

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SUIT FOR PERMANENT INJUNCTION

Reserved on: 09.12.2013

Pronounced on:31.01.2014

RFA (OS) 50/2008, C.M. APPL. 17116/2008

HINDUSTAN UNILEVER LIMITED Appellant
Through: Sh. Sandeep Sethi, Sr. Advocate with Sh. Aditya Narayan, Sh.
Sameer Parekh, Sh. Kumar Shashank and Sh. Nitin Thukral, Advocates.

versus

RECKITT BENCKISER INDIA LIMITED Respondents
Through: Sh. C.M. Lall with Ms. Ekta Sarin, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

1. This is a defendant's appeal directed against a decree for permanent injunction issued by the learned Single Judge in a claim alleging that the defendant/appellant's advertisement had disparaged the plaintiff's goods. The impugned judgment also directed payment of punitive damages to the extent of Rs. 5 lakhs to the plaintiff. The parties will be referred to by their original description in the suit for the sake of convenience.

2. The plaintiff (hereafter "Reckitt") sought to restrain the defendant Hindustan Lever Ltd. (hereafter "HUL") by permanent injunction from telecasting the impugned advertisement or otherwise disparaging Reckitt's goodwill and reputation and its product sold under the trade mark DETTOL, in any other advertisements and in all media, from using the depiction of Reckitt's soap or any other soap deceptively similar to that of Reckitt's in its advertisement or in any other manner disparaging the goodwill and reputation of Reckitt and its product sold under the trade mark DETTOL,

and finally, from using any other indicia whatsoever to associate with/depict Reckitt or its products in its advertisements issued in any and all media whatsoever including the electronic media. Reckitt also sought damages to the tune of Rs.20,00,050/- towards disparagement, denigration and tarnishment of its goodwill and reputation by the impugned advertisement. A claim for exemplary damages too was made in the suit.

3. Reckitt is involved in the manufacture of the famous antiseptic disinfectant under the trade mark DETTOL for over 70 years. It was averred that the mark DETTOL is synonymous with good hygiene and, today, it is a household name and is the most widely used antiseptic disinfectant in the country. The plaint also mentioned the history of DETTOL dating back to 1929 when the DETTOL antiseptic liquid was developed. As an antiseptic germ disinfectant, it was argued, DETTOL had an unparalleled reputation in the medical profession and that it continuously evolved to meet modern day demands, and now incorporates a range of innovative antiseptic, disinfectant and cleaning products ranging from antiseptic liquid, hand wash and the

DETTOL toilet soap which has been manufactured and sold by Reckitt continuously since 1981. Reckitt relied on the new modern, distinctive and unique shape of the DETTOL toilet soap, which was subjected to intentional and deliberate disparagement by the defendant is identified by the members of the trade and public by its colour. Reckitt stated that on the front of the soap the trade mark “DETTOL” and the sword device is clearly visible. Reckitt contended that consumer-recognition of its products is by the colour and distinctive shape of the soap, and also through its distinctive green coloured packaging. In 1981, the DETTOL soap was launched as a rectangular shaped, orange coloured bar without any curves. Reckitt adopted the present shape with the curves instead of edges in May, 2006. It was argued that this new improved soap with curvature in the middle and curved edges helps consumers to easily identify and distinguish the product from others. Unlike other orange coloured soaps in the market, Reckitt’s product is the only one with such distinctive shape. Three variants of the new soap are available in the market, i.e. DETTOL Original; DETTOL Skincare (a white soap) and DETTOL Cool (a blue soap). Of the three variants, the DETTOL Original bar is an orange coloured and is the most popular. According to the plaint, the sale of DETTOL Original constitutes 80% of the total DETTOL soap sales.

4. Reckitt argued that the soap packaging has always been of a distinctive green and white colour combination and such packaging is synonymous with Reckitt's famous DETTOL brand. In this line of argument, Reckitt argues that the purchasing public perceives the orange coloured bar with its

distinctive shape and the distinctive green and white packaging to be synonymous with the DETTOL Original soap. Reckitt claims that it continuously and uninterruptedly marketed its DETTOL products with such distinctive green and white colour combination packaging, including the sword device in India since the year 1933. It claims to have announced in a press release that it was contemplating introducing new variants of its flagship brand DETTOL and it launched a new ad campaign – “Surakshit Parivar” – to create awareness of the practice of hygiene at the family level. Reckitt allocated a budget of about Rs.5 crores for the programme.

5. Reckitt became aware that the HUL introduced an advertisement on television, which intentionally and deliberately disparages Reckitt's soap under the trade mark DETTOL and the unique and distinctive packaging. The offending advertisement concerns the defendant's LIFEBUOY soap. Reckitt alleges that a bare viewing of the said advertisement would convince this Court of the defendant's malicious intent to increase the market share of its LIFEBUOY soap by tarnishing the goodwill and reputation of Reckitt's soap i.e. DETTOL Original Soap. The disparaged soap, alleged Reckitt, is its product. The contours and the curvature in the middle on the toilet soap in the defendant's advertisement are identical to the contours of Reckitt's DETTOL Original soap. The only difference is that Reckitt's product and the logo are not shown in the advertisement. The colour of the soap in the defendant's advertisement is virtually identical to that of the DETTOL Original soap of Reckitt. The packaging of the toilet soap used in the defendant's advertisement is likewise similar to that of Reckitt's soap's

packaging. The defendant's advertisement is designed to give an impression to the buyers that the offending soap is Reckitt's DETTOL Original soap. The learned Single Judge describes the disparagement alleged, in the following manner:

(i) The advertisement begins with a couple returning home after getting wet in the rain. The wife then proceeds to take a new soap to go and have a bath. The green coloured packaging, the orange coloured soap and the distinctive DETTOL shape is clearly visible in the advertisement. The intention of this scene is to convey to the audience that the offending soap pertains to an

established soap i.e., Dettol Original soap presently being used by the family.

(ii) The next frame shows the husband, a medical doctor, and the children telling the lady of the house not to use the soap and the vocals state: “Oh God bachaa lena naadaan ko aql dena....Hum sab ko bachaa lena”.

It is alleged that the use of a doctor protagonist is once again relevant as Dettol is an established brand in the medical profession.

(iii) The next frame shows the doctor husband explaining to the wife the reason as to why she should not use the offending soap and, instead, should use the Defendant's Lifebuoy soap by stating that normal antiseptic soaps make the skin dry leading to cracks in the skin thereby permitting the germs to enter the cracks in the skin while the defendant's soap fights germs and keeps the skin protected. According to the plaintiff this scene is clearly intended to give out the message that the Plaintiff's soap is not effective against fighting germs whereas the Defendant's soap is effective against fighting germs. The words used in the advertisement are:- “Dua ki zarurat padegi is dawa ke saath. Aam antiseptic sabun twacha ko rukha kar dete hai jis se dararon mein kitanu ghus jaate hain...isi liye naya Lifebuoy skin guard jo kare kitanuon per waar aur banaye suraksha ki bhi deegar.”

According to the plaintiff it is relevant to mention that as Dettol is used in respect of an extremely well known brand of antiseptic liquid, the use of the term “dawa” (medicine) is clearly intended to draw the attention of the viewer to the Plaintiff's product.

(iv) In the next frame the lady is then shown to go and have a bath with the Defendant's soap and come out very satisfied with the same. According to the plaintiff, this falsely indicates that the defendant's soap is effective against fighting germs while the plaintiff's Dettol soap is not.”

6. Reckitt alleged that the defendant's advertisement is a slanderous attempt to increase the market share of its Lifebuoy soap by defaming and disparaging the worth and reputation of Reckitt's product. It was also alleged that the said advertisement outreaches the limits of allowed competitive advertising and blatantly denigrates the reputation and goodwill of Reckitt's well established and leading brand. It not only showed that HUL's product was good (i.e. puffery) but also very clearly depicts that Reckitt's product is completely worthless. Further, the use of the soap bar including its unique curved shape and the distinctive packaging which is virtually identical to that of Reckitt's by HUL resulted in dilution and debasement of the hard earned reputation and goodwill of Reckitt's world-known and widely used products. HUL's conduct in filing a caveat dated

16.7.2007 was alleged to indicate its mala fide intentions as against Reckitt's product as HUL was aware that the soap depicted in its advertisement was Reckitt's soap and also knew that Reckitt would initiate action against it.

7. The defendant, in its written statement, denied that Reckitt had any cause of action or that the action could be adjudicated in the civil courts, since the allegations pertained to unfair competition and were properly the subject matter of proceedings under the Monopolies and Restrictive Trade Practices Act, 1969 (hereafter referred to as the 'MRTP Act') and the Consumer Protection Act, 1986. The advertisement, in question, stated the defendant referred to ordinary antiseptic soaps; Reckitt's soap is neither an antiseptic soap, nor an ordinary (unbranded) soap. It relied on the judgment in *Reckitt Benckiser (India) Limited v. Naga Limited & Others*: 2003 (26) PTC 535 (Del.), where it was allegedly held that Reckitt's soap is not an antiseptic soap. The defendant alleged that Reckitt does not have a monopoly over the colour or over the shape of the soap and cannot claim exclusivity over the colour, shape or packaging of the soap. The defendant further stated that the shape, contours and curvatures of Reckitt's orange coloured soap DETTOL was not registered under the Design's Act to give it an exclusive right to use it.

8. The defendant stated that it marketed several toilet soaps including one under the brand name "LIFEBUOY" through an extensive marketing network across the country and that it enjoys considerable goodwill and reputation among the Indian consumers. It is stated that LIFEBUOY is a global brand which was launched in the United Kingdom in 1894 as a product for personal hygiene and that it is India's oldest toilet soap brand and has been synonymous with health and hygiene in India since 1895. The defendant alleged that the said product sold under the brand name LIFEBUOY for over 110 years has acquired substantial goodwill in the market and has become a household name. The defendant denied that its advertisement disparaged Reckitt's product and said that it aims at educating the consumers and public at large to understand the difference between toilet soaps containing glycerine, which have a moisturizing effect on the skin and give a long term benefit on the one hand and ordinary antiseptic soaps in the market on the other which may not contain glycerin and do not give to the consumers the benefit of moisturizing the skin and removing the possibility of formation of cracks which is a breeding ground for germs. It is further stated that the defendant's claims about its soap being better than any other ordinary antiseptic soap is based on the laboratory test conducted by it.

9. The defendant urged that its TV advertisement had to be seen in totality and not in an isolated and unnatural manner, frame by frame. The defendant

contended that the intent, manner, story line and message of its advertisement are that its soap is better than ordinary antiseptic soaps because it is rich in glycerin and vitamin E. Further, the defendant stated that Reckitt's soap, a Rs.200 crore brand, cannot be termed as an ordinary soap and in any event, is not an antiseptic soap. In the entire advertisement, there is no reference whatsoever to the trademark DETTOL or the sword device and, therefore, there is no reference to Reckitt's product, argues the defendant.

