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

% Judgment delivered on: 09.08.2010

**IA No. 8134/2010 in CS(OS) No. 1236/2010**

HINDUSTAN UNILEVER LIMITED ..... PLAINTIFF

Vs

CAVINCARE PRIVATE LIMITED ..... DEFENDANT

**Advocates who appeared in this case:**

For the Plaintiff : Mr C.M. Lall with Mr D.P. Mohanty, Mr Sumeet Lall & Mr Debojyoti Bhattacharya, Advocates

For the Defendant: Mr Amit Sibbal with Mr Sushant Singh, Mr Manav Kumar, Mr P.C. Arya, Mr V.K. Sinha, Mr Gautam Panjwani, Mr Tejinder Singh, Ms Parveen Rathi & Mr Harsh, Advocates

**CORAM :-**
**HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether the Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

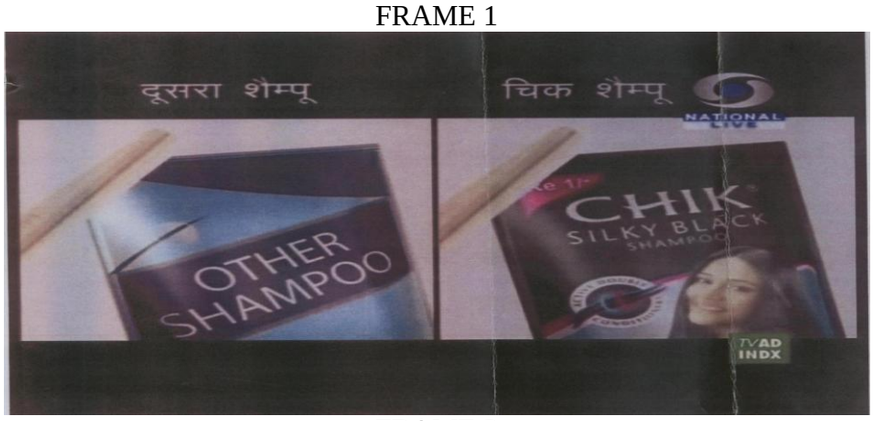
**RAJIV SHAKDHER, J**

**IA No. 8134/2010 (O. 39 R. 1&2 r/w S. 151 of CPC)**

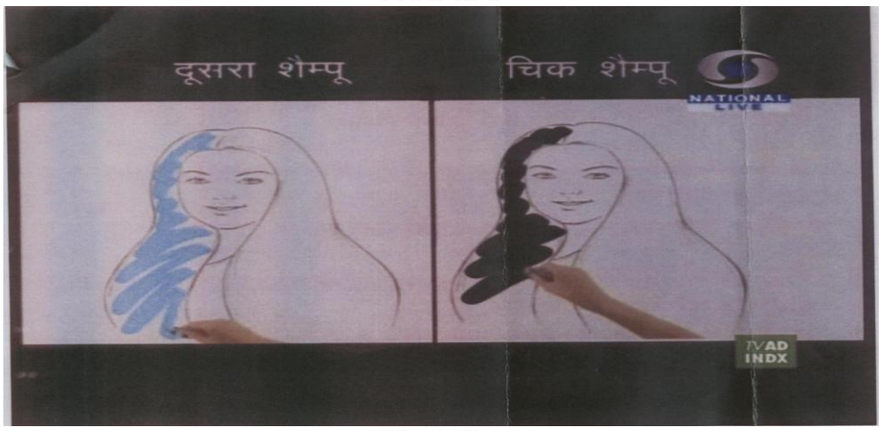
1. The captioned interlocutory application (in short 'IA') has been filed by the plaintiff under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') seeking injunction against the defendant, its agents, principals and officials etc., against continued telecast or, in any other manner, causing the publication of the impugned advertisement

