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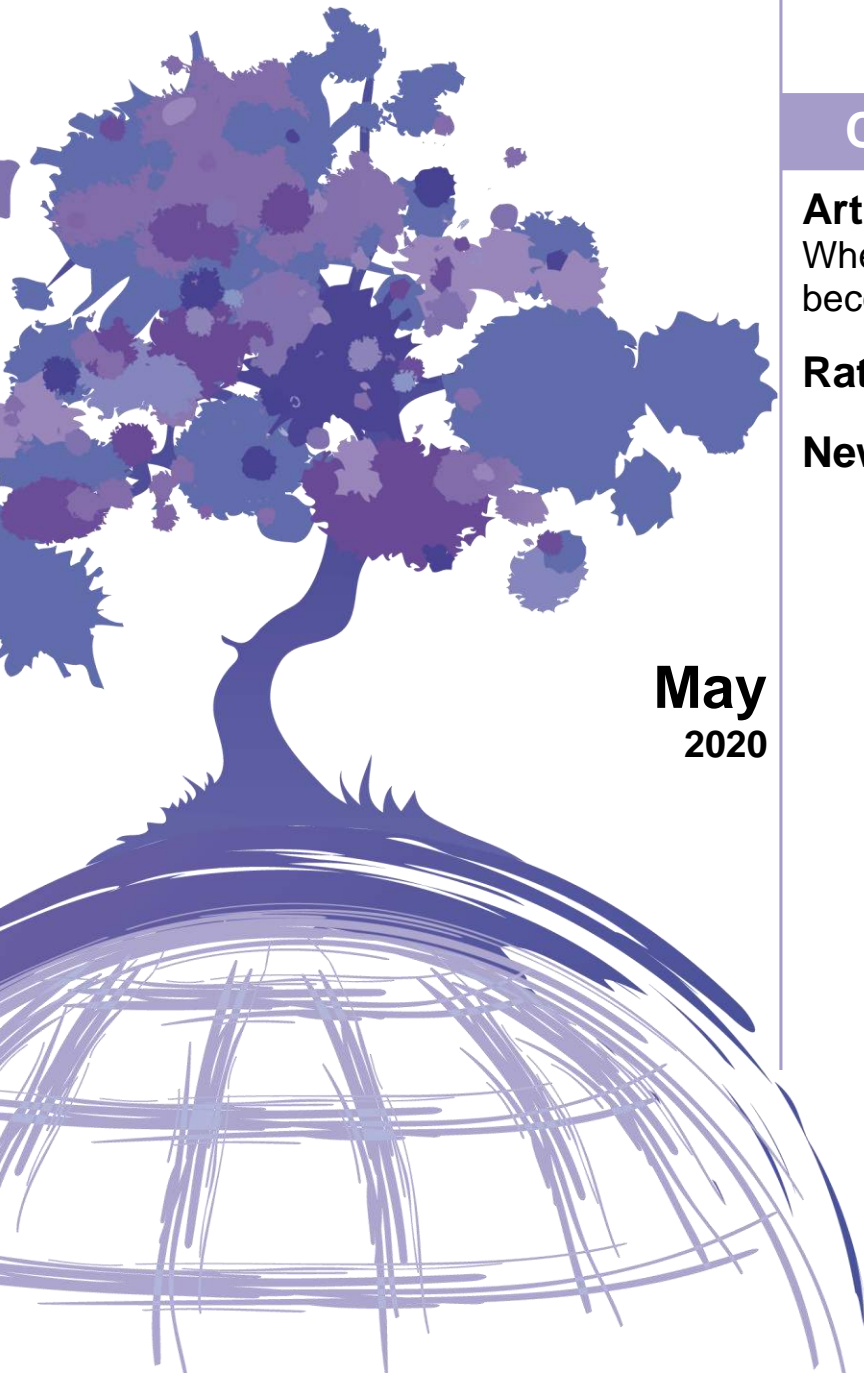
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## Article

### When can expression of opinions become defamatory

By R. Parthasarathy & Sutapa Jana

In the case of *Abhijeet Bhansali v. Marico Ltd.*<sup>1</sup>, the Division Bench of the Bombay High Court while dealing with the issue of disparagement of PARACHUTE COCONUT OIL by a video blogger, laid down the principles by which any such video or any statement can be considered to be defamatory. The Division Bench held that while opinions based on undisclosed or implied facts may be disparaging and are actionable, mere expressions of facts cannot be considered as defamation or disparagement, provided that facts asserted were substantiated.

