

\$~

\*

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

Reserved on: 15<sup>th</sup> October, 2019

Decided on: 31<sup>st</sup> October, 2019

**FAO (OS) 64/2019 and CM Appl. No. 15551/2019 (stay)**

**PURO WELLNESS PVT LTD**

..... Appellant

Through: Mr. Sudhir Chandra, Senior Advocate  
and Mr. C.M. Lall, Senior Advocates  
with Mr. Rajat Manchanda, Advocate.

versus

**TATA CHEMICALS LTD**

..... Respondent

Through: Ms. Bani Dakshit and Ms. Ashima  
Ghosh, Advocates.

**CORAM: JUSTICE S. MURALIDHAR  
JUSTICE TALWANT SINGH**

**J U D G M E N T**

**Dr. S. Muralidhar, J.:**

1. This appeal is directed against an order dated 15<sup>th</sup> March, 2019 passed by the learned Single Judge in IA No.10934/2018 in CS(OS) No. 403/2018 restraining the Appellant/Defendant from “televising or publishing any commercials or any other advertising or promotional material in the print or electronic form which would result in disparagement or denigration of the Plaintiff’s product/brand TATA salt including the impugned three television commercials or any modified forms thereof, the viral video, the pamphlet and the flyer as also the marketing booklet or any modified forms thereof.”

2. The learned Single Judge however clarified that the Appellant “is entitled

to promote its own product- Puro Healthy Salt as a salt which is natural and healthy.”

***TCL's case***

3. The aforementioned suit was filed by the Respondent/Plaintiff Tata Chemicals Limited (TCL) against the present Appellant alleging that the Appellant had in the impugned ‘advertising material’ made ‘false, baseless and reckless statements’ against the Respondent/Plaintiff’s product: ‘TATA Salt’. The ‘impugned material’ referred to in the plaint comprises:

- (a) Three television commercials (TVCs) featuring the well-known actor Mr. Anil Kapoor
- (b) Modified TVCs which allegedly continued the false propaganda
- (c) Interview of the promoter of the Appellant Mr. Ruchir Modi published in the Economic Times (ET) dated 14<sup>th</sup> March, 2018
- (d) A flyer/pamphlet containing allegedly objectionable content
- (e) A video alleged to have been published and circulated by the Appellant on WhatsApp.

4. TCL averred in the plaint that since 1983 it has been manufacturing TATA salt and enjoys a 24% to 25% market share in edible iodised salt. It further claimed that it was one of the two Indian companies to manufacture iodised white salt through vacuum evaporation and that it was safe for human consumption. It claimed that TATA Salt was fully compliant with the norms under the Food Safety and Standards Act, 2006 (FSS Act) and the regulations thereunder. It admitted to using an anti-caking agent being E-536 permissible under the FSS Act as well as one iodised agent i.e. Potassium

iodate.

5. The Appellant manufactures 'Puro Healthy Salt'. TCL alleged that the above aforementioned 'impugned material' of the Appellant constituted its 'campaign' that was intended to send a message that TATA Salt was harmful to health and not fit for human consumption. TCL characterised the said impugned material as 'disparaging, malicious and false'. Referring to the gesture of the wave of hand by Mr. Anil Kapoor in the three TVCs, TCL alleged that this were 'meant to cast aspersions on the Plaintiff's brand-TATA.' It was alleged that the advertisement was not merely puffery but was 'false and slanderous.'

6. TCL averred in the plaint that it addressed a complaint to the Advertising Standards Council of India ('ASCI') in relation to the first of the three TVCs released. ASCI assured TCL by an e-mail dated 13<sup>th</sup> December, 2017 that it was looking into the matter. During the pendency of that complaint the second and third TVC and the modified TVCs came to be telecast. By two separate e-mails dated 9<sup>th</sup> January, 2018 TCL made further complaints to ASCI against the Appellant.

7. TCL claimed that by e-mails dated 15<sup>th</sup> February, 2018 and 11<sup>th</sup> March, 2018 ASCI held in favour of TCL, substantially upholding its contentions. After the first e-mail an undertaking of the Appellant was recorded by the ASCI that it would modify its advertisements. It is further claimed that the Foods Safety Standards Authority of India ('FSSAI') had also complained against the impugned material to ASCI.

8. The Appellant did not comply with the recommendations of ASCI but challenged it by filing Suit No.1167/2018 in the Bombay High Court primarily on the ground that it was not a member of the ASCI and therefore not bound by its recommendations.