2. The relief for injunction is premised on the plaintiff's allegation that the impugned advertisement disparages the shampoo manufactured by it; which is sold in sachets priced at Re. 1 each. In order to appreciate the allegations made by the plaintiff, it may be useful to extract the story board of the impugned advertisement:

FRAME 1




FRAME 2




FRAME 3

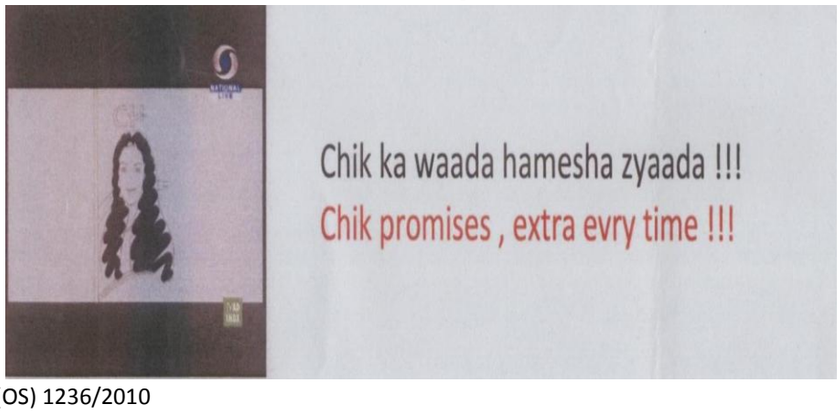

FRAME 4

FRAME 5

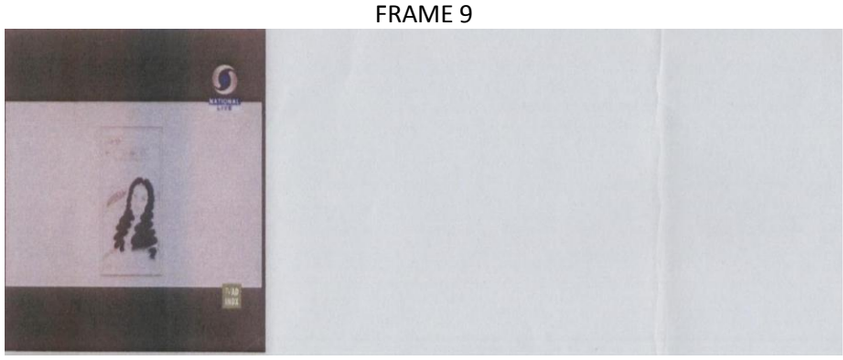

FRAME 6


FRAME 7

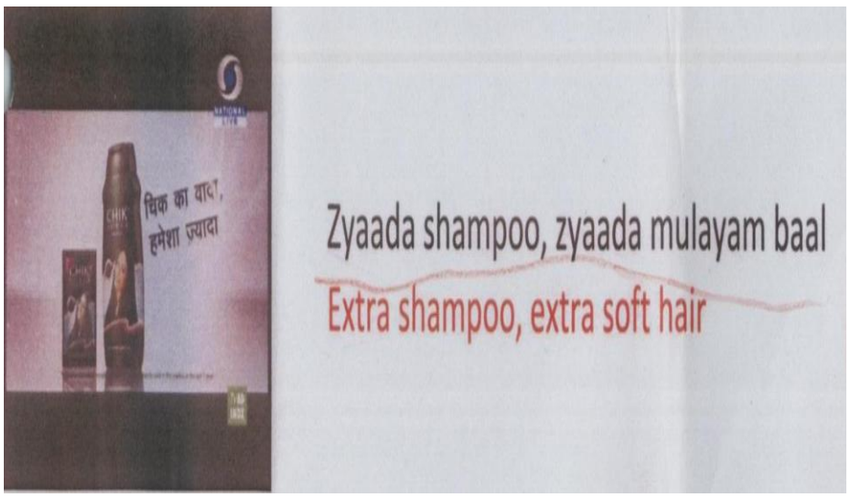

FRAME 8



FRAME 9



FRAME 10




3. It is in the background of this impugned advertisement that the plaintiff has put forth its case both, in the pleadings and in the submissions made before me. It is averred that the plaintiff, is a leader in manufacturing and selling fast moving consumer goods (FMCG), which includes personal care products, such as skin creams, soaps, hair shampoos and other toiletries. With effect from 01.05.2010, the plaintiff had launched a campaign which attempted to highlight the fact that, henceforth in terms of quantity it would offer 20% extra shampoo in sachets priced at Re. 1 or 0.50 paise. In other words, the plaintiff purported to offer to the consumers, evidently 20% extra shampoo at the same price. The defendant, it is averred, only to denigrate the plaintiff's product has, maliciously released the impugned advertisement on 06.05.2010, which seeks to convey to the public at large, that all such shampoos, which includes the plaintiff's shampoo, which are sold in sachets of Re. 1, are less efficacious in comparison to the defendant's shampoo, which is sold under the brand name 'Chik' in sachets of Re. 1. In other words the impugned advertisement seeks to convey, to the consumers at large, that the quantity of shampoo contained in the plaintiff's

sachets is not sufficient for enabling the consumer to have a complete hair wash. It is the plaintiff's case that even though the impugned advertisement does not specifically allude to it, the fact that the impugned advertisement uses '***pearly blue colour***' shampoo, which is sold by the plaintiff under its brand name 'Clinic Plus' (priced in sachets of Re. 1) it could only refer to the plaintiff's shampoo and none other.