10. Denying that the impugned advertisement described Reckitt's soap, the defendant outlined points of distinction. Again, the narration of the Single Judge in this regard is set out below:

“(a) The colour of the soap shown in defendant's advertisement is yellow in comparison to the plaintiff's orange soap; (b) The soap shown in defendant's advertisement is taken out of a pale green single-colour packaging, whereas the plaintiff's DETTOL TOTAL is sold in green and white and its other variants are sold in blue and white packaging; (c) There are many other soaps in the market with curvatures and contours similar to the plaintiff's soap. (d) The brand name DETTOL and/or the Sword device are embossed on all the plaintiff's products but the same are admittedly missing from the soap shown in the defendant's advertisement.”

11. Without prejudice to its pleas that the impugned advertisement did not describe or refer to Reckitt's product, the defendant stated, *arguendo*, if the soap shown in the defendant's advertisement was that of Reckitt, nevertheless a tradesman is entitled to declare his goods to be the best in the world, irrespective of the truth of that statement. It can be said that a tradesman's goods are better than his competitors; though such statement may be untrue. To say that one's goods are the best in the world or are better than that of the competitors one can even spell out the advantages of his goods over that of others. Reckitt itself has been showing that its soap is better than that of the defendant's in its various advertisements, both in India and abroad.

12. The following issues were framed in the suit, for adjudication:

“1. Whether the depiction in the advertisement of the defendant of soap refers to the Dettol soap of the plaintiff? (OPP)

2. Whether the advertisement of the defendant disparages or denigrates the soap of the plaintiff? (OPP)

3. Whether the impugned advertisement seeks only to promote the superiority of the defendant LIFEBOUY soap over an ordinary antiseptic soap? (OPD)

4. Whether the plaintiff is guilty of suppression of material facts? If so, its effect? (OPD)
5. Whether the impugned advertisement constitutes an attack on the goodwill and reputation of the Dettol brand of the plaintiff? (OPP)
6. Whether the present suit is barred on account of the provisions of the MRTP Act, 1969 and/or the Consumer Protection Act, 1986? (OPD)
7. Whether the plaintiff is entitled to any damages for disparagement, denigration, loss of goodwill and reputation? If so, the extent thereof? (OPP)
8. Whether the plaintiff is entitled to punitive and exemplary damages? If so, the extent thereof ? (OPP)
9. Relief.”

13. Reckitt relied on documents, Ext. PW1/1 to PW1/19 and PW1/DX1. HUL relied on Ext. DW1/1 to DW1/18 and DW2/1 to DW2/9. The video clip of the advertisement was filed in a compact disc (Ext. PW1/2). Reckitt produced one witness (PW-1) – Mr. Mohit Marwah, its Brand Manager. The defendant relied on testimonies of three witnesses - (1) Mr. Anuj Kumar Rustagi, Global Marketing Manager, Lifebuoy Soaps (DW1); (2) Dr. Rajan Raghavachari, Regional Senior Product Development Manager of the defendant (DW2) and (3) Dr Hemangi Jerajani, Dermatologist (DW3). Affidavits of the witnesses in the first instance formed their examination in chief and they were subjected to cross-examination by the opposing counsel.

14. The Court had the benefit of considering the suit records, including the video clip of the offending advertisement (Ext. PW1/2). The observations of the Single Judge describing the story board are extracted below:

“1. A man and his wife returning home on a rainy day. The wife exclaims “Kya baarish hai” (what rain). The man places his white coat and stethoscope which indicates that he is a doctor. He goes and sits with his children (boy and girl) on the sofa. The children are watching a cricket match on television.

2. The next frames show that his wife plans to take a bath saying “chalo main naha leti hoon” (come, let me take a bath). She is then shown taking out an orange bar of soap from a green wrapper.

3. On seeing the orange soap in his wife’s hand, the husband has a shocked look on his face and says “Oh God, bachaa lena” (Oh God, Save her).

4. The next frames show the husband and children pointing at the wife and singing a song in chorus “Naadaan ko aql dena, ham sab ko bachaa lena.....” (show reason to the naive, save us all).

5. The wife has a surprised look on her face and asks “Kya kar rahe ho” (what are you doing?).

6. The next frames show the husband displaying the orange soap in his raised right hand and looking at his wife and saying “Dua ki zarurat padegi iss dawaa ke saath” (prayers would be required with this medicine).

7. This is followed by a cut to a bathing shot where a woman is shown using the said orange bar of soap. In this cut, there is a male voice-over stating:

“Aam antiseptic sabun twacha ko rukha kar dete hain..”

(Ordinary antiseptic soaps make the skin dry..).

8. Then there is a close-up of the upper-arm under a magnifying glass which reveals skin with cracks and green germs lodged in the cracks. At this juncture the male voice-over states: “..Jis se dararon me kitanu ghus jate hain” (.. as a result of which, germs get into the cracks). Simultaneously, the following words appear on the bottom left of the screen:-

“Aam antiseptic sabun” (ordinary antiseptic soap)

9. Then there is a cut to a water shot, where we see a bar of the red LIFEBUOY soap emerging out of the water. On the top left hand corner of the screen, the words “Glycerine” and “vitamin E” appear and the male voice-over states “Isi liye naya Lifebuoy Skin Guard” (that is why, new Lifebuoy Skin Guard).

10. Then there is a cut again showing a part of the arm under a magnifying glass and the green germs are seen getting washed away. The male voice-over states that :

“.. jo kare kitanuon pe waar” (.. which attacks the germs).

11. The next frames show a layer of glycerine flowing from left to right under the magnifying glass and the voice-over states: “.. aur banaye suraksha ki bhi deewar” (..and also builds a protective wall).

12. The clip then proceeds to a new cut showing the wife, apparently after having had a bath, coming into the living room where the husband and children are watching the cricket match on television. On seeing her they, once again break into the same song “Bachaa lena” (Save us).

13. The wife stops them and, referring to the cricket match being shown on TV, says “Aa hah, doctor saheb dua inke liye bachaa lena” (Aa hah, doctor saheb, save the prayers for them).

14. The next frames show that the wife joins her husband and children at the sofa and says:

“Hame koi dar nahin” (we have no fear).

15. The next shot shows the LIFEBUOY Skinguard bar of soap and its package and the LIFEBUOY logo zooms onto the package. At this juncture the male voice-over announces: “Naya Lifebuoy Skin Guard” (new Lifebuoy Skin Guard).

16. This is followed by a cut to the Hindustan Lever Limited logo and the advertisement ends there.”

15. After making a detailed frame by frame description of the offending advertisement, the learned Single Judge held that:

“The new shape of the DETTOL Original toilet soap with the curved edges and the curvature in the middle is clearly displayed on the product packaging, which is further indicative of the importance given to the shape by the plaintiff in its marketing of the product. The packaging (Ext. PW1/8) also establishes the fact that although white is also used, green is the pre-dominant colour. Although, the brand name, logo or the sword device does not appear in the orange bar of soap shown in the advertisement (Ext. PW1/2), there can be no misgiving that the bar of soap which has been shown in the said advertisement is of a colour similar to that of the plaintiff’s DETTOL soap. The contours, curvature as well as the overall shape of the orange bar of soap in the advertisement itself, are virtually the same as that of the contours, curvature and overall shape of the plaintiff’s DETTOL Original soap. Moreover, the clear impression given in the advertisement is that the said orange bar of soap has been taken out from a green wrapper/ packaging. It must also be noted that the design of the plaintiff’s soap has been registered by the plaintiff as indicated by Ext. PW1/DX-1. While it is true that there may be other orange coloured soaps and other soaps sold in the pre-dominantly green packaging and other soaps which have an oval shape, it is also true that it is only the plaintiff’s soap which has a combination of all the three elements, i.e., orange colour, curved oval shape and pre-dominantly green packaging. Apart from this, it is only the plaintiff’s soap which has contours in the manner indicated in the bar of soap in the said advertisement. No evidence has been produced by the defendant to show that there is any ordinary antiseptic soap with the same combination of the aforesaid elements of colour, shape, design and packaging. I have absolutely no doubt that the orange bar of soap shown in the advertisement refers to the plaintiff’s DETTOL Original soap.”

16. The learned Single Judge conceded that though Reckitt’s soap was not an antiseptic soap, and therefore, facially the defendant was not referring to DETTOL, yet the long association of Reckitt with antiseptic products and medications in the general public’s mind led to the belief that the offending soap was that of Reckitt, and an antiseptic one at that. The Single Judge then rejected the defendant’s argument that there had to be proof of disparagement through oral testimony of witnesses:

“It has been contended on behalf of the defendant that the plaintiff has not produced any evidence of consumers to indicate that the orange bar of soap

in the said advertisement appears to be the plaintiff's DETTOL Original soap. In response the learned counsel for the plaintiff submitted that producing such evidence would be counter-productive and is not necessary. He submitted that the plaintiff could produce witnesses stating that the orange bar of soap shown in the advertisement had reference to the plaintiff's DETTOL Original soap. Similarly, the defendant could also produce witnesses to state the contrary. Ultimately, it would be for the court to make a judgment from the perspective of an average person with imperfect recollection, a test which has been well established, particularly in passing off cases. Though slander of goods and disparaging advertisements stand on a slightly different footing to passing off cases, I find myself to be in agreement with the submissions made by the learned counsel for the plaintiff. Ultimately it is a question of perception and the perception has to be determined from the stand point of an average person man with imperfect recollection but, with a corollary, which shall stated be shortly. One could normally expect that there would be a difference in perception between two distinct classes of persons -- (1) Persons who are using DETTOL Original soap and (2) persons who do not use that soap. A person belonging to the latter category may not be aware of the orange coloured bar of soap of the plaintiff with its distinctive shape, curvature and contours. He may also not be aware of the packaging employed by the plaintiff. Therefore, such a person may not link the bar of soap shown in the advertisement with the plaintiff's product when he sees the advertisement or when he comes upon the plaintiff's product in a shop. Such a person, in all likelihood, would perceive the orange bar of soap shown in the advertisement as being some unbranded bar of soap. On the other hand, a person belonging to the former category, being a user of the plaintiff's DETTOL Original soap, would immediately recognise the bar of soap shown in the advertisement as referring to the plaintiff's DETTOL Original soap. This is because, such a person is familiar with the plaintiff's product. He is "intimately" aware of the look and feel of the soap because he uses it everyday."

After the above analysis, the impugned judgement proceeded to hold as follows:

"The difference in approach in a passing off action and one for disparagement must also be highlighted. In a case of passing off, the question invariably is whether the trade mark or trade dress employed by A for his product is so deceptively similar to the established mark or trade dress of B's product that A's product could be confused by or passed off to consumers as B's product? Here the comparison is of rival products having a similar trade mark, get-up or trade dress. Familiarity with the established

mark, trade dress or get-up is presumed. Because, it is this familiarity that the person intending to pass off his goods as those of the famous or more popular, exploits. In the case of disparagement, the one who disparages another's product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor's product. The comparisons, therefore, in cases of passing off and in cases of disparagement are different. Consequently, the comparison must be from the perspective of an average person with imperfect recollection but, that person must be picked from the category of users of the product allegedly sought to be disparaged or slandered.

27. Considered from the standpoint of an average man with imperfect recollection who is also a user of the DETTOL Original soap, the inescapable conclusion would be that the soap shown in the advertisement refers to the plaintiff's DETTOL Original soap. Consequently Issue No 1 is decided in favour of the plaintiff and against the defendant."

