason to interfere with the view of the learned Single Judge in this regard. The registration certificates produced by Reckitt establish that it has a registered trademark in the shape of the bottle. According to HUL, the said registered trademark is only in respect of the labels on the bottle and not the shape of the bottle. At this stage, we are unable to accept the said contention. The trademark registration clearly depicts the bottle from various angles and therefore, it may not be correct to suggest that the trademark is limited to the labels used on the said bottle.

42. We are also unable to accept that the shape of the bottle shown as an ordinary toilet cleaner is not similar to the shape of the bottle used by Reckitt for the competing product, Harpic. It is well settled that the similarity between competing trademarks is not required to be resolved by juxtaposing them and closely examining various features of the trademarks. Similarity between the trademarks is required to be viewed from the standpoint of a person of average intelligence and an imperfect recollection. The question is whether such a person viewing the shape of the bottle in the impugned videos, would consider the same to be depicting the bottle of Harpic. *Prima facie*, the answer is required to be in the affirmative



43. We concur with the *prima facie* view of the learned Single Judge that the shape of the bottle, as depicted in the impugned videos, is deceptively similar to Reckitt's trademark. Trademarks are source identifiers and therefore, we find no infirmity with the reasoning of the learned Single Judge that the depiction of the bottle of an ordinary toilet cleaner in the impugned videos is likely to be identified as Reckitt's product Harpic.

44. It is not necessary that an advertisement must expressly and clearly mention the competitor's product. It would be impermissible if the disparaged product is likely to be identified as that of a rival. In *Hindustan Lever Ltd. v. Colgate Palmolive (India) Ltd. & Anr.*<sup>12</sup>, the appellant had telecast an advertisement regarding a toothpaste claiming that its toothpaste would be more effective in combatting germs. The characters in the said TV Commercial did not specifically mention the respondent's product (Colgate Toothpaste). It merely showed a lip movement by a child in the TV Commercial, which could be identified as pronouncing 'Colgate'. Further, in the background, a jingle was played, which could be identified as that from the respondent's advertisement. This was sufficient to establish that the appellant was alluding to its rival's product, 'Colgate Toothpaste'. Similarly, in the case of *M/s Colortek Meghalaya*<sup>4</sup> a depiction of a red toothpowder was found to be referring to the appellant's toothpowder.

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<sup>12</sup> (1998) 1 SCC 720

45. In view of the above, we find no infirmity with the decision of the learned Single Judge interdicting the telecast of the first and the third impugned videos.

46. The second impugned video mentions that the ordinary toilet cleaner (referring to Reckitt's product Harpic) is only effective for one flush but HUL's product is effective for a longer period of 100 flushes. It is common a ground between the parties that HUL's message is not in the nature of puffery or hyperbole but is held out as a statement of fact. Thus, the question whether HUL is entitled to run an advertisement representing that its product is effective for 100 flushes and Harpic is effective for only one flush, is required to be answered by determining whether the said statement is true and not misleading.

47. There is no dispute that comparative advertisement is permissible. However, the same cannot disparage the products of the competitors. It is permissible to advertise that a particular feature or quality of the product is better than that of the competitor. However, this is clearly subject to the condition that the overall advertisement must not be misleading. A statement of fact or a representation made in an advertisement must not only be accurate but should not be misleading, as well. This has to be viewed from the standpoint of the customers that the advertisements seek to target. For instance, it is possible that a particular feature of the product, which has no material relevance, is compared with the feature of the competing product to craft an advertisement reflecting the product of the advertiser to be superior to the product of its competitor. Whilst the statement regarding

comparative features may be true, the overall commercial advertisement may be grossly misleading.

48. In *M/s Colortek Meghalaya*<sup>4</sup> this Court had emphasized that there must be a “*reasonable factual basis*” for an assertion.

49. In the present case, the second impugned video asserts that Domex fights bad odour up to 100 flushes while ordinary toilet cleaners (referring to Reckitt’s product Harpic) fight bad odour only till the first flush. It is also relevant to refer to the first frame where the question posed is “Aapka toilet cleaner kya badbu se ladhata hai” (freely translated in English, “whether your toilet cleaner fights bad odour”). In the next frame, the word “kya” (freely translated in English “whether”) is struck off and replaced by “kabtak” (freely translated in English “till when”). The question asked to the customers is: for how long does their toilet cleaner fight bad odour?

50. As stated above, HUL’s claim that its product fights bad odour till 100 flushes rests solely on the basis that it uses a compound with hydrophobic qualities that sticks to the side of the toilet bowls and therefore, does not let the odour causing liquids (referring to urine) stick on the side wall for up to 100 flushes.

51. HUL relies on a laboratory test conducted by the International Association of Plumbing and Mechanical Officials (IAPMO). The procedure followed as indicated in the test report was to keep a ceramic surface on an inclined stand in a tray inside a fume hood. 50 ml of Ammonia solution (0.05% ammonia solution in de-ionized water) was

poured on the ceramic surface uniformly and was allowed to fall naturally and after five to six seconds the extent of ammonia smell was evaluated. This cycle was repeated. Reckitt disputes that the methodology used can lead to the broad inference as advertised. Mr. Lall contends that the said test does not indicate as to how the ceramic surface is rinsed so as to simulate a flush. He submitted that a toilet bowl has hydrophobic qualities and coating the same with 'Saline' does not result in fighting bad odour as the foul-smelling liquid would collect in the water at the bottom of the toilet bowl. He submitted that any test to validate HUL's claim would necessarily entail the ceramic surface being rinsed immediately after the ammonia solution is poured. The competing efficacy of the product is required to be determined by ascertaining whether any foul-smelling liquid is retained on the walls of the toilet bowl after flushing.

52. The question whether the test report furnished by HUL substantiates its claim is a contentious one. The learned Single Judge has proceeded on the basis that determination of the said question requires the parties to lead evidence. Given the nature of the controversy, we find no infirmity with the decision of the learned Single Judge to defer the decision in this regard till the parties have led evidence.

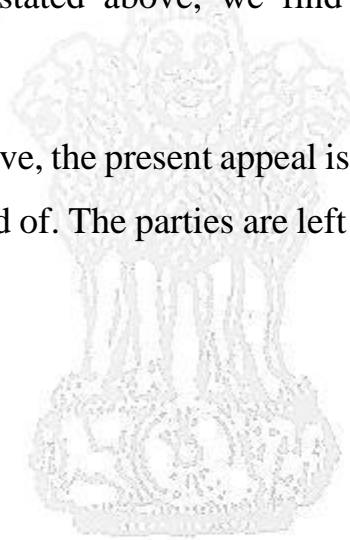
53. Undisputedly, the balance of convenience lies in favour of Reckitt. A false advertisement campaign would cause irreparable loss to Reckitt while postponing broadcast of an advertisement referring to Reckitt's product may not have any material effect on HUL,

considering that it is free to advertise its product without reference to Reckitt's products.

54. Given the nature of the controversy and the facts, the learned Single Judge has not interdicted HUL from broadcasting the impugned videos but merely directed that it remove all references to Reckitt's product and the bottle representing ordinary toilet cleaners as the same is identifiable with Reckitt's product – Harpic.

55. For the reasons stated above, we find no infirmity with the impugned judgment.

56. In view of the above, the present appeal is dismissed. All pending applications are disposed of. The parties are left to bear their own costs.



**VIBHU BAKHRU, J**

**AMIT MAHAJAN, J**

**APRIL 13, 2023**  
**RK**