4. The defendant, on the other hand, has refuted the charge of disparagement. It is the defendant's case that the plaintiff is not, the only one, in the business of manufacturing shampoos in colour blue. In this regard reference has been made to several other manufacturers such as Procter & Gamble Home Products, ITC Ltd., Paigham Industries, Miraj Products Pvt. Ltd., JT Cosmetics & Chemical Pvt. Ltd., Power Soaps Ltd., amongst others, who not only sell the shampoo which is blue in colour, but also sell their product, in sachets, priced at Re. 1. As a matter of fact the defendant has also averred that there are several toiletries apart from the shampoo, such as toothpaste, soaps, washing detergents and floor cleaners which are, also available in blue colour. In other words, it is the case of the defendant that the plaintiff cannot with regard to shampoo or other toiletries have any monopoly in the colour blue.

4.1 Furthermore, the defendant asserts that while, there is no attempt to denigrate the plaintiff's product the assertion therein is true, in as much as, the defendant's sachets priced at Re. 1 carried a larger quantity of shampoo. There is some obfuscation on this issue, to which I will refer to later. This, according to the defendant, being a statement of fact no fault can be found with the defendant on this score. It is also the defendant's assertion that merely because the impugned advertisement seems to suggest that a larger quantity of shampoo would result in better results in the form of softer and smoother hair can at best be categorized as puffery; which the law, does not interdict.

5. Based on the aforesaid broad contours of the case set up by both parties (in so far as it is relevant for the disposal of the captioned application) the counsel for parties submitted as follows:

6. Mr Lall, who appears for the plaintiff, apart from reiterating the submissions made in the pleadings filed before me, relied upon a Physiochemical Analysis conducted by the plaintiff's Research And Development (R & D) Department to demonstrate that, even when plaintiff was offering lesser quantity of shampoo in its sachets sold prior to 01.05.2010 (at which point in time they launched their extra 20% sachets) the plaintiff's shampoo 'Clinic Plus' was superior to that of the defendant's product. For this purpose, the learned counsel compared various parameters of its shampoo such as the PH Factor, Viscosity, Active Detergent (AD), and the ingredients contained therein, with those of the defendant to drive home his point. This apart, the other reason why my attention was drawn to the R & D report was to support the plaintiff's case, that the assertion, in the impugned advertisement, to effect that, greater quantity of the shampoo used, the better would be the final result; (as in it resulted in softening of hair), was both misleading, and false.