On the second issue, i.e. whether the impugned advertisement promoted the defendant's product, the Court held that the advertisement could be divided into two parts: one of those disparaged Reckitt's product and the other sought to promote the defendant's product. It was held that though an attempt at promoting the defendant's product – which was permissible – was discernible, yet the net result of the advertisement was to disparage Reckitt's DETTOL Original. The Court held that the materials relied on by Reckitt were insufficient to entitle it to compensatory or general damages. However, Hindustan Lever's conduct was held to be such as to entitle Reckitt to punitive damages, which the learned Single Judge quantified at Rs. 5,00,000/-.

Appellant's contentions

17. The appellant/HUL contends that Reckitt could not have maintained the suit since it was guilty of unfair conduct. It was submitted in this regard that though Reckitt concedes that its product is not an antiseptic soap but at the same time it unfairly maintains that the impugned advertisement disparages and denigrates its products. It is submitted in this regard that the advertisement merely cautions the viewers and the members of the public that antiseptic soap tends to injure the skin. It is not Reckitt's contention that its soap is an antiseptic soap. This important aspect escaped the notice of the learned Single Judge. The suit, therefore, was not maintainable at all. Learned counsel in this context relied upon the observations of the learned Single Judge in paragraph 23 of the impugned judgment to the effect that

Reckitt's soap – Dettol Original – is not an antiseptic soap whereas the soap in the advertisement is referred to as an “ordinary antiseptic soap”. However, it was argued that nevertheless the impugned judgment erroneously held that the public at large carried an impression that all Dettol products are antiseptic. Furthermore, submitted learned counsel, Reckitt even had claimed that its product was recommended by the Indian Medical Association (IMA) – advertised prominently on the cover too.

18. Elaborating on this aspect, learned counsel submitted that Reckitt did not in fact have a cause of action at all because the Dettol Original is a toilet soap, concededly bearing BIS specification IS:2888; 2004. However, the comparison made in the advertisement is against an ordinary antiseptic soap, an entirely different article or product falling within the BIS specification IS:11479; 1985. Learned counsel relied upon the ruling of this Court in *Reckitt Benckiser India Limited v. Naga Ltd.*, 104 (2003) DLT 490. It was argued next that the learned Single Judge did not apply the proper test applicable in disparagement of goods/products disparagement cases. Learned counsel here submitted that the appropriate test applicable is whether a reasonable man with average intelligence can identify Reckitt's products in the advertisement. It was emphasized that the overall or the totality of impression test in the same medium (of communication) has to be applied in this context. Learned counsel faulted the learned Single Judge for applying the test of confusion, properly applicable in passing-off actions. Reliance was placed upon the meaning of the expression “disparagement” given in the *New International Webster's Comprehensive Dictionary*, i.e. “to speak of slightly or undervalue or bring discredit or dishonor upon ...” It was submitted that in considering whether a statement is denigrating or otherwise, the Court should give the statement or material in question its natural and ordinary meaning. In this context, learned counsel relied upon the decision reported as *Gillic v. British Broadcasting Corporation* 1996 EMLR and the discussion in *Clerk and Lindsells Treatise on Torts* (20th Edition) Common Law Library, published by Sweet & Maxwell, it was emphasized that the question whether the statement is defamatory or disparaging depends on the probability of the case and the natural tendency of the publication, having regard to the surrounding circumstances and not the intention of the defendant. Reliance was placed upon the judgment reported as *Keays v. Murdock Magazines*, 1991 (1) WLR 1184. It was submitted further that the learned Single Judge fell into error in holding that the target group of persons to whom the impugned advertisement was made, was the one who used the product as they would know how it looks. It was stressed that this conclusion was illogical because then it would not be a case

of imperfect recollection. Besides, argued counsel, this flies on the face of the well-accepted proposition that words are not defamatory if they may damage the man in the eyes of a section of community unless they amount to disparagement in the eyes of the right-thinking people of the entire general public. Counsel also took exception to what he termed as a minute and elaborate analysis of the impugned advertisement by the learned Single Judge. He argued that the Court should have considered the overall effect, rather than a bits and pieces approach in detailed scrutiny of the various elements of the advertisement. Counsel relied on *Skuse v. Grenada* [1993] EWCA Civ 34, in support of this argument. It was next argued that the learned Single Judge could not have found, upon the fair assessment of the materials on record, that there was disparagement of Reckitt's Dettol Original soap.

19. Learned Senior counsel, Shri Sandeep Sethi, underlined that to arrive at such a conclusion it was essential for Reckitt to have led evidence by way of oral testimony of some consumers who saw the advertisement of Dettol ordinary and found that its effect was to run-down the reputation and goodwill or cause injury in their eyes. The absence of this material, submitted counsel, undermined the findings of the learned Single Judge. Reliance was placed upon the decision *Colgate Palmolive v. Hindustan Lever*, 1999 (7) SCC 1. Reliance was also placed upon *Reckitt and Coleman of India Ltd. v. Jyothi Laboratories*, 1999 (2) Cal. LT 230. Learned counsel argued that none of the witnesses produced by Reckitt could be characterized as genuine members of the public since they were all either its officials or associated with it.

20. HUL further argued, through senior counsel, Sh. Sandeep Sethi, that the impugned advertisement has not been considered in its totality by the learned Single Judge, but considered it frame-by-frame and in bits and pieces to hold that it disparaged Reckitt's Dettol Original soap. Learned counsel relied upon the decision of the Supreme Court in *Lakhanpal v. MRTP Commission*, AIR 1989 SC 1692. It was next urged that since the impugned findings do not apply the proper test of overall effect but was based upon an intense frame-by-frame analysis of the advertisement, highlighting the soap, the packaging, the colours and the shape, the conclusions were distorted. It was also emphasized that the learned Single Judge fell into error in holding that the impugned advertisement contains a combination of three elements, i.e. orange colour, curved shape and prominently green packaging. Learned counsel relied upon the decision reported as *Colgate Palmolive v. Mr. Patel* 2005 (31) PTC 583 (Del) to say that no one can claim monopoly over colours and consequently Reckitt

could neither claim monopoly over the orange colour nor the overall green packaging which were common colours. However, the comparison made in the advertisement was with ordinary antiseptic soap. Learned counsel further stressed that intense frame-by-frame scrutiny has prejudiced the mind of the learned Single Judge since it completely overshadowed the overall effect. The time given for depicting the shape (with colour), packaging of HUL's soap and the so-called disparaging comments having regard to the overall length of the advertisement, was miniscule and disproportionately low – less than five per-cent. This could not have resulted in disparagement at all – a very important aspect overlooked by the learned Single Judge. Learned counsel also submitted that in this intensive analysis, the impugned judgment overlooked a very significant aspect which was that Reckitt's packaging of its Dettol soap, claimed in the plaint was the white and green colour combination. The impugned judgment, on the other hand, erroneously held that the green packaging depicted in the advertisement was a pointed reference to that of Reckitt's product. In other words, submitted the counsel, Reckitt's case was that its white and green colour combined packaging had attained distinctiveness whereas the impugned advertisement was green and no evidence was led by Reckitt to establish that it packaged its products in that manner.

21. Sh. Sandeep Sethi next argued that the learned Single Judge failed to consider the evidence of HUL and in particular, the affidavit evidence of DW-1 along with the photographs, DW-1/1, DW-1/2 and DW-1/3. These documents were photographs of various branded and unbranded orange coloured soaps (DW-1/1); of various orange coloured antiseptic soaps (DW-1/2) and green and white packaging (DW-1/3). It was argued in this context that orange is a common product colour in the market in both branded and unbranded soaps and that there are several orange coloured antiseptic soaps with green and white packaging.

22. Learned counsel also submitted that Reckitt could have led appropriate survey evidence that consumers involved in all orange coloured soaps in a curvature and green packaging associated them with the Dettol Original toilet soap. There was complete lack of such evidence. In these circumstances, the appropriate course for the learned Single Judge was to draw an adverse inference against Reckitt and not to decide the case on the basis that such evidence or the lack of it was of no consequence. This led to failure of justice because the evidence led by the defendant, i.e. HUL was not taken into consideration. Likewise, submitted learned counsel, the finding that the customer associated the term "ordinary antiseptic soap"

referred to in the impugned advertisement with Reckitt's product is based upon an assumption and does not rest on any material or evidence.

23. Learned senior counsel next submitted that to succeed in its suit for disparagement, not only did Reckitt have to prove that the impugned statement was concerning his goods but also that it was false and malicious, i.e. with intent to cause injury. Reliance was placed upon the decisions reported as *White v. Mellin*, 1895 AC 154; *Imperial Tobacco Company v. Albert Bonnan*, AIR 1928 Cal 1. It was submitted that the learned Single Judge failed to consider the evidence led by HUL to establish that the laboratory test reports produced as DW-2/1, DW-2/2, DW-2/3 and DW-2/7 substantiated the claim that ordinary antiseptic soaps were not of the same standard as HUL's "Skin Guard". Thus, the truth of the statement that Reckitt's advertisement regarding its Skin Guard toilet soap which had moisturizing content was more beneficial than antiseptic soaps which had the tendency to cause injury to the skin. This error, in the submission of HUL's counsel, clearly goes to the root of the matter since Reckitt could not have in these circumstances stated that the claims made in the advertisement were false. Thus, the second element, i.e. the truth of the statement having been proved was established by HUL, the suit had to necessarily fail.

24. Learned counsel faulted the impugned judgment in granting plaintiff's claim for punitive damages even after holding that no special damage had been proved. Reliance was placed upon the decision of the Supreme Court referred to as *Organo Chemical Industries v. Union of India*, 1979 (4) SCC 1. It was stated that this approves the grant of such punitive damages. Learned counsel also relied upon the judgment of the Court of Appeals in *Broome v. Cassel and Co.*, 1972 AC 1027 to submit that grant of punitive or special damages even while the Court is unable to grant any general or compensatory damages, is without authority of law. Learned counsel further relied upon the decision in *Microsoft Corporation v. Deepak Rawal*, 2007 (35) PTC 478 (Delhi) to say that the rationale of awarding punitive damages is to deter the wrong-doer from indulging in unlawful activities which have a criminal propensity. He submitted that the reliance on *Times Corporation v. Lokesh Srivastava*, 2005 (30) PTC 3 (Del) by the learned Single Judge was inappropriate. Learned counsel emphasized that the latter decision had discredited the binding judgment of the Supreme Court in *Organo Chemical Industries* (supra).

Contentions of Reckitt Benckiser

25. It was argued on behalf of Reckitt Benckiser, the plaintiff, by Mr. C.M. Lall, learned counsel that an overall reading of the rival pleadings, particularly the allegations in paragraph 23 of the plaint and the

corresponding averments in the written statement clearly demonstrate that the claim was in respect of reputation and goodwill of Reckitt soap under the trademark Dettol with its new curved shape, orange colour, distinct green and white packaging and the reputation it enjoyed. Learned counsel emphasized that to establish this claim, adequate evidence in the form of design registration of the soap, Ex. DW-1/DX-1 and the Design Act, conferred exclusivity. However, PW-1, in the deposition clearly stated that the soap, Ex.PW-1/8 and the wrapper served as a trademark and was displayed in the product packaging and that no other soap was available in that unique shape in India or elsewhere. Learned counsel underlined that there was no cross-examination on this issue. Likewise, there was no cross-examination about the sales figures at the time of its launch in May 2006, in the form of statement, Ex.PW-1/10. Likewise, PW-1 had asserted that the orange colour of the soap and the green coloured packaging were identifying features for Reckitt's Dettol toilet soap. On this too, there was no cross-examination.