9. The plaint also adverted to the fact that the Indian Salt Manufacturers Association ('ISMA') filed Civil Suit No. 432/2018 in the City Civil Court, Ahmedabad against the 'impugned material' being released. An ex-parte ad-interim injunction granted initially in the said suit was subsequently vacated by the Gujarat High Court for failure to record reasons. The said suit is stated to be pending. Apparently, another Civil Suit was filed before the Principal Senior Civil Judge, Gandhidham, which too was stated to be pending.

### ***Case of the Appellant***

10. In its written statement the Appellant contended that TCL was indulging in 'forum shopping'. It pointed out that in respect of the same subject matter, the following proceedings were pending:

- (i) Suit before the Bombay High Court arising out of the ASCI complaint;
- (ii) ISMA's Suit before the City Civil Court, Ahmedabad;
- (iii) Suit in the Court of the Principal Senior Civil Judge, Gandhidham by an individual.

11. The Appellant further averred that the 'Puro Healthy Salt' manufactured by it was 'unrefined Himalayan pink rock salt'. It came to be manufactured from 2017 onwards as a natural healthier alternative to regular refined white

salt.

12. The Appellant questioned the maintainability of the suit before the learned Single Judge on the ground of territorial jurisdiction. It was specifically averred that the 'video' referred to by TCL had already been disowned by the Appellant. A complaint regarding the video was filed with the ASCI and the Appellant had denied that it was circulated at its behest. The Appellant contended that it was 'not created by the Defendant nor circulated by the Defendant' and that it had categorically informed ASCI about this. It is pointed out that although the Appellant was not a member of the ASCI and was not governed by the decisions of the ASCI, TCL being a member of ASCI was bound by its decision. The ASCI had in fact held that the impugned viral video could not be attributed to the Appellant.

13. As regards the 'flyer', it was contended by the Appellant that TCL had projected just one page of a brochure the images on which were "blurred images of products which were created by the creative agency" and cannot be identified. It was further pointed out that the Appellant had "already stopped using the brochure since March, 2018 in view of the barrage of the frivolous ASCI complaints initiated by or at the behest of TCL". In other words, it was pointed out that there was no such "alleged impugned flyer" as sought to be suggested by TCL.

14. It is further pointed out that the Consumer Complaints Council of the ASCI had, while deciding the complaints filed by the Plaintiff TCL, held that it did not think that the statement made by the protagonist regarding

‘white refined salt’ not being *kudrati* ('natural') was objectionable. The Defendant maintained that nowhere in the TVCs or the modified TVCs was there any reference made to the Plaintiff's product and that there was no disparaging content therein.

15. The Appellant further contended that the fact remained that refined salt was produced by TCL using a chemical process and that no statement had been made by the Appellant in the TVCs that TCL's product was hazardous or contaminated or unfit for human consumption. The stand of the Appellant was that merely because the standards prescribed by the FSSAI were met with by the Plaintiff's product, it did not mean that such product was healthy. The statement that white refined salt contains chemicals was truthful since the chemical name of E-536 was Potassium Ferrocyanide which was a chemical banned from being added in food products in many countries such as the USA. It is pointed out that the Appellant had not claimed that E-536 was banned in India and the fact that the FSSAI had approved some quantities of E-536 to be used in white refined salt did not make it healthy.

16. The Appellant averred that the Plaintiff was manufacturing white refined salt at its integrated inorganic chemicals complex at Mithapur, Gujarat where it had set up a chemical factory for the production of soda-ash. The white refined salt was a by-product of using steam to make soda-ash. The Appellant pointed out that the Plaintiff also manufactured cement, caustic soda, liquid chlorine, sulphuric acid and soda-ash in the same factory and that, therefore its statement that the Plaintiff's product was manufactured in

a chemical factory was correct.

17. The specific contention of the Appellant in relation to the TVCs was that 'manner, intent, story line and message conveyed by the impugned TVC is nothing but the truth'. As regards the interview stated to have been given to ET on 14<sup>th</sup> March, 2018 by the promoter of the Appellant, it was pointed out that in the said interview no reference was made to TCL or its product. As regards the waving action it is averred in para 2.12 of the Memorandum of Appeal as under:

2.12 That with a view to peacefully carry on its business and to avoid any complications and unnecessary harassment or legal proceedings, the Appellant informed the ASCI representatives that without prejudice to its objection as to the jurisdiction of ASCI vis-a-vis the Appellant, it had discontinued airing all three of the Appellant's TVCs in their original form and has started airing slightly modified versions of the Appellant's TVCs after removing the waving action which according to ASCI was the objectionable element and the same was communicated to the Appellant during a meeting with ASCI after the passing of the decision. It is pertinent to mention that the waving action was not a reference to the Respondent as sought to be falsely suggested in the Plaint but is an action which is used in advertisements across industries and only means good-bye."