6.1 Mr Lall also adverted to the certificate/report dated 05.05.2010 obtained by the defendant based on which the defendant sought to sustain its stand that its sachets carried a larger quantity of shampoo. Mr Lall submitted that since its new product had already been launched on 01.05.2010, the report was clearly inaccurate as, at that point in time, the plaintiff was offering the consumers, sachets which carried 7.8 ml of shampoo, and not 6.5 ml as shown in the report dated 05.05.2010. Mr Lall also contended that the quantity shown, which the defendant's sachet assumingly carry, that is, 8 ml is once again not accurate, in as much as in the pleadings filed by the plaintiff, it has been clearly stated that the defendant's sachets carry 7.5 ml of shampoo, which has not been denied by the defendant. Therefore, the statement in the report dated 05.05.210 that the defendant's sachet carry 8 ml of shampoo is clearly an after-thought; incorporated therein, only to cover up some lost ground. Mr Lall in support of his submissions has relied upon the following judgments:

***Dabur India Ltd. Vs M/s Colortek Meghalaya Pvt. Ltd. 2009 (42) PTC 88*** and ***Dabur India Limited vs Colgate Palmolive India Ltd. AIR 2005 Del. 102***.

7. Mr Amit Sibbal, who appeared for the defendant, in support of the defendant's case set up in the pleadings; briefly submitted as follows:

i) There is no disparagement of the plaintiff's product as alleged or at all.

ii) The plaintiff has no monopoly over the colour blue. Reference in this regard was made to various manufacturers of shampoo and other toiletries. My attention was drawn to examples set out in the written statement; which have been noticed hereinabove by me.

iii) The impugned advertisement (i.e., the story board) till frame five (5) refers to the position which obtained pre 1.5.2010, that is, prior to 20% extra shampoo advertising blitzkrieg carried out by the plaintiff. From frame six (6) onwards the impugned advertisement only suggests that the quantity of shampoo offered by defendant in its Re 1 sachet is more less equal to the quantity offered by all others in the market. In this regard reference is made to frame no.7.

iv) The statements made in the last three frames (i.e. frame nos. 8, 9 and 10) are correct. In frame no.8 defendant is seen as making only a promise to give to consumers evidently, extra quantity of shampoo every time. This is a statement made in isolation. Insofar as picture in frame No.9 is concerned, it is contended that there is no reference to any other product. The statement made alongside the picture in frame no.10 it is asserted : is an attribute of the defendant's product achieved on account of an additive known as "active double conditioner".

v) It was also contended that notwithstanding the absence of specific denial in the written statement that the plaintiff's Re. 1 sachet's contained greater quantity of shampoo – the fact remains that prior to 20% extra campaign of the plaintiff (i.e., 1.5.2010) the plaintiff's sachet's contained 6.5 ml of shampoo whereas the defendant's sachet's Re. 1 contained 7.5 ml shampoo. After 1.5.2010 even though plaintiff's Re. 1 sachet's purportedly contains 7.8 ml of shampoo it was not 20% more than the quantity of shampoo which the defendant offered in its Re 1 sachet. Presently, the defendant offered a fill of 7.5 ml. the difference in the quantities offered by the plaintiff and defendant was only 0.30 ml. Additional twenty percent (20%) would result in the increase in quantity by 1.5 ml, and

therefore the plaintiff ought to have been offering 9 ml fill as against 7.8 ml fill, it presently offers. Thus, as presently placed plaintiff's offers only 4% more, in terms of quantity, of the shampoo in its Re 1 satchet as compared to the defendant. In other words, the defendant's assertion of giving "extra" quantities is not false or misleading, especially when seen in the context of shampoo's offered by various manufacturers. The defendant's quantity seem less albeit by a minuscule margin, when compared specifically with that of the plaintiff. Since there is no attribution to the plaintiff such comparison is misconceived.