26. Learned counsel next submitted that in another suit filed by HUL, a copy of which was produced as Ex. PW-1/16, an admission was made that Dettol had launched a toilet soap. That suit claimed relief against the advertisement which were produced in the present case, i.e. DW-1/11, DW-1/12, DW-1/13 and DW-1/14. It was submitted that the orange coloured Dettol soap with unique shape could be seen in the story board in that suit. Learned counsel relied upon the examination-in-chief of DW-1 and the evidence, DW-1/15, produced in the form of sales data collected by an independent agency, IMRB to establish that sales figure of Dettol Original undergo changes in summers and winters. Learned counsel emphasized that the written statement admitted the extensive sales of Reckitt's product, in paragraph 9 and DW-1 had admitted to purchasing Dettol Original soap and thereafter developing the offending advertisement. In this regard, learned counsel relied upon paragraph 11. It was contended that the impugned judgment has adopted the correct approach with respect to proof of disparagement. Learned counsel submitted that the conclusion arrived at by the learned Single Judge, i.e. that evidence of consumers would tend to cancel out the effect of each other, was a common sense and a practical method at resolving what was obviously to be decided by the Court.

27. On the question whether HUL's advertisement disparages or denigrates Reckitt's soap, Shri Lal relies on an admission in the former's written statement. It reads as:

"23 ... It is further submitted that the defendant advertisement is dissuading the public from using the unbranded antiseptic soap" (emphasis supplied)

This averment, submits Reckitt, is relevant as it establishes that the attack is on the rival product and not mere puffery of HLL's product. Counsel underlined that this constitutes an admission of malice and passes the test of malice set out in Imperial Tobacco Co. (i.e. it is "done with the direct object of injuring the other person's business."). Likewise, the averment in paragraph 20 of the plaint is relied to say that it lists the denigration made and includes the representation that use of DETTOL soap in fact invites germs to the body which are then killed and washed away with the LIFEBUOY soap of the defendant. Counsel highlights that in the story line the husband (a doctor) and the children, the most influential people in the life of a housewife, repeatedly mock at the mother for using DETTOL by use of the term "bacha lena" (save) repeatedly. This clearly constitutes denigration. This is a direct attack on Reckitt's "surakshit parivar" (secure family) advertisement campaign, which is alluded to in paragraph 14 of the plaint. Counsel also relies on the following averments to say that denigration and malice are specifically pleaded in the plaint, in particular:

".....a bare viewing of the said advertisement will be sufficient to convince this Hon'ble Court of the malicious intention of the Defendant to increase the market share of its LIFEBUOY soap by tarnishing the goodwill and reputation of the plaintiff's popular product." (paragraph 18)

"...the impugned advertisement is nothing but a slanderous attempt of the defendant to increase market share of its LIFEBUOY soap by defaming and disparaging the worth and reputation of the plaintiff's product." (paragraph 21).

It is argued that the impugned advertisement not only shows that the defendant's product is good but also very clearly depicts that Reckitt's product is completely worthless.

28. Mr. Lal contends that Reckitt has led positive evidence, Ex.PW-1/13 in the form of a test report of an independent agency to establish that DETTOL soap is 10 times more efficacious at reducing bacterial and fungal cell counts than LIFEBUOY. It is submitted that PW-1 was cross-examined on this issue and that HUL's representation that DETTOL causes germ formation is therefore completely false. It is urged that HUL too admits that DETTOL is more than 10 times more efficacious than its LIFEBUOY soap with actives, and a reference is made to Ex. PW-1/17, where in a previous judgment, a learned Single Judge of this court recorded that admission (by HUL, plaintiff in that suit) in the following terms:

"The statement in the advertisement that DETTOL is 10 times more efficacious is in comparison with those soaps which are without actives. Therefore, this statement would not have any reference to the plaintiff's

LIFEBUOY soaps and even otherwise the said statement is claimed to be true by the defendant no.1 and the plaintiff could not dispute that if DETTOL soap is to be compared with soaps without actives, then this statement is factually correct.”

It is stated that HUL itself has led evidence to establish that Reckitt’s soap and its soap are comparable in reducing bacterial count; Ex.DW-2/1 and Ex.DW-2/3 are referred to for this purpose. These, submits Reckitt, establish that Dettol Original (0.961%) has higher levels of Trichloro Carbanilide (TCC), which is the ingredient that helps reduce bacterial count, when compared to Lifebuoy Skin Guard (0.227%). That TCC is an anti-microbial active is admitted on in Para (vii) of the written statement. It is argued that the plaintiff, Reckitt, has discharged the onus that the depiction of Dettol, as the standard of proof indicated in *Reckitt & Coleman of India Ltd. v. Jyothi Laboratories Ltd.*, Cal LT 1999 (2) HC 230, has thus been discharged. Counsel additionally submits that Ex.DW-2/7 further establishes that out of a sample of 31 people on whom tests were conducted with the rival products, on four people Dettol Original caused less dryness and irritation to the skin than Lifebuoy Skin Guard. On six people, the irritation levels were the same. On 8 people, the irritation count was less than three. Therefore, they did not get skin irritation from either product. On 12 people HUL’s product caused skin irritation of the level of four or above. HUL’s own report, therefore, established the falsity of its claims made in the advertisement.

29. It is next urged that HUL’s entire written statement is based upon “laboratory test conducted” by it. (paragraph 6 of the written statement). DW-1 has admitted that “prior to the launch of Lifebuoy Skin Guard soap”, he procured the Dettol Original soap of Reckitt and only “thereafter” developed the offending advertisement (paragraph 11). All tests conducted by HUL are after the launch of the impugned advertisement. Reckitt’s test report, that DETTOL is 10 times more efficacious was available with HUL. This clearly established malice on its part, it is argued.

30. On the fourth issue, i.e. if Reckitt was guilty of suppress of material facts, it is urged that *Reckitt Benckiser (India) v. Naga Ltd.* [104 (2003) DLT 490] related to a different advertising campaign of Reckitt and against a different defendant and was based on completely different facts and had no relevance to the present proceedings. It is argued that Reckitt has always been careful in ensuring that the distinction between its DETTOL liquid and DETTOL toilet soap is maintained in the plaint and in the market place. The description of DETTOL soap as a toilet soap can be seen in paragraphs 7, 8, 9, 19(i) and 19(iii) of the suit, and discuss how the DETTOL brand has been

extended from an antiseptic liquid to a toilet soap. However nowhere is a claim made that DETTOL has any antiseptic quality. On the fifth issue, i.e. whether the impugned advertisement constitutes an attack on Reckitt's goodwill and reputation, the arguments based on HUL's evidence is reiterated.

31. It is argued further that the proceedings in the present case being a civil claim are not barred. Reckitt's counsel relies on Section 9, CPC which outlines jurisdiction of civil courts and states that such power can be ousted where cognizance is "expressly or impliedly barred." In this context, Section 4 of the MRTP Act is relied on to say that application of other laws is not barred. Even the provisions of Section 12B of the said Act – points out Mr. Lal – clarify that the powers of the MRTP Commission are "without prejudice to the right of such Government, trader or class of traders or consumer or institute a suit." Reliance is placed on the judgment of a learned Single Judge in *Citicorp. v. Todi Investors*, 2006 (23) PTC 631 (Del). It is, therefore, argued that there is no express or implied bar in the MRTP Act and on the contrary, a specific provision saves the rights under other laws. Furthermore, counsel submits that the common law remedy of false advertising existed prior to the enactment of the MRTP Act which came into existence in 1969. It did not bar the common law remedies. Learned counsel also argues that the MRTP Act is essentially a consumer protection statute and not a statute designed to protect the rights of one competitor against the other. Such a competitor therefore must only approach the Civil Court and not the MRTP Commission. Consumers on the other hand must approach the MRTP and not the Civil Courts.

Damages: Reckitt's counter claim

32. As to the issue of damages, it is contended that Reckitt established in Issue No.1 and 5 its reputation in its DETTOL soaps. HUL in its written statement admitted to "plaintiff's soap being a Rs.200 crore brand." Therefore, any denigration caused will be caused to at least a Rs. 200 crore brand. This will be the first important consideration for evaluating damages. Reliance is placed on Ex.PW-1/19, a comparative table of the channels in which advertisements of both products appear. This, Mr. Lal argues, establishes how HUL targeted many of channels on which Reckitt advertises. This fact is set out in Para 23 of the examination-in-chief of PW-1. Likewise, counsel relied on Ex.DW-1/12 to DW-1/14, advertisements by Reckitt. In each advertisement a mother is portrayed encouraging her child to bathe with DETTOL soap. The defendant's advertisement has denigrated and undermined this entire advertisement campaign which admittedly was run 'on various TV channels' and was "viewed by consumers and public at

large” “on almost daily basis during different hours.” Admittedly, these advertisements “are telecast during children’s houses for TV viewing and also shown prominently in between family serials for universal viewing” (counsel points out that all these are averments from the written statement). HUL’s advertisement has seriously damaged Reckitt’s campaign by showing the children now mocking at their mother for using DETTOL soap. This fact was spoken to by PW-1 in his examination-in-chief. It is submitted that the extent of damages can be determined by how extensively HUL used the offending advertisement. Ex.DW-1/16 to Ex.DW-1/18 establish the extent of this usage. A channel-wise break-up of the advertisement and the times that it was repeated is clearly set out in Ex.DW-1/18. It is contended that DW-1/17 shows how sales of HUL’s soap in the advertisement have increased. A large part of this is attributable to the advertisement in issue. This is specifically mentioned in the evidence of PW-1 at paragraph 26. Mr. Lal also urged the Court to set aside the findings of the learned Single Judge with respect to refusal to grant any general damages and pressed the counter claim of Reckitt, limited to this extent. He submitted that there were sufficient materials on record, empirically, to realistically evaluate general damages in the manner known to law. Counsel stressed that though the advertisement was for 30 seconds, its impact was widespread, since the defendant HUL had targeted every channel that had been used by Reckitt; it was pointed out that the advertisement was telecast no less than 4441 times between end June and August, 2007. Furthermore Reckitt’s DETTOL brand admittedly was worth Rs. 200 crores at that time. It was also urged that a total quantity of 9132 tons of the article, DETTOL Original, was manufactured during the period January to June, 2007 and that the marketing expenses for that soap, in its new shape was Rs. 23.6 crores for the latter half of that year. Counsel pointed out that the admitted advertising expense in respect of LIFEBUOY which was the subject of the impugned advertisement for one month alone (July 2007) was Rs. 2.5 crores, according to the testimony of DW-1. Based on these facts, the learned Single Judge should have awarded general (or compensatory) damages, upon a fair assessment. It was submitted that in disparagement (of products and goods) or slander to title, it is not easy to assess the extent of harm or injury as it might not be always discernible in the short term and may have long term effect, having regard to market forces.