18. It is further stated by the Appellant in para 2.14 of the memorandum of appeal that in Suit No. 656/2018 before the Bombay High Court against the order of the ASCI, the High Court on 4<sup>th</sup> May, 2018 granted an injunction restraining ASCI from implementing any of the decisions given in respect of the three TVCs. In the appeal filed by the ASCI against the said order being Appeal No. 235/2018, the Division Bench declined to interfere by its order

dated 4<sup>th</sup> July, 2018.

19. The Appellant pointed out that TCL is one of the principal members of the ISMA and instrumental in its formation. ISMA filed Civil Suit No.432/2018 in which an ex-parte injunction order was passed by the City Civil Court. However, in the appeal from order No.70/2018 filed by the Appellant in the High Court of Gujarat, the injunction order was vacated. After the Appellant filed a reply to the injunction application in the suit in this Court, ISMA sought to withdraw its suit before the Ahmedabad, City Civil Court reserving its right to take 'appropriate steps'/pursue 'appropriate remedies' but on an objection taken by the Appellant to such conditional withdrawal, the City Civil Court, Ahmedabad dismissed the said application filed by ISMA.

20. The Appellant pointed out that the third proceeding was another Civil Suit No. 104/2018 filed by one Mr. N.I. Thakkar in a representative capacity against the Appellant before the Court of Principal Senior Civil Judge, Gandhidham on 30<sup>th</sup> July, 2018 based on the same cause of action as the ISMA suit. According to the Appellant, this was only done to harass the Appellant. In the said suit on 17<sup>th</sup> August, 2018 an injunction was issued restraining the Appellant from circulating the flyer. The Appellant filed a reply in the injunction application. Thereafter the said Court at Gandhidham by the order dated 2<sup>nd</sup> November, 2018 recorded that the video was neither created nor circulated by the Appellant in addition to the fact that the Appellant had stated so in its reply.



### ***Impugned order of the Single Judge***

21. It is seen that the arguments in the interim injunction application before the learned Single Judge concluded on 16<sup>th</sup> January, 2019. The impugned order was passed on 15<sup>th</sup> March, 2019 in which the learned Single Judge came to the following conclusions:

- (i) The purpose of the impugned material was to ‘clearly convince customers that white salt is dangerous for health’ and that the said message was being conveyed ‘by making references and allusions to TATA Salt’.
- (ii) In the video, ‘TATA Salt packaging is clearly visible’.
- (iii) In the pamphlets and booklet, TATA Salt packaging is blurred, but there is no doubt that packaging is clearly discernible’.
- (iv) “A comparison of white salt with poison is clearly meant to create panic amongst the consuming public and if allowed to be carried on unhindered, it can have a deleterious impact not just on the Plaintiff and its product, but also on customers, who could be forced to give up on the use of white salt, which is a basic ingredient in food cooked in almost every household in the country.”
- (v) “The portrayal that white salt is bleached, manufactured in a chemical factory and comparable with paint or bleached clothes is not merely puffing but an exaggerated message which could lead to shaking up of customers’ confidence.”

22. The learned Single Judge also observed that TCL's product had been ‘sold for several decades and this is a fact of which judicial notice can be taken’. It was observed that ‘showing the Plaintiff’s plant, calling it a chemical factory and making wide ranging allegations that hyper tension is

caused due to consumption of white salt were "statements made without foundational facts" and that it was not permissible for any company to indulge in advertising for its product which would lead to panic amongst consumers."

23. The learned Single then dealt with the price difference between the two products and observed that it was 'extremely stark'. It was noted that 1 kg of TATA Salt costs Rs.20 whereas the Appellant's product was sold at Rs.99 per kg. The learned Single Judge concluded that TCL's product was 'consumed by the masses' and that the Appellant's product 'is not a substitute or replacement for the same due to pricing itself.' Further it was observed that both were not comparable products: "one is iodised salt which is sold as per FSSAI Regulations. The other is rock salt." According to the learned Single Judge, "the intent of all these commercials and advertisements is to shock the consumers."