8. In rejoinder, Mr.Lall apart from reiterating what he had already submitted stressed upon the deliberate inaccuracy in the report dated 5.5.2010 cited by the defendant which asserts that defendant's Re 1 satchet's of shampoo, contain a fill of 8 ml. He also reiterated the fact that the plaintiff's extra 20% offer is vis-à-vis its own earlier offer whereby sachets of Re 1 were carrying a fill of 6.5 ml, and now with 20% increase they carry 7.8 ml.

9. It is pertinent to note at this stage that in order to get a clear picture of the situation as it obtained at present, the defendant was directed to file an affidavit by order dated 6.7.2010. In the affidavit dated 13.07.2010, the defendant stated that till December, 2008 their Re. 1 sachets contained a fill of 8 ml; however after the aforesaid date the fill has been reduced to 7.5 ml.

**REASONS:**

10. I have heard the learned counsel for the parties. Before I proceed to discuss the specifics of this case, let me allude to briefly to the parameters which govern the action for disparagement. Disparagement is essentially an action for a tort of ***malicious falsehood***. It is often described as ***trade libel or even slander of goods***. The latter presents a narrower scope of the tort since it essentially seeks to protect financial interest, and not commercial interest. Therefore, disparagement of goods involves making of statement about a competitor's goods which is untrue or misleading; made to influence or tends to influence the public not to buy the competitor goods (See Black's Law Dictionary Sixth Edition at page 470). However, every disparagement is not actionable. For disparagement to be actionable, that is, to bring it within the tort of malicious falsehood it should have the

following ingredients: (i) the impugned statement should be untrue; (ii) the statement ought to have been made maliciously, that is, without just cause or excuse; and (iii) lastly, the plaintiff, as a result of the above, ought to have suffered a special damage thereby. [See ***Royal Baking Powder Company vs Wright Crossley & Co. (1901) 18 R.P.C. 95*** cited with approval in ***Dabur India Ltd. Vs M/s Colortek Meghalaya Pvt .Ltd. 2009 (42) PTC 88***]. The defendant in an action for disparagement is always entitled to set up a defence whereby, he can seek to repel an action by justifying the impugned statement based on the following: that the law does not interdict a trader from saying that his goods are the very vest. To achieve this end a trader is entitled in law to compare his goods with his competitors'.

10.1 This perhaps is also the genesis of comparative business. The only caveat to the above defence is, of course, that in the process of comparison, the defendant cannot denigrate the goods of his competitors. Though, no fault can be found, if a trader were to only suggest that his goods are better than his rival in trade, in one or, the other respect. But the question is how do you differentiate between a harmless comparative statement, and a statement which tends to denigrate maliciously without just cause or excuse. The litmus test, in my opinion is, whether a "reasonable or prudent man" would take the statement "seriously"- attributing a defect in the rival traders goods. It is because ultimately it is for the consumers to decide which product is better equipped to meet his needs. The courts are not equipped to assess either the attributes or the efficacy of the products which are purveyed in the market for consumption and use. Since advertisements is a form of commercial speech it is protected under Article 19(1)(a) of the Constitution of India, albeit with reasonable restrictions as provided by law. Therefore, as long as advertisements operate within the permissible areas, in other words, do not denigrate the goods of a rival, the courts should be slow in injuncting such acts. As a matter of fact at the interlocutory stage if the defendant sets up an arguable case; the courts do not generally injunct statements of defendants which are impugned on an allegation of disparagement.

