

GA No.243 of 2010

CS No. 12 of 2010

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

HINDUSTAN UNILEVER LIMITED

VS.

PROCTER AND GAMBLE HOME PRODUCTS LIMITED

BEFORE THE HON'BLE JUSTICE PATHERYA

DATED : 15. 2. 2010

In a suit for mandatory injunction directing the defendants to deliver the master tape and for its cancellation and from further publishing the advertisement and telecasting the television commercials which disparage the goods of the petitioner, this application has been filed for interim relief. The case of the petitioner is that by telecasting television commercials in respect of "Fairness Cream", the respondent has disparaged the petitioner's Fairness Cream which it is not entitled to do. Niacinamide also known as Vitamin-B3 is the petitioner's invention which was patented in 1972. Niacinamide reduces the pigment melanin. Due to the research conducted by the petitioner lightening cream was initially manufactured by it. On expiry of the patent the use of niacinamide operated in the public domain. The respondent is seeking to launch a fairness cream for the first time in the Indian markets and for such purposes has taken recourse to advertisement through television channels. The advertisement on the satellite channels tends to slander the petitioner's goods. The products of both the petitioner and the respondent are in the same field of "fairness cream" and by its advertisement, the respondent is seeking to disparage the petitioner's goods which it is not entitled to do in law. Such disparagement is not by name, but is so subtle that it communicates to the viewer that like products of others are lacking in something. By the advertisement it is communicated that the product is the result of a new technique, which enables the fairness cream of the petitioner to permeate deep into the skin to have the required effect. This representation is false as Niacinamide is the only component which has

a lightening effect and the products both of the petitioner and the respondent contain Niacinamide.

The "innuendo" that the fairness cream of others works on the surface (jaise ye kaam kare sirf upar se) shows the petitioner's product in bad light. Reliance is placed on 29 PTC 1; 35 PTC 556 and 2007 (2) CHN 44 for the proposition that even the use of a generic word if it tends to disparage the products of others will warrant an order of injunction. Reliance has also been placed on 40 PTC 653 to highlight the unfair trade practice adopted through the advertisement. There is nothing new in the product of the respondent as it also contains Niacinamide and therefore, tends to mislead the public. Slander of goods is actionable per se and damage is to be presumed. The use of the word "Nayatarika" (New Technique) is also a false representation made to the public, so also the projection that other fairness creams do not have the desired effect. By virtue of the television commercials the petitioner has disparaged the petitioner's fairness cream and orders as sought be passed.

Counsel for the respondent submits that in the advertisement there is no reference to the name of the petitioner or its product. The decision reported in 1999 PTC 741 lays down the tests to be applied so also 2009(2) CHN 479. There are 150 fairness creams and a generic advertisement is not actionable unless particularised. Niacinamide is used both in the Petitioner's product so also in the respondent's product. No action will lie in case the respondent puffs up its product, but action will only lie if such product of its competitor is said to be bad or rubbished. This is not being done by the said advertisement. Reliance is placed on 1895 Appeal Cases 154; 1899 [1] QBD 86; 1999 FSR 161; 35 PTC 317 and 32 PTC 307. As no slander is attached to the petitioner's goods and no balance of convenience Shown by pleading special damages, therefore, there has been no disparagement of the Petitioner's goods and the petitioner is not entitled to an order of injunction. Counsel for the petitioner in reply submits that 19 PTC 741 supports the case of the petitioner and in 1895 Appeal Cases 154 what was general in terms was assumed to be specific. 1899 [1] QBD 86, 1999 FSR 161, 2009[2] CHN 479; 35 PTC 317 and 32 PTC 307 are distinguishable on facts. The advertorial of 2nd December, 2009 has further clarified the intent of the advertisement which first came to be telecast on 1st December, 2009.

From a look at the storyboard, it will appear that the question answered by the visual mask removal is in the negative. The advertorial on 2nd December, 2009 has made explicit the advertisement on television channels by specifying 'there is no other alternative'. Therefore, orders be passed as sought. Having considered the submissions of the parties and the cases cited it appears that both the petitioner and the respondent have a "fairness cream" as its product.

Niacinamide is an ingredient in both products. The respondent by its advertisement has sought to compare its product with other like products and while doing so has puffed up its product which it is entitled to do. It has also sought to project that its product is the result of a new technique thereby has boasted about its product. This too it is entitled to do but in doing so has it sought to rubbish similar product of others and has the complainant by virtue thereof suffered economic loss is what has to be considered. The storyboard of the Hindi version of the advertisement with its English translation has been filed. The storyboard of TVC 1 is nothing but puffing up of the respondent's product. The storyboard of TVC 2 is what has to be examined. The first frame opens with a question-

"Kya aapki fairness cream sirf upar se kaam karti hain"

The English translation of which is-

"Does your fairness cream work only on the surface".

This question is followed by-

"Jaise ye Kaam kare sirf upar se, andar se nahin"

The English translation of which is-

"like this which works only on the surface, not from within".

From a reading of the aforesaid it appears that a comparison is sought to be drawn between the respondent's fairness cream and other fairness cream. In doing so the petitioner's product has not been rubbished or said to be bad either by visual display of the petitioner's tube or jar. By using the phrase "sirf upar se kaam karti hainandar se nahin", the respondent has sought to compare its product with that of its competitor. By virtue of such comparison the respondent has not in any way attempted to indicate that the petitioner's product is inferior in quality as held in 19 PTC 1. The respondent is entitled to compare the advantages of its product with those available in the market.

It can also boast the advantages of its product and its new technology but cannot say that the known technology is bad or harmful. No such representation has been made by the respondent's advertisement. Therefore, such comparison is permitted. In fact, in the following frame it has been mentioned in writing that it refers to the epidermal layer. Such

epidermal layer is the outer skin. So although a comparison may have been sought to be drawn, the subsequent frame makes it clear that it is confined to the epidermal layer and not the dermis layer (inner layer). In fact the cream only works on the epidermal layer (outer) and not the inner layer and the representation made in respect of other creams is true while its product has been puffed up.

By virtue of the aforesaid, no disparagement can be attributed to the respondent. While deciding such a dispute the perception of an average individual who is reasonably well informed and observant has been considered as the market targeted is not of illiterate persons.

From a reading of the plaint it appears that although the petitioner has alleged disparagement but the economic loss suffered has not been established. The suit was filed on 27th January, 2010 while according to the plaint the respondent has telecast its advertisement on and from 1st December, 2009 and the advertorial was published on 2nd December, 2009. Till the filing of the suit the petitioner has not been able to show that it has sustained any economic loss by virtue of such advertisement. For no loss evidenced or dip in its sales no interim order need be passed at this stage.

Directions are given for filing affidavits.

Affidavit-in-opposition be filed within three weeks from date; affidavit-in-reply, if any, be filed within two weeks thereafter. Matter to appear in the list six weeks hence. All parties to act on a Photostat signed copy of this order on the usual undertakings.

(PATHERYA,J.)