24. As regards the submission of the Appellant that the three TVCs were also the subject matter of the ISMA suit, the learned Single Judge observed that this was correct: "However, when the TVCs are seen along with the additional material from the point of view of specifically the Plaintiffs product -TATA salt, the legal and statutory rights that are affected as also the reliefs that can be claimed by the Plaintiff are those that cannot be granted in the ISMA suit."

25. According to learned Single Judge

"The right of the Plaintiff to protect the good standing of TATA

salt as a product and TATA as a brand is a right which cannot be replaced or exercised by ISMA which can only take general action to protect its members including the Plaintiff. The ISMA suit does not usurp the Plaintiffs rights to sue and neither can the said right be replaced by ISMA.”

26. On the view of the learned Single Judge, when the advertisement campaign was viewed as a whole and the submission of the Plaintiff that the hand waving gesture of ‘bye-bye’ was an allusion to TATA was ‘rather amusing’ “at the same time it cannot be said that the same is wholly innocent.” The learned Single Judge then referred to the decisions of this Court in *Colgate Palmolive Company v. Hindustan Unilever Limited* 206 (2014) DLT 329 and *Dabur India Limited v. M/s Colortek Meghalaya Pvt. Ltd.* ILR (2010) 4 DLT 489 and the decision of the Bombay High Court dated 16<sup>th</sup> June, 2017 in notice of motion (L.No.690/2017) in Suit (L) No. 204/2017 (*Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Limited*) and concluded that the impugned material showed that the intention of the Appellant was not merely to promote its product as a better product ‘but to call white salt in general, and specifically TATA salt, dangerous as it is made in a chemical factory and is bleached.’

27. As regards the Appellant disowning the video the learned Single Judge observed as under:

“The clever manner in which the Defendant has completely disowned the viral video, which is completely beneficial only to its own business, clearly shows that the Defendant does not wish to own up to its own acts. A perusal of the video shows several commonalities between the admitted material and the disputed video. The theme in all the impugned material is the same. It is very telling that the markings which appear in the

book titled 'Salt of the Earth' as shown in the video in fact appear in the extract of the book filed by the Defendant. In the booklet which the Defendant admits to have circulated, the packaging of the Plaintiff is shown in a blurred form. The conduct of the Defendant has been far from bonafide. This Court holds that on the basis of the material available on record, prima facie the video has been circulated either by the Defendant or at its behest.”

28. It was further held as under:

“Permitting the Defendant to continue, the telecast/publication of the impugned material would lead to allowing tarnishing and denigration of a product such as TATA salt which is a household name in India. The truthfulness or otherwise of the Defendant's allegations would have to be gone into during trial. But even if it is presumed that the product is made at the Mithapur plant, where one of the by-products of the manufacture of salt from the sea is soda ash, the depiction of the same in the manner in which it is done by the Defendant is wholly unacceptable.”

29. According to the learned Single Judge:

“The TATA brand has earned an iconic status. TATA Salt was introduced by the Plaintiff and was recognised by the Government as one of the products meant to eliminate iodine deficiency. It was promoted as "Desh ka Namak Tata Namak" and has a large customer base. The swathe of population which has consumed and continues to consume a product such as TATA salt cannot be led to believe that they were consuming poison or a dangerous ingredient, without there being irrebuttable proof for the same. Upholding the Defendant's right to make such statements would mean that the regulatory authorities have turned a blind eye to poison being sold, which is also clearly unacceptable. The truth, if any, of the Defendant's statements has to be established in trial. Until then, the Defendant cannot be permitted to make such denigratory and disparaging remarks.”

30. This Court has heard the submissions of Mr. Sudhir Chandra, learned Senior Counsel for the Appellant and Ms. Bani Dikshit, counsel for the Respondent TCL.

***Scope of the present appeal***

31. At the outset it requires to be clarified that of the ‘impugned material’ considered by the learned Single Judge, one has been expressly disowned by the Appellant viz., the video circulated on Whatsapp. This was noted even by the learned Single Judge. However, for some reason, and to this Court it appears to be a conclusion not based on evidence, the learned Single Judge concluded that the video was circulated at the behest of the Appellant. Indeed, there was no material at the stage at which the impugned order was passed to come to such a conclusion. Even ASCI held that the video could not be attributed to the Appellant. In any event, Mr. Chandra clearly stated that the Appellant is not aggrieved by the video being injuncted from being circulated and is concerned only with it being wrongly attributed to the Appellant.