11. A Division Bench of this court in the case of ***Dabur India Ltd. Vs Colortek Meghalaya Pvt. Ltd. & Anr. 167 (2010) DLT 278*** has expounded the factors and principles that have to be kept in mind while deciding the issue of disparagement. I do not intend to invent the wheel. It would suffice I were to quote the observations of the bench. This is more so as both sides have relied upon this judgment in support of their respective cases. The relevant observations made in paragraphs 14, 16 and 18 of the judgment are extracted below for sake of convenience:

> *"14. On the basis of the law laid down by the Supreme Court, the guiding principles for us should be the following:*
> *(i) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.*
> *(ii) An advertisement must not be false, misleading, unfair or deceptive.*
> *(iii) Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.*
> *To this extent, in our opinion, the protection of Article 19(1)(a) of the Constitution is available. However, if an advertisement extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection.*
> *16. In Pepsi Co. it was also held that certain factors have to be kept in mind while deciding the question of disparagement. These factors are: (i) Intent of the commercial, (ii) Manner of the commercial, and (iii) Story line of the commercial and the message sought to be conveyed. 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.*

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

11.1 The order of the Division Bench judgment was carried in appeal to the Supreme Court. The Special Leave Petition was however dismissed; confining the observations made in the case to the disposal of the interlocutory application.

12. In the light of the aforesaid principles let me advert to the particulars of this case. The plaintiff is aggrieved by the fact that the defendant, by virtue of the impugned advertisement, has denigrated its product **clinic plus** which is sold in Re. 1 sachets by conveying to the public at large that the quantity offered by it is insufficient for a complete hair wash. I must note at this stage that Mr Lall, who appears for the plaintiff, had fairly conceded before me that the plaintiff does not claim any monopoly over the colour blue, though this was the case set up in the pleadings. A perusal of the story board (which has been extracted by me hereinabove) would show that there is no attribution to the plaintiff whether specific or generic. The fact that the plaintiff has a large market share, and is a lead player in the industry, is not an argument which would have me hold that the impugned advertisement is directed at the plaintiff. This apart, as noticed in my narrative above, there are admittedly not only several other manufacturers which sell shampoos, which are blue in colour; but also offer extra shampoo like in the case of the plaintiff. However, since Mr Lall chose to argue that the very fact that the plaintiff has filed a report dated 05.05.2010 wherein

a comparison has been made with the plaintiff's product, prior to the launch of the impugned advertisement, would reveal clearly that the defendant was conscious of the fact that the advertisement was directed towards the plaintiff. This argument was sought to be supported by Mr Lall, by reminding the Court that the defendant expecting the institution of the instant action in Court, filed a caveat on 06.05.2010. In my opinion, such an argument is untenable. There is nothing in the story board which would suggest that it is specifically or generally directed towards the plaintiff. Even if one were to assume that it was so, in my view, the statement made by virtue of the impugned advertisement does not prima facie constitute disparagement. The reason for this is that there is no dispute about the fact that prior to the plaintiff launching its 20% extra campaign (that is, prior to 01.05.2010) decidedly the plaintiff's sachets carried a fill of 6.5 ml, which was, less than that of the defendant. The defendant's sachets of Rs. 1, prior to 01.05.2010, carried a fill of 7.5 ml. It was perhaps because of this, and other factors which may have prompted the plaintiff to offer 20% extra quantity of shampoo to its consumers. It is claimed by the plaintiff that w.e.f. 01.05.2010 its sachets carry a fill of 7.8 ml of shampoo which is 20% more than what it was prior to the said date. A careful perusal of the story board would show that till frame 4 (if it is assumed that the comparison is with the plaintiff's product) what is sought to be conveyed is that the defendant's sachets of Re. 1 have a greater quantify of shampoo in it. It is after the 4$^{th}$ frame, that the defendant, if at all, has ingeniously tried to convey that the quantity of shampoo that they offer is always more. This, according to Mr Lall, is sought to be conveyed in frame no. 7, by virtue of the three exclamation marks next to the picture of the lady which evidently used the defendant's product. Mr Lall argued that this frame sought to convey that even after the defendant's product had been used completely, there was still some extra quantity left for further use.