#### *Facts of the case*

The Defendant, a 'YouTuber' / 'V-Blogger', had his own channel titled 'Bearded Chokra' on the website [www.youtube.com](http://www.youtube.com), wherein, he uploaded videos reviewing products of various manufacturers.

On or about 1st September 2018, the Defendant published a video titled 'Is Parachute Coconut Oil 100% Pure?', wherein, the Defendant reviewed the Plaintiff, Marico Ltd.'s well-known brand PARACHUTE COCONUT OIL.

Upon coming across the above-mentioned video, the Plaintiff sent a cease and desist notice to the Defendant, subsequent to which protracted correspondence ensued between the parties. As the parties failed to reach an amicable settlement, the Plaintiff approached the Bombay

High Court *inter alia* praying for injunction against the Defendant from publishing or broadcasting or communicating to the public the said video disparaging or denigrating the Plaintiff's product.

After hearing the parties, the Single Judge passed an interim injunction order in favour of the Plaintiff and against the Defendant. Aggrieved by the said order, the Defendant appealed before the Division Bench of the Bombay High Court.

#### *Contentions of the plaintiff before the Single Judge*

The Plaintiff contented that the Defendant's video review of the Plaintiff's product was malicious, containing words and visuals which were false in nature and had the effect of not only denigrating the Plaintiff's product but also caused and was likely to cause special damage to the Plaintiff. It was further contented that since the creation and publication of such videos is the Defendant's occupation, the Defendant's review cannot be equated with a review of an ordinary consumer on account of the fact that the Defendant generates revenue from the same. It was also contented by the Plaintiff that the Defendant through his video was promoting a competing product by comparing the same with Plaintiff's product and urging the consumers to stop using the product of the Plaintiff. It was also contented by the Plaintiff that before making such a video the Defendant should have conducted proper research.

<sup>1</sup> Interim Application No. 1 of 2020 in Commercial Appeal (L) No. 31 of 2020 in Notice of Motion No. 1094 of 2019 in COMIP No. 596 of 2019

## *Contentions of the defendant before the Single Judge*

The Defendant submitted that there was no intention to malign the Plaintiff's product as statements made by him in his video were true and constitute his *bona fide* opinion. The said video was made with the objective of educating his viewers. Further, in the present case, the Plaintiff had shown wet coconut alongside its product in order to give an impression to the consumers that the product was derived from wet coconut whereas the oil was actually prepared from dry coconut, i.e. 'Copra'. It was contended by the Defendant that the Plaintiff's product was not branded or marketed as being 'copra oil' which is how such an oil is known. Further, since the Plaintiff's advertisements suggest that its oil was extracted from wet coconuts, its comparison with virgin coconut oil/organic oil was justified. Furthermore, by placing reliance on certain scholarly articles, the Defendant submitted that his statement that Plaintiff's product was of an inferior quality to other organic cold pressed coconut oil was absolutely correct and in accordance with scientific literature which showed that copra oil was inferior in quality to other organic cold pressed coconut oil. Relying on various judgments<sup>2</sup>, it was also argued by the Defendant that since he was neither a trader nor a rival of the Plaintiff's goods, the tort of disparagement of goods/slander does not apply to him. Placing reliance on the decision of the Supreme Court in *R. Rajagopal v. State of Tamil Nadu*<sup>3</sup>, it was also argued by the Defendant that if a person was required to approach a statutory authority before making any comment about a product the same would impose an unduly harsh

<sup>2</sup> *Hindustan Unilever v. Gujarat Cooperative Milk Marketing Federation Ltd. & Ors.* MANU/MH/1197/2017; *Gujarat Cooperative Milk Marketing Federation Ltd. v. Hindustan Unilever Ltd.* order dated 13.12.2013 in Appeal No. 340 of 2017 in Notice of Motion (L) No. 690 of 2017 in Suit (L) No. 204 of 2017, Bombay High Court (Division Bench); and *Hindustan Unilever Ltd. v. Cavincare Pvt. Ltd.*, 2010 (44) PTC 270 (Del)

<sup>3</sup> (1994) 6 SCC 632

and onerous burden on the freedom of speech and expression.