32. As regards the alleged flyer, the Court has been shown the brochure circulated by the Appellant. On page 10 in the left-hand top corner of the said brochure, there are blurred images of some salt packets which, according to the Respondent/Plaintiff, were blurred images of the TATA salt packets. Mr. Chandra on instructions has stated that they are willing to remove the said blurred image at page 10. The said undertaking is taken on record. In the considered view of the Court, once the blurred image is removed from page 10 of the Appellant's promotional brochure, any

grievance of TCL that the said brochure specifically targets its product should stand allayed.

33. The third element of the 'impugned material' is the ET article dated 14<sup>th</sup> March, 2018 carrying an interview with the promoter of the Appellant. The said article has been written by Mr. Rajiv Singh who is not stated to be connected with the Appellant. A perusal of the printed interview does not reveal any words spoken by the Appellant's promoter which disparages TCL's product. This is of course on a *prima-facie* reading of the said article. The comments outside of the quotes attributed to the Appellant's promoter are to be attributed to the author of the piece and not the Appellant. Consequently, injuncting the said article, which already stands published, and is not shown to have been repeated, is pointless.

34. While the learned Single Judge has proceeded on the basis that the impugned material should be considered as constituting a 'campaign' and it should therefore be considered as a whole, it was necessary for the Single Judge to have considered the merits of each of the distinct elements constituting the 'impugned material'. Further in the impugned judgment, one type of material is conflated with the other. For instance, there is extensive reference in the impugned judgment at various places to the video and its contents despite it being disowned by the Appellant.

35. The focus of the present judgment would, therefore, be the three TVCs and understandably most of the arguments of the parties focussed on them.

### ***Legal position***

36. Before proceeding to discuss the three TVCs, a brief recapitulation of the legal position would be necessary. In ***Reckitt & Colman of India Ltd. v. M.P. Ramchandran, 1999 (19) PTC 741*** the following propositions relating to comparative advertising were laid down by the Calcutta High Court:

- (a) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.
- (b) He can also say that his goods are better than his competitors', even though such statement is untrue.
- (c) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
- (d) He however, cannot, while saying that his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible.
- (e) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

37. The settled legal position is that the manufacturer of the product allegedly disparaged ought not to be hyper-sensitive in such matters. In ***Pepsi Co. Inc. v. Hindustan Coca Cola Ltd. 2003 (27) PTC 305 (Del) (DB)***, a Division Bench of this Court explained the factors that had to be considered while viewing commercials that compared the advertiser's product with that of the rival. These were (i) Intent of the commercial, (ii)

Manner of the commercial, and (iii) Story line of the commercial and the message sought to be conveyed.

38. This was further developed in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.* (*supra*) where on an analysis of the decisions of the Supreme Court, the following guiding principles were culled out:

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

39. The Court however added: "if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection."

40. Discussing the factors delineated in *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.* (*supra*) the Court in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.* *ILR* (*supra*) held:

"While we generally agree with these factors, we would like to amplify or restate them in the following terms:

- (1) The intent of the advertisement - this can be understood from its story line and the message sought to be conveyed.
- (2) The overall effect of the advertisement - does it promote the advertiser's product or does it disparage or denigrate a rival product?



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

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

41. In *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.* ILR (*supra*), the Court emphasised that:

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

42. There too the Plaintiff claimed a larger market share and that, therefore "the obvious target of the commercial is the product of the Appellant." Rejecting the argument, the Court observed:

"In our opinion, this argument cannot be accepted. The sub-text of this argument is an intention to create a monopoly in the market or to entrench a monopoly that the Appellant claims it already has. If this argument were to be accepted, then no other

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

43. The consumer too must be credited with some discretion as to choice of products when the relevant information concerning them is placed in the public domain. In *De Beers Abrasive v. International General Electric Co. 1975 (2) All ER 599*, the Court explained that the test to be applied was "whether a reasonable man would take the claim being made as a serious claim." It went to elaborate as under:

"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 judgment:

“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.”