33. HUL argues and its counsel, Mr Sethi, submits that the learned Single Judge correctly evaluated the evidence and held that general damages should not be awarded. Counsel submitted that production figures or amounts spend towards publicity or even the number of times that the impugned

advertisement was published has little relevance to the issue of damages. What is important is that the plaintiff has to establish that it suffered injury capable of assessment in monetary terms, which it could not, in the facts of the present case. Therefore, counsel concluded that the findings of the learned Single Judge did not call for interference.

Analysis and conclusions

34. The law recognizes that tradesmen and manufacturers may commend their goods and state that they are better than those of rival traders. Yet this is with an important caution that the publisher or advertiser should not make any false representation as to the quality or character of the rival or competitor's goods or products. If no such false representation (as to the character or quality of the rival's goods) is made, the advertisement of a tradesman howsoever commendatory or exaggerated cannot result in an actionable claim. Exaggerated claims sans such false representations are known as 'puffing'. This license – to puff – was recognized in *Bubbuck v. Wilkinson*, 1899 (1) OB 86 where the Lindlay MR observed that mere statement that the defendant's goods are better than the plaintiff would not be actionable. This reasoning was upheld in *Allen v. Flood*, 1898 AC 1. Lindlay MR held that mere puffing would not be actionable because it would "open a very wide door to litigation and might expose every man who said its goods were better than another's to the risk of action". This was echoed in *White v. Mellin*, 1895 AC 154 (widely cited by Indian Courts): "Indeed the Courts of Law would be turned into machinery for advertising rival productions by obtaining judicial determination which of the two was the better".

The determinative considerations were described in *Cellacite & British Uralite v. Robertson* [*The Times*, July 23rd, 1957 (CA)] in the following, if one may so term – legal 'catch phrase': 'the general proposition is: Comparison – Yes but Disparagement – No'. In *De Beers Abrasive v. International General Electric Co.*, 1975 (2) All ER 599, the Court elaborated this as follows:

"In order to draw the line one must apply this test, namely, whether a reasonable man would take the claim being made as a serious claim."

35. Indian Courts have recognized actions for damages in a claim for slander of goods. In *Imperial Tobacco Company v. Albert Bonnan*, AIR 1928 Calcutta 1 (DB), the Court held that to succeed in an action of slander of goods, the plaintiff has to allege and prove that the statement complained of was made concerning his goods and that it must be with the direct object of injuring his business. In India, the decisions of various Courts, namely, *Hindustan Lever Ltd. v. Colgate Palmolive (I) Ltd. and Anr.*, 1998 (1) SCC

720, *Pepsi Co Inc. & Ors. v. Hindustan Coca Cola Ltd & Anr.*, 2003 (27) PTC 305 (Del) (DB), *Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.*, 1999 PTC (19) 741, have followed the English precedents on the subject, especially the five guiding principles outlined in *De Beers Abrasive* (supra). In *Dabur India Ltd. v. Colgate Palmolive India Ltd*, 2004 (29) PTC 401 (Del), the peculiarity of generic disparagement of rival products without specifically pin pointing the rival goods was held to be objectionable. The Court noticed that clever advertisement of a rival tradesman's article without specifically referring or alluding to it and observed that disparagement of a class of goods can result if the rival's goods fall within a class and can be identified. We notice that this judgment was taken into consideration by the learned Single Judge, as also two later English decisions, i.e., *Jupiter Unit Trust Managers Trust Ltd. v. Johnson Fry Asset Managers*, (2000) Unreported 19 April, QBD and *DSG Retail Ltd. v. Comet Group, PLC* (2002) EWHC 116 (QBD).

36. HUL complains that the impugned judgment does not err in its understanding of the law or the guiding principles but as to their application. It is contended that the learned Single Judge even after noticing the law incorrectly concluded that HUL's products disparage Reckitt's Dettol Original. In its argument, HUL mainly contends that a frame by frame analysis of the advertisement coupled with the 'average man with imperfect recollection' test applied by the learned Single Judge has resulted in distorted conclusions. It is also emphasized in this context that the Court overlooked that the plaintiff did not present any or evidence proof and that instead the Single Judge sought to judge the advertisement from the stand point of a common or reasonable man without any witnesses' deposition that could have been tested through cross examination. This Court proposes to address each of these submissions in turn.

37. Slander of goods is a species or branch of the law of defamation. It is widely accepted that to be defamatory, an imputation must tend to lower the claimant in the estimation of right thinking members of society generally, (i.e., the reference to the 'common' or 'reasonable' man). The standard that the statement must amount to 'disparagement of ... the reputation in the eyes of right thinking men generally' was spelt out in *Leetham v. Rank* (1912) 57 SJ 111, and also applied and followed in *Byrne v. Deane*, [1937] 1 KB 818 and in *Campbell v. Toronto Star*, (1990) 73 DLR 190. Whilst the Canadian and Australian approach appears to be largely in tune with the English law [ref *Campbell* (supra), a Canadian decision; and *Reader's Digest Services Pty Ltd v. Lamb* (1982) 150 CLR 500, an Australian decision], the approach of the US Supreme Court appears to be a bit different. In a case where the

plaintiff, a teetotaler, sued the publisher of a news item that he used to drink whiskey, in the course of its judgment, the US Supreme Court held that there could be no general consensus or opinion that to drink whiskey was wrong and yet at the same time observed [ref. Peck v. Tribune Co 214, US 185 (1909)] as follows:

“if the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote... No falsehood is through about or even known by all the world. No conduct is hated by all. That it will be known by a larger number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm... It seems to be impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in her community.”

38. An interesting and fascinating discussion on the subject may be found in Gatley on Libel and Slander (10th Edition) (2004) (the Common Law Library, Sweet & Maxwell, paragraphs 2.10 to 2.14). There, the expression “right thinking person” was described as being “as much an abstraction as the “reasonable man””: both serve as metaphors for what is in fact the judge’s view of what is capable of being recognized as acceptable public opinion. Perhaps the American approach makes this issue more open to argument.

39. In the present case, the learned Single Judge in our opinion, correctly described the guiding principles after discussing the case law on the subject and even brought home the distinction between passing off actions – which are concerned with deceptively similarity or confusion between the two marks for which the test of impression gathered by an average woman or man with imperfect recollection is applicable – and disparagement. The impugned judgment notices this distinction and comments that “in the case of disparagement, the one who disparages another’s product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor’s product. The comparisons, therefore, in cases of passing off and in case of disparagement are different.”

40. Nevertheless, thereafter, in paragraph 27 of the impugned judgment, the test applied in the present case is “stand point of an average man with imperfect recollection who is also a user of Dettol original soap” to hold that Dettol original was disparaged by the impugned advertisement.

41. This Court is of the opinion that the approach and understanding of the learned Single Judge while discussing the law generally applicable as to disparagement and permissible limits of puffing is correct and does not call for any interference. At the same time, his allusion or reference to “average man with imperfect recollection using Dettol soap” requires some elaboration. Whilst there can be no quarrel with the fact that a reasonable man and an average man refer to the same metaphor and imperfect recollection refer to an natural attribute of a reasonable or average man, what needs closer scrutiny is whether the standard applicable in judging disparagement claims is if a particular class of user (in this case the Dettol user) feels that the statement is disparaging. The learned Single Judge’s discussions and conclusions on this are based upon his analysis of what perceptions are discernible from the impugned advertisement. This is elaborately discussed in paragraph 24 of the impugned judgment where two kinds of users, i.e., the Dettol users and those who do not use that soap are noticed. The learned Single Judge held that the latter, i.e., non-users may be unaware of the unique curvature shape, packaging etc. of the Dettol soap sufficiently to link it with Reckitt’s product as to possibly associate the advertised product with Dettol, since the bar of soap in the impugned advertisement is some unbranded soap. However, as far as the former category is concerned, the learned Single Judge held the Dettol users would “immediately recognize the bar of soap shown in the advertisement as referring to the plaintiff original Dettol soap”. This was on account of familiarity by reason of use of such soap and knowledge of its shape, colour, size, contours and packaging.

42. The question which this Court, therefore, has to address itself to is whether the learned Single Judge faulted in his approach towards applying the test of a reasonable man with imperfect recollection as being a particular class of such citizens, i.e., Dettol users and then proceeding to hold that such class can clearly identify the soap in the impugned advertisement as the plaintiff “Dettol original”.

43. The previous discussion on the question as to whose perception is to be considered in an action for defamation or disparagement has revealed that the law of defamation recognizes that it is the standard of the right thinking or reasonable men and women of the community from whose stand point the imputation requires to be judged. In the case of disparagement of a rival’s product, it may also be necessary to keep in view the possibility that potential users of the product could be warned away by the advertisement, thus widening the “target group”. The American Court’s refinement to this is that the standpoint should be that of “respectable men and women” of the

community to which the claimant belongs and not to all kinds of people. Not infrequently, Courts have been confronted with the argument that the target audience is not a specific one, but of all reasonable men and women generally. This has been described in *Gatley* (supra), at paragraph 2.15) as follows:

“.....First, it is plain that to say that the statement must lower the claimant in the estimation of right-thinking persons generally does not mean that the statement must be readily comprehensible to people in general: a defamatory statement may be made in a foreign language or in a highly technical scientific journal. In such cases there must be a publication to persons who do in fact understand the statement in the sense of which the claimant complains but the issue then seems to be “if this were explained to the ordinary citizen would it reflect on the plaintiff’s reputation in his eyes? Secondly, in many cases it may be possible to show that a charge of conduct which in itself is obnoxious only to a limited group is defamatory because the statement carries the additional imputation that the claimant is thereby guilty of conduct, such as disloyalty or hypocrisy, which is regarded as discreditable by reasonable people generally even though they may be indifferent to the tenets of the group which is directly offended...”

44. There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement disparages or defames the viewpoint to be considered is that of the general public (the refinements of whether such “right thinking” or “reasonable” persons belong to a “respectable” section of the public, apart). Thus, whenever an argument that a sectarian approach (i.e. applying the standpoint of members of a section of the public) is to be adopted, Courts have tended to reject it time and again. In *Tolly v. Fry*, 1931 AC 333, the House of Lords had to decide if the depiction of the plaintiff, an amateur golfer – without his consent – in an advertisement defamed or caused injury to his amateur status (which was during the times regarded as valuable for a golfer). The advertisement contained a limerick and also the plaintiff’s picture. It was argued unsuccessfully by the plaintiff that the governing test was whether the knowing public (i.e. those aware about the nature of the game, and the valuable status of an amateur, at that time) would regard the depiction and the statement as defamatory. The House of Lords, which had to decide whether the judgment which left the matter to the judge, instead of the jury, was a correct one, held that the guiding principle was one of perception of the general public and not the golf knowing citizens. This was emphasized in the judgement:

“The question here does not depend upon a state of facts known only to some special class of the community, but to

the inference which would be drawn by the ordinary man or woman from the facts of the publication.”

Similarly, in *Gillick v. Brook Advisory Centres* [2001] EWCA Civ 1263, the following approach was adopted:

“the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.”