## *Decision of the Single Judge*

The Ld. Single Judge categorized the Defendant as a nascent category of individuals known as 'social media influencers' and observed that a social media influencer cannot deliver statements with the same impunity available to an ordinary person. Such person bears a higher burden to ensure that there is a degree of truthfulness in his statements. In view of the same, it held that the Defendant had a higher responsibility to ensure that he was disseminating correct information and the same do not mislead the public. Further, the Single Judge reiterated the following essential ingredients for establishing disparagement/slander of goods.

- a) That the Defendant's statements were false;
- b) That the said statements were made and published maliciously/recklessly; and
- c) That the said statements caused special damages to the Plaintiff.

In light of the above, the Ld. Single Judge noted four following instances of falsehood in the Defendant' video.

- a) No proper analysis;
- b) Not showing what kind of organic coconut oil was used for comparing;
- c) Using virgin coconut oil to compare the same with the coconut oil marketed by the Defendant; and
- d) Giving the viewer a representation that the exemplar oil used was an organic coconut oil as against the true fact that the exemplar oil used was virgin coconut oil.

Also, the Ld. Single Judge held that in an action for disparagement/malicious falsehood/slander of goods, it is irrelevant whether the Defendant was a trader or not, so long as the necessary ingredients were satisfied.

Further, observing that the creation of videos by the Defendant was for the commercial purposes of earning revenue, the Single Judge held the said video to be a commercial activity and the opinion of the Defendant in the said video to be a commercial speech. It was also observed by the Ld. Single Judge that the fundamental right is not an unfettered right as it comes with a set of restrictions under Article 19(2) of the Constitution and the said fundamental right cannot be abused by an individual for disparaging the product of others as in this case. Moreover, the Ld. Single Judge observed that Defendant under the garb of educating and/or bringing the correct facts before the public, should not put misleading information which disparages/discredits or belittles someone else's product or influences the consumer not to buy the product. Further, the Court also observed that the unauthorized use of the Plaintiff's trademarks in a manner which was detrimental to its distinctive character or reputation cannot ever be in accordance with the honest practices in industrial or commercial matters.

In light of the above, the Single Judge *vide* Order dated 15th January 2020 held that the Defendant's video was disparaging in nature, in its entirety and consequently, passed an interim injunction in favour of the Plaintiff and ordered the Defendant to take down/remove/block access to the said video.

### *Decision of the Division Bench*

After examining the contention of the parties and the Ld. Single Judge's observations, the

Division Bench of the Court observed the following.

- a) Although the law does not restrain a person from asserting a fact, damages may be awarded against said person if he is unable to substantiate the said fact.
- b) If a statement is *per se* defamatory, an injunction must follow. However, different yardstick is to be applied with respect to opinions and subjective issues, which cannot demonstrably be shown to reveal the facts on which the said opinions are based.
- c) Merely labelling a statement as opinion will not automatically make it an opinion or make it safe from the possibility of it being defamatory. If the communication can be reasonably understood and verified by the audience, such communication is not treated as opinion.
- d) An expression of opinion was classified as simple and mixed. A simple expression of opinion is the one which is made after the facts on which the said opinion is based are disclosed. A mixed expression of opinion is not accompanied by any facts, either they are employed by the presenter himself or assumed by the audience receiving the said opinion. When an expression of opinion is based on disclosed non-defamatory facts, no action is supported. However, if the expression of an opinion is based on undisclosed or implied facts, the speaker is liable for making a defamatory statement, provided that the recipient believes the truth of such undisclosed or implied defamatory fact.