44. In *Dabur India Ltd. v. Wipro Ltd. Bangalore 2006 (32) PTC 677* it was explained that:

"In comparative advertising, a consumer may look at a commercial from a particular point of view and come to a conclusion that one product is superior to the other, while another consumer may look at the same commercial from another point of view and come to a conclusion that one product is inferior to the other. Disparagement of a product should be defamatory or should border on defamation, a view that has consistently been endorsed by this Court. In other words, the degree of disparagement must be such that it would tantamount to, or almost tantamount to defamation."

45. In the same case the Court went on to say:

"A manufacturer of a product ought not to be hyper-sensitive in such matters. It is necessary to remember that market forces are far stronger than the best advertisements. If a product is good and can stand up to be counted, adverse advertising may temporarily damage its market acceptability, but certainly not in the long run."

46. Turning to the decision in *Hindustan Unilever Limited v. Gujarat Co-operative Milk Marketing Federation Limited (supra)*, one significant aspect of the case was the finding of the Court that the product found to be denigrated did not contain any vanaspathi (or artificial ghee) whereas the impugned TVC suggested that it did. In the present case, as will be seen hereafter, there is no direct reference in any of the three TVCs to TATA Salt as such.

47. In the background of the above legal position, the Court proceeds to discuss the three TVCs.

***The three TVCs***

48. The Court has viewed the three TVCs carefully. The story board of each of the three TVCs has some common elements and distinct elements. The first TVC is the 'paint film'; the second is 'clothes film'; and the third is 'haldi film'. The initial few frames/visuals in each of the films contain distinct elements. The remaining frames are identical in the three TVCs.

49. The first frame in the paint film shows Mr. Anil Kapoor holding up a white can with the words 'Paint' written on it. In the next frame he is holding a packet which has the words 'Safed Namak' written in black. There is no indication that this packet is that of TCL. The words spoken by Mr. Kapoor are '*Ye paint, chemical factory mein banta hai*' and while holding the packet of salt he states '*Aur ye aapka safed namak, Jisse aap roz khate hai ye bhi chemical factory mein banta hai, bleach kiya jaata hai.*'

50. The third frame in the paint film (which is the fourth in the clothes film and fifth in the Haldi film) shows Mr. Kapoor stating '*Isiliye safed namak ko karo...*' and making a waving gesture which in the normal sense would mean 'bye-bye'.

51. TCL's specific objection to the waving gesture is that it is a 'direct reference' to TCL because it is a '*Ta Ta*' gesture. The Court is of the *prima facie* view that the Respondent is indeed reading too much into the above waving gesture. It did not in fact even convince the learned Single Judge

who found it to be 'amusing' but not 'wholly innocent'. It *prima-facie* appears to be in the form of an advice to discerning consumers to move away from salt manufactured by a chemical process to natural salt. It is not possible *prima-facie* to read into the waving gesture any 'direct reference' to TCL's product. Here, it requires to be noted that even TCL does not dispute that it is not the sole manufacturer of salt using a chemical process. TCL's plea that it denigrates a whole class of salt manufacturers is dealt with separately hereafter.

52. The other criticism is that by stating that both paint and white salt are manufactured in a chemical factory, an impression is being created 'that production methods of both are similar' and that white salt is 'toxic and harmful, like paint'. This again *prima-facie* appears to be an instance of TCL reading too much into the advertisement. TCL does not deny that its salt is manufactured at its chemical factory which produces soda-ash and that the salt is a by-product. TCL also admits that the salt contains an anti-caking agent E-536 which is indeed Potassium Ferrocyanide.

53. There appears *prima-facie* to be no suggestion in the paint film that TATA salt is either poisonous or harmful to health. The only suggestion appears to be that the consumer should make an informed choice. On the issue of denigration or disparagement of the TATA salt, at this stage when evidence is yet to be led by the parties, what has to be considered is whether in the paint film, any statement of Mr. Kapoor can be said to be false or misleading or deliberately denigrating TATA salt?

54. As far as the other frames are concerned, which are common to all the

three TVCs, they promote the Appellant's product as being natural, containing potassium, iron and iodine in the natural form and stating that it is healthy and urging the consumer to choose the Appellant's product. The objection to the word 'bleached' and that all white salts are therefore unfit for consumption appears to be based on the alleged disparagement of 'an entire class of white salt manufacturers.'