45. In *Petra Ecclestone v. Telegraph Media Group Ltd*, 2009 EWHC 2779 (QB), the imputations against which the claimant sued Telegraph Media Group were that Sir Paul McCartney’s public call for “Meat free Mondays” did not impress the plaintiff/claimant who is reported to have said that she was not a “veggie” and did not have time for people like McCartney. The Court rejected the submission of defamatory imputation and observed that:

“It might be that a sector of the public (i.e. those who disapproved of the use of leather or eating animal products) could think the less of the Claimant for taking the opposite stance, and might even do so because of what she is reported to have said about the McCartneys and Annie Lennox. But the test is not whether a sector of the public could think less of the Claimant for what she is alleged to have said (see *Arab News Network v Al Khazen* [2001] EWCA Civ 118 at [30]), but whether ordinary reasonable people in our society as a whole - or to use Mr Barca’s phrase ‘the public’ generally could do so. In our society people hold different (and sometimes strong) views on any number of issues including the use of animal products. In a democratic society where freedom of expression is a protected right, people are entitled to hold strong views, and to express them within the limits laid down by law.”

The point was again brought home in yet another later decision, *Robert Crow v. Boris Johnson*, [2012] EWHC 1982 (QB), which also cited *Tolley* (supra):

“The law can conveniently be taken from the judgment of Thomas LJ in *Modi v Clarke* [2011] EWCA Civ 937 paras 10 to 12:

“12. It was also accepted that there is a distinction between “people generally” and a section of people. The distinction is set out in a number of authorities but the one relied on before the judge was that of Greer LJ in *Tolley v Fry* [1930] 1 KB 467 at 479 where he said:

“Words are not defamatory, however much they may damage a man in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that would disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man is not actionable within the law of defamation.”

46. The discussion may be usefully summed up in the words of the Australian High Court in *Reader’s Digest* (supra):

“7. Where no true innuendo is pleaded and the published words clearly related to the plaintiff, the issue of libel or no libel can be determined by asking whether hypothetical referees - Lord Selborne’s reasonable men (*Capital and Counties Bank v. Henty* (1882) LR 7 App Cas 741, at p 745) or Lord Atkin’s right-thinking members of society generally (*Sim v. Stretch* (1936) 52 TLR 669, at p671 or Lord Reid’s ordinary men not avid for scandal (*Lewis v. Daily Telegraph Ltd.* (1964) AC, at p 260) - would understand the published words in a defamatory sense. That simple question embraces two elements of the cause of action: the meaning of the words used (the imputation) and the defamatory character of the imputation. Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation (*Byrne v. Deane* (1937) 1 KB 818, at p 833 , being a standard common to society generally (*Miller v. David* (1874) LR 9 CP 118 ; *Myroft v. Sleight* (1921) 90 LJKB 883 ; *Tolley v. J.S. Fry & Sons Ltd.* (1930) 1 KB 467, at p 479...”

47. Thus, the conclusion of the above discussion is that the learned Single Judge’s appreciation of the law, i.e. that the perspective of the Dettol users guides the court in considering whether HUL disparaged Reckitt’s soap is erroneous, as it is based on a sectarian and “section of the public” point of view and not of the “right thinking” or “reasonable” member of the public

generally. As to whether this approach has resulted in a wrong conclusion, is another matter, which the Court would consider presently.

48. The next aspect to be considered is the nature of judicial scrutiny. HUL complains that the learned Single Judge fell into error in making a frame by frame, bit by bit analysis of the impugned advertisement and thereby overlooked the guiding test that the advertisement or publication has to be seen as a whole, rather than in a sectional manner, to decide if it denigrates or disparages a rival product.

49. The first question here is as to the manner in which such advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged. On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view to catch an ‘infringement’. This distinction is thin, but important: in trying to determine whether commercial disparagement has occurred, the relevant consideration is how the viewer (i.e. the individual to whom the alleged disparagement is addressed) would see the advertisement. This consideration is important also because of the manner in which the advertisement is appreciated – whether as a running reel or frame by frame. The answer to this necessarily is the former, for two clear reasons. First, when deciding such matters, the judge is to consider (as will be discussed below) how an average, reasonable man would view the advertisement as it appears on the television or electronic medium, as in the present case. In order to do this, the endeavour of the court is to substitute its judgment for that of the average/reasonable man. Undoubtedly, when the advertisement is displayed on the television, it is not scrutinized in every detail by the viewers, but rather, taken as a whole as it is displayed. This simple proposition is of great relevance, since a judge, sits in an adversarial setting with the clear purpose of determining whether commercial disparagement has occurred, and thus, on the look-out for any indication of the same, must equally remain cautious that the advertisement is viewed as viewers normally view it.

50. These concerns have been echoed by several courts – for example, in *Skuse v. Grenada*, [1993] EWCA Civ 34, the Court noted that “[w]hile limiting its attention to what the defendant has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue.”

Earlier, in *Slim and Others v. Daily Telegraph and Others*, [1968] 2 QB 157, a case concerning libel, Lord Justice Diplock struck an important point:

“In the spring of 1964 two short letters appeared in the correspondence columns of the “Daily Telegraph.” Written by Mr. Herbert, they formed part

of a robust though desultory controversy about the prospective use by motor vehicles of a public footpath forming part of Upper Mall in Hammersmith. Neither letter can have taken a literate reader of that newspaper more than 60 seconds to read before passing on to some other, and perhaps more interesting, item. Any unfavourable inference about the plaintiffs' characters or conduct which he might have drawn from what he read would have been one of first impression. Yet in this court three lords justices and four counsel have spent the best part of three days upon a minute linguistic analysis of every phrase used in each of the letters. If this protracted exercise in logical positivism has resulted in our reaching a conclusion as to the meaning of either letter different from the first impression which we formed on reading it, the conclusion reached is unlikely to reflect the impression of the plaintiffs' character or conduct which was actually formed by those who read the letters in their morning newspaper in 1964."

51. The importance of returning to the meaning conveyed at first impression, which for the viewer, at least in so far as advertisements such as the present one are concerned, is also the final impression, is crucial. This was also stated in *McDonalds v. Burger King*, (1986) FSR 45, in noting that: "advertisements are not to be read as if they are testamentary provisions in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared."

52. On this question, we must examine the approach of the learned Single Judge closely – in that the Court applied the legal standard (which will be discussed below) on a frame by frame appreciation of the impugned advertisement. Such approach, with due respect, in this court's opinion, is incorrect. The conclusions apart, the method employed in determining whether disparagement has occurred (and crucially, the effect on the consumer's mind) must be considered by Courts in such cases. The learned Single Judge has, at paragraph 21 of the impugned judgment, considered each frame of the advertisement in detail, and further, in paragraph 22, considered some still pictures from the advertisement where the Dettol soap is alleged to be shown. Relying on these photographs, the learned Single Judge reached the conclusion that the soap displayed in the advertisement does indeed refer to the Dettol soap. This, in the opinion of the Court, cannot be the correct approach; the appropriate method of viewing the advertisement objected to would be to consider its overall effect.

Was the impugned judgment in error in its appreciation of the evidence

53. HUL complains that the impugned judgment is in error because the learned Single Judge held that in the final analysis the judge has to decide, after considering the advertisement and its effect:

“It has been contended on behalf of the defendant that the plaintiff has not produced any evidence of consumers to indicate that the orange bar of soap in the said advertisement appears to be the plaintiff’s DETTOL Original soap. In response the learned counsel for the plaintiff submitted that producing such evidence would be counter-productive and is not necessary. He submitted that the plaintiff could produce witnesses stating that the orange bar of soap shown in the advertisement had reference to the plaintiff’s DETTOL Original soap. Similarly, the defendant could also produce witnesses to state the contrary. Ultimately, it would be for the court to make a judgment from the perspective of an average person with imperfect recollection, a test which has been well established, particularly in passing off cases.”

HUL relies on Imperial Tobacco and Colgate Palmolive in support of the submissions. As this court reads those authorities, the Courts did not prohibit the judge presiding over the trial to consider the meaning of the term or advertisement in issue, nor stated that as an invariable rule, the ritual of one or a set of witnesses stating that it amounted to slander of goods and another (for the defendants) stating otherwise, had to be ritualistically followed. The learned Single Judge’s approach, to a great extent, is based on common sense and pragmatism. So long as the origin of the advertisement or publication (i.e. who caused it to be telecast or broadcast, or published in the print media), its contents, duration etc. are not in dispute (as in the present case) whether the content disparages is a decision that would ultimately depend on the judge’s reading and appreciation of the advertisement taken as a whole, based on a proper application of the law on the subject. This view is supported by the decision in *Slim v. Daily Telegraph*, [1968] 2 QB 157, where Lord Justice Diplock expressed the rule in a clear statement:

“...Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is ‘the natural and ordinary meaning’ of words in an action for libel.”

In *Vodafone Group Plc. v. Orange Personal Communications Services Ltd.*, [1997] F.S.R. 34, the Court held as follows:

“The meaning is for the court to determine when a judge sits without a jury. Evidence of the meaning to others is inadmissible. The question: ‘Is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ... what the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the word. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning” per Lord Reid in *Lewis v The Daily Telegraph*.’

The Court notices that even in recent English decisions (*Cruddas v. Calvert*, 2013 EWHC 1427 (QB) delivered on 5th June, 2013 and *Interflora Inc v. Marks & Spencer Plc*, 2013 (2) All ER 663) – though in analogous cases relating to ad-word and trademark infringement claims- it was held that evidence as to the meaning of common words and phrases in advertisements or their effect, is by and large inadmissible. In *Interflora*, (supra) after an elaborate review of past cases, the Court of Appeal held:

“In previous cases, it had been held that evidence of members of the public could not stand proxy for the legal construct of the average consumer. In the context of Ad-Words, the average consumer had been replaced by the reasonably well-informed and reasonably observant internet user, but the underlying concept, of a legal construct, was the same, *BACH and BACH FLOWER REMEDIES Trade Marks* [2000] R.P.C. 513 applied (see paras 40-44 of judgment). In cases involving ordinary consumer goods and services, the judge could reach a conclusion from his own experience without evidence from consumers ...”

In view of the above discussion, it is held that there is no merit in HUL’s argument that the judge fell into error in not considering oral testimony of the parties as to whether the impugned advertisement amounted to slander of goods, or denigration of Reckitt’s DETTOL Original. Did the impugned advertisement disparage or denigrate Reckitt’s DETTOL Original

54. This court has previously observed that the correct test is whether the impugned advertisement, or the publication complained of disparaged the plaintiff's goods in the eyes of the right thinking members of the public or reasonable men and women. The Court had further held that while considering the question of disparagement, the applicable test would not be whether a "target audience" or "target group" i.e. a section of the general public would perceive the advertisement to be disparaging, but if all reasonable men and women would regard it to be so. Now, the all-important question of whether the impugned advertisement in fact disparaged or denigrated the plaintiff's DETTOL Original has to be decided in the light of the evidence.

55. As observed in an earlier part of this judgment, the advertisement was of a total duration of 30 seconds and was telecast at the relevant time, in a multitude of television channels. This Court had the opportunity of viewing the advertisement, a recording of which was filed as part of the record and was also played at the time of the hearing of the appeal. The court finds that the storyline has been accurately described by the learned Single Judge.