In light of the above, the Division Bench noted that the Plaintiff in its pleadings have admitted that the coconut oil marketed by it is extracted from copra using expeller pressed

process. The same was the reason for the yellowish tint and strong odour in the oil. The said admission was considered to be acceptance of the statements of the Defendant, on the part of the Plaintiff. Further, the Division Bench also observed that the Ld. Single Judge has wrongly held that the Defendant had compared Plaintiff's product with a virgin coconut oil as the Ld. Single Judge has overlooked the fact that even the Plaintiff had claimed its oil to be virgin coconut oil. Consequently, the Division Bench *prima facie* held that the four instances of falsehood in the impugned judgment were incorrect and the only trivial error committed by the Defendant was to refer to the exemplar oil as organic coconut oil and not virgin coconut oil. The Division Bench also noted that Plaintiff's product is value for money for cooking only, but if coconut oil at lesser price are available for cooking purposes then why would somebody pay more for Plaintiff's product. Consequently, the Court stayed the operation of the Single Judge's Order subject to the condition that the Defendant modifies the video by changing the caption on the landing page of the video 'IT'S NOT AS GOOD AS YOU THINK' to 'IT'S NOT WORTH THE PRICE YOU PAY FOR' and by deleting certain words and

phrases in the storyboard of the Defendant's video as undertaken by the counsel for the Defendant within a period of two weeks from 14 February 2020.

### Conclusion

The Division Bench of the Bombay High Court has held that although no person can be restrained from expressing matters of fact, he/she can be held liable for defamation, if he/she fails to substantiate the facts asserted. The Division Bench further held that if the expression of an opinion is based on undisclosed or implied facts, the speaker is liable for making a defamatory statement, provided that the recipient believes the truth of such undisclosed or implied defamatory fact. It would have been equally important and interesting if the Division Bench would have also answered the question of law framed by it relating to the additional responsibility supposedly placed on social media influencers vis-a-viz opinions expressed by others in non-commercial ventures. However, unfortunately this was not done.

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## Ratio decidendi

### Trademarks – Identifying features of the names to be compared

In a case where the issue of rectification of the mark was pending consideration before the Supreme Court, the Delhi High Court has held that the name 'Creative Tours and Travels (I) Pvt. Ltd.' by which the defendant's company was

incorporated, after the plaintiff company 'Creative Travel Pvt. Ltd.', too nearly resembles the name of the plaintiff company. The Court observed that the identifying feature of the names of both the plaintiff and the defendant companies was 'CREATIVE', with the remaining words 'TRAVEL PVT. LTD.' and 'TOURS AND TRAVELS (I) PVT. LTD.' merely connoted/denoted the business

carried on by the companies. It also observed that both the companies were in the business of rendering travel related services and that the confusion was implicit with the prominent and distinguishing part of the name of both being 'CREATIVE'.

Further, noting that merely interchanging the placement of word 'TRAVEL' and 'TOUR' in the name of the defendant, considering that said words are descriptive of business, was ineffective, the Court held that incorporation of defendant twenty years after incorporation of plaintiff, was contrary to the provisions of the Companies Act. Relying on precedents, the Court also observed that the defendant who had itself obtained a registration, was estopped from taking the plea that the word 'CREATIVE' was generic. It though noted that the registration in favour of the defendants was not of the word mark 'CREATIVE' but of a device mark with the word marks 'CREATIVE TOURS AND TRAVELS (I) PVT. LTD.' contained therein, it held that it is the prominent and distinguishing feature of the device mark which is to be seen and which was the word 'CREATIVE'. The Court was also of the view that the word 'CREATIVE', in the context of travel and tourism trade, cannot be said to be descriptive or generic.