55. As regards treating the suit of TCL as a class action, it is seen that ISMA, of which TCL is an active member, has already filed a suit in which interim injunction initially granted stood vacated by the High Court of Gujarat, which order subsists. This is not denied by TCL. There is, therefore, merit in the contention of the Appellant that as far as class action is concerned, the ISMA suit is already pending. The Gandhidham suit also involves an identical issue. While TCL does not explain why it should be permitted to institute multifarious litigation concerning the same issue, there appears to be no justification in its prayer that its suit out of which the present appeal arises, and which has been filed by TCL alone, should be considered to be a class action particularly when the ISMA suit is pending.

56. As far as the present suit is concerned, the initial burden is on TCL to demonstrate that its product has been specifically targeted by the TVCs. *Prima facie* it does not appear to have succeeded in doing so. In other words, the Court is not *prima facie* satisfied that the first TVC deliberately denigrates TCL's TATA Salt. This Court is unable to concur with the learned Single Judge in this regard.

57. Turning now to the second TVC which is the 'clothes film', the first

visual shows a bundle of white clothes which have been bleached and the packet of white salt which Mr. Kapoor states has been bleached in a chemical factory and which is why it is white. The objection is that this creates an impression that it is 'unnatural'. These objections overlook the fact that the consumer who is paying Rs.20 for 1 kg of TATA Salt will think several times over if he decides to pay Rs.99 for a kg of the Appellant's Puro-Healthy salt. He should know what the added value of the Appellant's product is, which is the attempt being made in these three TVCs including in the 'clothes film'.

58. *Prima-facie* it does not appear that the second TVC i.e. the clothes film specifically targets TATA Salt. There is no image or allusion to TATA Salt in the second TVC. Again, there is the waving gesture but without any words. It *prima-facie* cannot be said to be denigrating TATA Salt in the manner suggested by TCL.

59. The third TVC is the 'Spices Film' or the 'Haldi Film'. The first frame states an obvious fact that it is natural to use 'Haldi' and 'Lal Mirch' in eating, whereas the salt that is used is made in a chemical factory and is bleached. Here again there is no direct reference to TATA Salt. Following this are the other common visuals which have been referred to earlier beginning with the waving gesture. In the modified TVCs, a waving gesture has been omitted.

60. In the considered view of the Court while it is open to the Appellant to release both the original and the modified TVCs, the waving gesture as such should not be seen as directly alluding to the Respondent's product. This



should be seen as a permissible element in a commercial advertisement where every expression could not be seen to be 'false, misleading, unfair or deceptive.' It must be seen as encouraging the consumer to make an informed choice about the product for which the consumer is going to pay much more. The class of the product itself is not comparable. The class of consumers targeted is also different.

61. Learned counsel for the Respondents placed considerable reliance on the observations of the learned Single Judge in para 63 of the impugned judgment. In the absence of the matter having gone to the stage of evidence, the conclusion of the learned Single Judge in para 63 that 'the TATA brand has earned iconic status. TATA salt was introduced by the Plaintiff and was recognised by the Government as one of the products meant to eliminate iodine deficiency', is problematic. Equally problematic is the opinion that "The swathe of population which has consumed and continues to consume a product such as TATA salt cannot be led to believe that they were consuming poison or a dangerous ingredient, without there being irrebuttable proof for the same." This ought to be qualified by the caveat that this is the Plaintiff's case which remains to be tested in evidence. The threshold for proving defamation is high. In the present case, it might be higher with the Appellant pleading truth as a defence.

62. In the *prima-facie* view of this Court, at the present stage when evidence of the parties is yet to be led, it is not possible to come to a conclusion in the manner that the learned Single Judge has, that the three TVCs make a direct reference to TATA Salt and are either disparaging or denigrating of it.

***Conclusion***

63. Consequently, this Court sets aside the impugned order of the learned Single Judge in so far as it has enjoined the Appellant from releasing the three TVCs. However, the injunction as regards the impugned video released on whatsapp will continue.

64. As far as the injunction of the pamphlet flyer and marketing booklet etc. is concerned, the Appellant's statement that it would delete the blurred image of the salt packets on the left hand top corner of the page 10 of the brochure is taken on record and the Appellant is permitted to release the said brochure with the said modification. The impugned order of the learned Single Judge in that regard stands modified accordingly.

65. The injunction as regards the article in the ET forming part of the 'impugned material' is, for the reasons aforementioned, vacated.

66. The appeal is accordingly disposed of in the above terms. The pending application is also disposed of.

**S. MURALIDHAR, J.**

**TALWANT SINGH, J.**

**OCTOBER 31, 2019**

*mw*