56. It would be necessary to briefly summarize the whole advertisement. A doctor and his wife return home on a rainy day. The wife plans to bathe and she takes out an orange bar of soap from a green wrapper. This part of the film is less than two seconds. The husband, at this stage exclaims that his wife can only be saved by God; later he and the children sing out that naadan (the ignorant) should be given wisdom and all of them should be saved from naiveté; the wife, surprised at this, questions them. Next, the husband holds up the orange soap (this for about 2 seconds) and says that with such cure, a blessing too would be necessary. In the next scene, a bathing lady is shown raising the said orange bar of soap; it is accompanied by a male voice over which states that ordinary antiseptic soaps dry up the skin; the camera then zooms to the upper arm, shown under a magnifying glass revealing cracked skin with green germs lodged in them. The male voice then comments that germs get into the cracks (of the skin). As if to emphasize the idea, the term "ordinary antiseptic soap" appears on the screen. Next in a water shot, a bar of red LIFEBUOY soap emerges out of the water. This scene highlights the words "Glycerine" and "Vitamin E" and the male voice-over states this is why, new Lifebuoy Skin Guard). To underline the idea, the arm under the magnifying glass is shown again, this time with a voice over stating that it (LIFEBUOY) attacks germs; the scene then shows glycerine flowing – and the voice over adding that (LIFEBUOY) also builds a protective wall. The next scenes show that the wife allays the fears of her family, and all of them saying that they have no fear (thus

suggesting that the wife accepted the suggestion to stop using the antiseptic soap and had started to use LIFEBOUY). The final part of the advertisement shows a LIFEBOUY Skinguard bar of soap and its package with the LIFEBOUY logo zooming onto the package and the male voice-over announcing "Lifebuoy Skin Guard"; the Hindustan Lever Limited logo is then focused and the advertisement ends then.

57. Facially, HLL's argument that the exposure to the orange coloured soap is for about 5% of the entire advertisement – and the attendant submission that this renders the possibility of any lasting impact improbable, is attractive. That however, is not the main consideration which the court should be alive to. As discussed earlier, it is the overall effect of the advertisement rather than a frame by frame analysis which is relevant. To focus only on the manner that the orange soap bar is shown in the advertisement would therefore, be falling into the same trap which HLL cautioned the court from avoiding. It is not only the total time devoted in the entire advertisement by which the orange bar is shown (in all about 4 seconds, on three occasions) which is to be considered, but its contextual setting. The learned Single Judge accepted Reckitt's argument that though it did not market an antiseptic soap, yet the repeated allusions to antiseptics and how they result in cracks in the skin, provided the powerful contextual background for the entire advertisement. HLL is no doubt right in saying that there were several orange bars of soaps; some with curvature and a few had green coloured packaging. Yet, the one shot (in which one protagonist) holds up the orange soap bar shows the curvature of the orange bar, and the unique indented shape within, which leaves no room for any doubt that it is DETTOL Original. The absence of the Dettol symbol (cross) does not in any manner – in the opinion of the court- detract from this impression (of the ordinary reasonable viewer) as to the identity of the soap bar. This the Court holds because the evidence on record, in the form of the story board in Reckitt's advertisement campaign for DETTOL Original (to which umbrage was taken by HLL, in a previous suit, filed in this Court – produced as Ex. PW-1/16) shows that the soap was launched in May, 2006. HLL filed the suit some-time in June, 2006; interim injunction was refused by a reasoned judgment and order dated 17-11-2006. This story board (i.e concerning Reckitt's DETTOL Original, in the previous suit by HLL) was produced as DW-1/11 and DW-1/12, by HLL's witness, DW-1. This material clearly depicts Reckitt's DETTOL Original advertisement, which contains the same – or identical oval shaped orange soap – as in the impugned advertisement. That advertisement too was published in the same media, in television channels. Reckitt led evidence (PW-1/19) disclosing that the advertisement

was widely and extensively telecast in numerous channels, on 2763 occasions, during the whole of July till 11 August, 2007.

58. As this Court understands, the plaintiff's grievance is not that HUL simplistically depicted its DETTOL Original in a bad light or denigrated it. That argument would have been natural if Reckitt alleged that the soap shown in the advertisement alone constituted denigration of its product. However, the overall effect on the viewer – the shape of the soap, the green packaging, the number of times the soap was shown, the suggestion made that antiseptic soaps are bad for the skin, as they allow germ build up – is complained to constitute what is termed as a defamatory innuendo. This court had, earlier in *Dabur India*, recognized that clever advertising can suggest something which is plainly not said, and create the desired impact in the mind of the viewer. The innuendo, or the suggestion of something more than what is spoken, is one such device. *Tolley (supra)* was a case which used a pun and a limerick; there have been other instances where different suggestions and innuendos have been held to be slanderous or disparaging. In *Kiam v. Neil*, 1996 EMLR 493, the claimant, a prominent businessman had appeared in advertisements and liked a razor so much that he bought the company. The complained newspaper publication alleged that a Bank stated that the plaintiff had defaulted on a GBP £ 13.5 million loan and that he had filed for bankruptcy, neither of which was true. The newspaper apologized. However, the claimant alleged a libel, based on an innuendo to members of the public who had bought razors relying on a promise of a refund if they were not satisfied, that the plaintiff had induced them to purchase when he was not in a position to fulfil the promise. The innuendo was founded on packaging for the razor which bore a photograph of the plaintiff and a statement about a refund. The defendants did not admit the innuendo. The court upheld the decision that the innuendo was defamatory of the plaintiff. This discussion is best summed up with in the words of Lord Reid in *Lewis v. Daily Telegraph* [1963] 2 All E.R. 151, that the ordinary sense and context of words is not their "legal sense" because:

"The ordinary man does not live in an ivory tower and he is not inhibited by the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer

from them, and that is also regarded as part of their natural and ordinary meaning.” (emphasis supplied)

59. In the present case, the Court has to be sensitive and alive to the fact that viewership of television channels and electronic media is diverse and widespread. The learned Single Judge found, and we see no infirmity in this regard, that DETTOL’s market leadership in the antiseptic liquid market made it particularly vulnerable in the impugned advertisement. In this context, the Court usefully recollects what was stated in a previous disparagement action (Glaxo Smithkline Consumer Healthcare Limited & ors v. Heinz India Private Limited & Anr., I.A. No.15233/2008 in CS (OS) No.2577/2008, decided on 12.11.2010) though in the course of interlocutory injunction proceedings):

“This Court is conscious of the powerful and lasting impact that audio visual images have on viewers. Unlike the printed word, which is processed analyzed, and assimilated uniquely by each individual, an advertisement in the electronic media, particularly, has a different impact. First, it has a wider spread; it is perceived aurally through different senses, such as sound, visual, and printed. The suggestive power of this medium is greater. Second, such advertisements use several different tools, like music, dialogue, colors, and other aids, to bring home the message. Advertisements through this medium can, and do operate at conscious and subconscious levels; their power of suggestion extends not just to the discerning, or educated viewer, but to an entire range of viewership, with diverse income earning capacities, educational attainments, tastes, and so on. They influence even children. The impact of a catchy phrase, a well acted skit or story line, or even distinctive sounds or distinctive collocation of colors, can well define the brand or product’s image, by imprinting it in the public memory forever.”

Here, though at a superficial level, HUL targeted antiseptic soaps and elaborated the ill-effects of antiseptics on the skin, the combined effect of this message with the three visuals, two distinctly (though briefly) showing Dettol soap, with its unique colour, curvature and shape suggested powerfully to ordinary and reasonable viewer that the soap being spoken against in the advertisement was none other than a Reckitt product. Though not strictly accurate, the innuendo was in the nature of a commercial double entendre where the hidden meaning was intended to impact the viewer more than the obvious, superficial one. This plainly is disparagement, and a slander of Reckitt’s DETTOL Original; the Single Judge arrived at the correct finding in that regard and the Court hereby affirms it.

60. As far as HUL’s argument with respect to its test reports go, this Court is of opinion that they are of little relevance. HUL may be justified in

saying that antiseptic soaps cause skin damage; however that is not the point it seeks to drive home in the impugned advertisement; the plaintiff Reckitt does not claim that its product is an antiseptic soap, nor does it say that such result can follow from use of such class of soaps. What is relevant is that the message conveyed through the impugned advertisement is loud and clear: that Reckitt's soap (the depiction of an "ordinary antiseptic soap") is bad for the skin. Likewise, though HUL has produced Exhibits DW-1/1, DW1/2 and DW-1/3 to show that other oval shaped, orange coloured and green wrapper packaged soaps exist, it made no attempt to co-relate the shapes and colour with specific products. Nor was its witness, DW-1 able to do so. In these circumstances, the argument that the plaintiff could not complain about being targeted by the impugned advertisement is insubstantial and unpersuasive.

Correctness of the approach of the Single Judge as to damages

61. In this section of the judgment, this court proposes to discuss the correctness of award of damages by the learned Single Judge in the impugned judgment. As noticed previously, the Single Judge felt that the plaintiff, Reckitt had been unable to prove the damages suffered on account of disparagement; yet award of punitive damages were called for. The defendant, HUL questions the grant of punitive damages whereas the plaintiff Reckitt complains that general or compensatory damages ought to have been awarded.

62. It is an accepted principle in English law that general damages are "at large" in the case of defamation, including disparagement, slander, etc. This was first stated in *South Hetton Coal Company Limited v. North-Eastern News Association Limited*, [1894] 1 QB 133 that "if the case be one of libel - whether on a person, a firm, or a company - the law is that damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case." It is important that a successful plaintiff is allowed to recover such damages as would compensate for the loss of its reputation. These principles were re-stated in *John v MGN Ltd* [1997] QB 586, where the Court of Appeal held that:

"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the

plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."

76. Of course, a company stands in a slightly different position, for it has no feelings to hurt, and it follows that considerations of aggravation which might be relevant if the claimant is an individual do not apply. However, the entitlement of a company to recover general damages has recently been affirmed by the House of Lords: see *Jameel v Wall Street Journal* [2007] 1 AC 359. A company's good name is a thing of value, but it can only be hit in its pocket, and there is no evidence here of actual financial loss. That is not to say that it may not merit vindication. The function of damages for vindication was well explained by Lord Hailsham in *Broome v Cassell* [1972] AC 1027 at 1071c-e in terms of the need, 'in case the libel, driven underground, emerges from its lurking place at some future date', for the claimant (whether personal or corporate) to be able to point to a sum sufficient to convince a bystander of the baselessness of the charge. Of course, those words were spoken in the context of a jury award, and it could fairly be said that the need for vindication by an award of damages is less in a case where some vindication is provided by a reasoned judgment."

This was followed in *Applause Store Productions Limited and Firscht v. Raphael* [2008] EWHC 1781, where the plaintiff complained of libel on account of a fake Facebook identity which falsely described the claimant's sexual orientation, his relationship status (that is to say, whether he was single or in a relationship), his birthday, and his political and religious views. Not all this information was truthful or accurate, and besides all of it was private information. The Court of appeal followed John (*supra*) and awarded substantial damages. Earlier, in *Jameel v. Wall Street Journal* 2007 (1) AC 379, the rule was re-stated as follows:

“...under the current law of England and Wales a trading company with a trading reputation in this country may recover general damages without pleading or proving special damage if the publication complained of has a tendency to damage it in the way of its business.”