12.1 The issue, in my opinion, is in so far as the plaintiff is concerned is: does this by itself denigrate the product of the plaintiff. The test, as I indicated above, is whether a prudent and reasonable consumer would take this depiction "seriously"; as attributing a defect in plaintiff's product. Is the plaintiff being "by sensitive".

12.2 In Hindustan Unilever Limited vs S C Johnson FAO(OS) 90/2010 dated 22.04.2010 the Division Bench applying "the test of bysensitivity" in impugning advertisement reversed an order of ad-interim injunction. At this stage the plaintiff is believed completely the difference in quantity is only 0.3 ml. Depending on the viscosity of the product it would be anyone guess how much of the actual quantity the consumer is able to squeeze out of the sachet for use. Mr Lall's submission that the message conveyed is that quantity offered by plaintiff is not sufficient for complete wash is not what the impugned advertisement seeks to convey. The stress is on showing the quantity offered. Pictorially it was perhaps the best way of conveying its message. How much shampoo is required for a complete hair wash; even a lay, reasonable and prudent man would understand is: largely dependent on the expanse of hair involved, the grim, dust and oil which is stuck to the hair follicle. At this interlocutory stage, I am unable to come to a conclusion that the impugned advertisement disparages defendant's product. The very fact that Mr Lall has had to, during the course of submissions made before me, stress upon sophistry of the message, which, according to the plaintiff, is sought to be conveyed; by itself, is a factor which would dissuade me from injuncting the impugned advertisement at this stage. The advertisement is played out for approximately 20 seconds, the fine distinctions which Mr Lall has sought to draw during the course of arguments cannot be visually grasped by a viewer. The last three frames may still well fall within the grey areas alluded to by the Division bench in the case of ***Dabur India*** (*supra*).

12.3 As regards the judgment in the case of Dabur India Ltd vs Colgate Palmolive Ltd was concerned, it turned on facts. One of the crucial admissions made by the defendants was that the impugned advertisement was directed against plaintiff's product "Lal Dant Manjan Powder". There is no such admission in the present case.

13. For the reasons given above, in my view, no interference is called for at this stage by the court.

14. Before I conclude, I may only refer to one aspect of the matter. The counsels before me adverted to the provisions of rule 6 of the Packaging Commodity Rules, 1977 framed under Section 34 of the Standard of Weights and Measurement Act, 1976, to establish, that there was no statutory requirement for printing the quantity of the fill supplied by the manufacturers of the shampoo, where quantities were less than 10 ml. As noticed above, I had directed the defendant to file an affidavit as to what was the exact quantity which was presently being offered by it in its Re 1 sachets. In the affidavit dated 13.07.2010 filed on behalf of the defendant it is averred that till December, 2008, its Re. 1 sachets, carried a fill of 8 ml which presently stands reduced to 7.5 ml. Mr Sibbal had submitted before me that the stocks of sachets of Re. 1, which carried a fill of 8 ml, were still in the market, which is possibly why the report filed by the defendant dated 05.05.2010 recorded that the defendant's sachets carried fill of 8 ml. It was Mr Sibbal's submission that the expert who made the comparison, had perhaps a sachet from an earlier stock. Whether this is correct or not may well emerge more clearly during the course of trial. The fact remains that the consumers have no way of knowing what is the exact quantity of shampoo in the sachets. Over the years the Courts have issued directions which have tended to arm the consumers. If the submissions of the defendant are to be understood in their correct context, it was never their intention to mislead its consumers. Therefore, if this submission of the defendant were to be accepted, in the fitness of things, the defendants ought on their own (eventhough there is no statutory obligation to do so) indicate on their sachets, from here on, the exact quantity of the shampoo contained in the sachets. The defendant is, accordingly, directed to do the needful. This arrangement shall obtain at least during the course of the trial.

15. Needless to say my observations made hereinabove will not impact the merits of the case, being prima facie in nature.

With the aforesaid directions the captioned application is disposed of.

**RAJIV SHAKDHER, J**

**AUGUST 09, 2010**
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