In the same judgment, the Court also reiterated the existing law that once defamation is proved, the law presumes damage- a proposition which applies to a trading company also. Further, the Court held that:

“The presumption of damage

119. Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel “the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff’s rights” (Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524 at 528). It is accepted that the rule applies and should continue to apply to individuals. But it is argued that it should no longer be applied to corporations. Corporations, it is said, have no feelings to be hurt and cannot feel shame. If they are to sue for libel they should be required to show that the libel has caused them actual damage.

120. These arguments, in my opinion, miss the point. The reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and shareholders may take pride, but an asset of positive value to it. Why else do trading companies pay very substantial sums of money in advertising their names in TV commercials which usually say next to nothing of value about the services or products on offer from the company in question but endeavour to present an image of the company that is attractive and likely to cement the name of the corporation in the public memory? Why do commercial companies sponsor sporting competitions, so that one has the XLtd Grand National or the YLtd Open Golf Championship or the ZLtd Premiership? It is surely because reputation matters to trading companies and because these sponsorship activities, associating the name of the company with popular sporting events, are believed to enhance the sponsor’s reputation to its commercial advantage. The organisers of a variety of activities some sporting, some cultural, some charitable, are constantly on the look-out for sponsorship of the activity in question by some commercial company. The choice of sponsor and the reputation of the sponsor matter to these organisers. Who would these days choose a cigarette manufacturing company to sponsor an athletic event or a concert in aid of charity? If reputation suffers, sponsorship invitations may be reduced, advertising opportunities may become difficult, customers may take their custom elsewhere. If trade suffers, profits suffer.

121. It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely to be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?

122. There is no doubt that, as the case law now stands, a libel is actionable per se at the suit of a corporation as it is at the suit of an individual, without the need to prove that any actual damage has been caused. In the *South Hetton Coal Co Ltd* case [1894] 1 QB 133 the plaintiff, a colliery company, complained of a libel that had attacked the company in respect of its management of company houses in which some of its colliery workers lived. The Court of Appeal held that the libel was actionable per se and, at p 140, that "... the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage."

In the United States of America, too, the difficulty which a defamed or slandered claimant, particularly a commercial enterprise is put to in proving empirically and accurately the damages or injury to its reputation and enterprise has been recognized. It was thus, held in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) that:

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it is enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise..... If the damage is certain, the fact that its extent is uncertain does not prevent a recovery."

63. In the present case, the plaintiff (Reckitt) has been able to prove, successfully, that HUL telecast the impugned 30 second advertisement on a large number of occasions (2763 times, to be precise, according to Ex. PW-1/19). The innuendo was cleverly designed to suggest that Reckitt's DETTOL Original caused damage to the skin. The advertiser, i.e. HUL, was conscious that it was crossing the boundary between permissible "puffing" and what was prohibited in law. The evidence on record, in the form of

HUL's witnesses' testimony, is that Rs.2.5 crores was spent in July 2007 alone for advertising its product. HUL also admitted during the trial that the DETTOL Original brand was worth Rs.200 crores. Such being the case, this Court holds that the Single Judge's reluctance to award general damages was not justified. It would be necessary to mention in this context that it may not be possible for an otherwise successful plaintiff, in a disparagement or slander of goods action to always quantify the extent of loss; there would necessarily be an element of dynamism in this, because of the nature of the product, the season it is sold in, the possible future or long term impact that may arise on account of the advertisement, etc. Therefore, courts the world over have resorted to some rough and ready calculations.

64. In view of the evidence presented before this Court (i.e. the number of times the advertisement was telecast, the quantum of advertisement expenses of HUL, the amount spent by Reckitt, to advertise its product, etc) this Court is of opinion that the plaintiff is entitled to recover general damages to the tune of Rs. 20 lakhs. The impugned judgment and order is modified to that extent, and the cross objection by Reckitt, is consequently allowed in these terms.

65. As far as punitive damages are concerned, the learned Single Judge relied in Lokesh Srivastava and certain other rulings. Here, since the Court is dealing with a final decree – and a contested one at that (unlike in the case of trademark and intellectual property cases, where the courts, especially a large number of Single Judge decisions proceeded to grant such punitive damages in the absence of any award of general or quantified damages for infringement or passing off), it would be necessary to examine and re-state the governing principles.

66. *Rookes v. Barnard*, [1964] 1 All ER 367, is the seminal authority of the House of Lords, on the issue of when punitive or exemplary (or sometimes alluded to as “aggravated”) damages can be granted. The House defined three categories of case in which such damages might be awarded. These are:

- a. Oppressive, arbitrary or unconstitutional action any the servants of the government;
- b. Wrongful conduct by the defendant which has been calculated by him for himself which may well exceed the compensation payable to the claimant; and
- c. Any case where exemplary damages are authorised by the statute.

The later decision in *Cassell & Co. Ltd. v. Broome*, 1972 AC 1027, upheld the categories for which exemplary damages could be awarded, but made

important clarificatory observations. Those relevant for the present purpose are reproduced below:

“A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury’s consideration. Even if it is not withdrawn from the jury, the judge’s task is not complete. He should remind the jury: (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories. (ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character. They can and should award nothing unless (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff’s solatium in the sense I have explained and (iv) that, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury’s idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in *Ley v. Hamilton*, 153 L.T. 384 the use of the word “fine” in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff’s pocket, and not contributing to the rates, or to the revenues of central government.” (emphasis supplied).

The House of Lords, in its discussion, remarked crucially that there is a considerable subjective element in the award of damages in cases involving defamation and similar actions. Courts, it remarked, used terminology to reflect overlapping, and sometimes undesirable ideas underlining the considerations weighing grant of damages:

“In my view it is desirable to drop the use of the phrase “vindictive” damages altogether, despite its use by the county court judge in *Williams v. Settle* [1960] 1 W.L.R. 1072. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding “aggravated” damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and,

as the result of the conduct exciting the indignation, demands a more generous solatium.

Likewise the use of “retributory” is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.

As between “punitive” or “exemplary,” one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer “exemplary,” not because “punitive” is necessarily inaccurate, but “exemplary” better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that “tort does not pay” by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The expression “at large” should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants’ counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in *Rookes v. Barnard* [1964] A.C. 1129, 1221, when he defines the phrase as meaning all cases where “the award is not limited to the pecuniary loss that can be specifically proved.” But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.

Finally, it is worth pointing out, though I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatizing “compensatory,” “punitive,” “exemplary” or “aggravated” damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another.”

67. In India, the Supreme Court has affirmed the principles in *Rookes* (supra) and *Cassel* (supra). Interestingly, however, the application in those cases has been in the context of abuse of authority leading to infringement of

Constitutional rights or by public authorities (ref. Ghaziabad Development Authority v. Balbir Singh, (2004) 5 SCC 6; Lucknow Development Authority v. M.K. Gupta, 1994 SCC (1) 243). As yet, however, the Supreme Court has not indicated the standards which are to be applied while awarding punitive or exemplary damages in libel, tortuous claims with economic overtones such as slander of goods, or in respect of intellectual property matters. The peculiarities of such cases would be the courts' need to evolve proper standards to ensure proportionality in the award of such exemplary or punitive damages. The caution in Cassel that "[d]amages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff's pocket...." can never be lost sight of. Furthermore – and perhaps most crucially –the punitive element of the damages should follow the damages assessed otherwise (or general) damages; exemplary damages can be awarded only if the Court is "satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium". In other words, punitive damages should invariably follow the award of general damages (by that the Court meant that it could be an element in the determination of damages, or a separate head altogether, but never completely without determination of general damages).

68. This court is of the opinion that the impugned judgment fell into error in relying on the decision in Times Incorporated v. Lokesh Srivastava 116 (2005) DLT 569. A Single Judge articulated, in his ex parte judgment in a trademark infringement action, as follows:

"This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade-marks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In Mathias v. Accor Economy Lodging, Inc. reported in 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a to

tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away. This Court feels that this approach is necessitated further for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs.5 lacs only which can be safely awarded. Had it been higher even, this court would not have hesitated in awarding the same. This Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement.”

With due respect, this Court is unable to subscribe to that reasoning, which flies on the face of the circumstances spelt out in *Rookes* and later affirmed in *Cassel*. Both those judgments have received approval by the Supreme Court and are the law of the land. The reasoning of the House of Lords in those decisions is categorical about the circumstances under which punitive damages can be awarded. An added difficulty in holding that every violation of statute can result in punitive damages and proceeding to apply it in cases involving economic or commercial causes, such as intellectual property and not in other such matters, would be that even though statutes might provide penalties, prison sentences and fines (like under the Trademarks Act, the Copyrights Act, Designs Act, etc) and such provisions invariably cap the amount of fine, sentence or statutory compensation, civil courts can nevertheless proceed unhindered, on the assumption that such causes involve criminal propensity, and award “punitive” damages despite the plaintiff’s inability to prove any general damage. Further, the reasoning that “one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes” is plainly wrong, because where the law provides that a crime is committed, it indicates the punishment. No statute authorizes the punishment of anyone for a libel- or infringement of trademark with a huge monetary fine-which goes not to the public exchequer, but to private coffers. Moreover, penalties and offences wherever prescribed require the prosecution to prove them without reasonable doubt. Therefore, to say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law. This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards. Consequently, this court declares that the reasoning and formulation of law enabling courts to determine punitive

damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat and Another, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled. To award punitive damages, the courts should follow the categorization indicated in Rookes (supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in Rookes and also following the five principles in Cassel. The danger of not following this step by step reasoning would be ad hoc judge centric award of damages, without discussion of the extent of harm or injury suffered by the plaintiff, on a mere whim that the defendant's action is so wrong that it has a "criminal" propensity or the case merely falls in one of the three categories mentioned in Rookes (to quote Cassel again – such event "does not of itself entitle the jury to award damages purely exemplary in character").

69. Reverting to the facts of this case, the defendant clearly was aware about its wrong doing and the harm which would ensue to HUL because of the published disparagement. Yet it went ahead and aired it in almost all the national and a large number of regional channels with repetitiveness. The deliberation points at an aim to denigrate the plaintiff's product and harm its reputation. At no stage did it – even in these proceedings – offer to make amends. In the circumstances, the award of punitive damages was warranted. The award of general damages through this judgment (although of a figure of Rs.20 lakhs) is moderate, since the advertisement was aired over 2700 times and seen – and intended to be seen – by millions of viewers. As observed in John (supra)

“The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people..”

Having regard to all these circumstances, the court is of opinion that the award of Rs.5 lakhs as exemplary damages in the facts of this case was justified and not disproportionate; it is accordingly upheld.

70. In view of the above discussion, it is held that this appeal has no merit. It is accordingly dismissed, but with costs, quantified at Rs. 55,000/-. The cross objections however succeed and the decree of the learned Single Judge shall be modified. In addition to injunction and punitive damages assessed by the impugned judgment, the plaintiff/Reckitt is also entitled to a decree for Rs.20 lakhs. The cross objections are allowed to that extent. The

plaintiff shall in addition to the costs of the appeal, be also entitled to costs of the cross objection and counsel's fee, assessed at Rs.25,000/-.

Sd/-
S. RAVINDRA BHAT
(JUDGE)

Sd/-
R.V. EASWAR
(JUDGE)

JANUARY 31, 2014