Rejecting the defendant's plea of delay and acquiescence, the Single-Judge of the High Court held that merely because the name of defendant appeared in the Directory of Members of IATO, of which plaintiff also was a member, it does not *ipso facto* lead to presumption of plaintiff being aware of the defendants. The Court was of the view that a Directory is referred to only to find contact particulars of the person one is searching for and not to go through each and every entry therein. The Court was also of the view that as long as plaintiff felt that there was no

confusion/deception or use in relation to same services, the plaintiff was not compelled to sue. Granting permanent injunction, the plea of honest and concurrent user was also rejected. [*Creative Travel Pvt. Ltd. v. Creative Tours and Travels (I) Pvt. Ltd.* – Decision dated 21-04-2020 in CS(COMM) 249/2018, Delhi High Court]

### **Trademarks – Spillover of international reputation to India needs to be established**

Observing that the plaintiff had no business, customers, agents or franchisees in India and had not been instrumental in establishment and/or operation of any real estate brokerage in India, the Delhi High Court has dismissed the application for interim relief in a dispute pertaining to use of mark 'KW'. The Court in this regard relied upon Supreme Court decision in the case of *Toyota Jidosha Kabushiki Kaisha*, wherein it was held that prior use of the trade mark in one jurisdiction would not *ipso facto* entitle its owner or user to claim exclusive rights to the said mark in another dominion. It noted that while applying for registration of the mark, the plaintiff did not claim any use, in India, of the mark, by spillover of reputation and goodwill from another territory to India. The Court also observed that the present case was not concerned with the field of medicine and thus had international character, and that the business of brokerage in real estate, in India was very different from the said business in USA. Holding that the plaintiff failed to make out a *prima facie* case, it noted that mere ownership or even registration of a mark does not lead to any presumption of the mark having a reputation and goodwill, even in the territories where the mark was being used.

The Single-Judge Court also noted that the plaintiff itself, while responding to the objections in the examination report of the Trade Mark

Registry to the application of the plaintiff for registration of the mark, took a stand that the business of advertising, business management, business administration and offices functions for which the defendant had applied for registration of the same mark prior to the plaintiff was distinct and different from the business of franchising/offering technical assistance in the establishment and/or operation of real estate brokerage for which the plaintiff had sought registration. Declining the interim relief, the Court further observed that while the plaintiff was using merely the alphabets 'KW' or together with 'Keller Williams', the defendants were using the same in conjunction with, either 'Blue Pearl' or 'Srishti' or 'Delhi-6' or in corporate names, in conjunction with 'Power Pvt. Ltd.' or 'Securities and Services Pvt. Ltd.' or 'Agro Pvt. Ltd.' or 'Infrabuild Pvt. Ltd.', etc., and hence the marks cannot be said to be similar or deceptively similar. The plaintiff was also found guilty of delay and laches. Lastly, observing that plaintiff had no business in India, the Court held that there was no question of plaintiff suffering any irreparable loss and injury. [*Keller Williams Realty, Inc. v. Dingle Buildcons Pvt. Ltd.* – Order dated 17-04-2020 in CS(COMM) 74/2019, Delhi High Court]

### Trade dress when crucial for distinguishing raw tobacco by relevant consumers

The Single-Judge Bench of the Bombay High Court has dismissed the appeal arising out of an *ex-parte* interim order of the Trial Court. The Trial Court *vide* its impugned order had granted an *ad-interim* injunction order, valid till the disposal of the suit, in respect of the yellow colour

pouch/packet used by the Appellants/Defendants in packaging their product, i.e., raw chewing tobacco, holding it to be similar to the yellow colour pouch/packet and trade dress of the Respondents/Plaintiffs.

The High Court noted that the name of the company, name of the product and logo on the front portion of the packet/pouch were written in very small fonts since the maximum space was taken up by the health warning as mandated by the provisions of Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and hence the combination of colours on the front portion of the packet/pouch was important. Further, it observed that the raw tobacco is usually consumed by the uneducated or persons having average intelligence and that such consumers would purchase the tobacco mostly based on combination of colours and would rarely read the name of the company, etc. It was held that, *prima facie*, the Appellants were using the same colour combination of the packets/pouches as of the Plaintiff's products.

Lastly, noting that the Plaintiffs had established its business in 1948, selling their products under registered trademark and trade dress, the High Court refused to interfere with the well-reasoned order of the Trial Court. Supreme Court's judgement in the case of *Toyoto Jidohsha Kabushiki Kaisha*, reiterating the Trinity test, was relied upon. [*Jaju Tobacco Company and Another v. R.K. Patel and Company and Others* – Order dated 30-04-2020 in Civil Application No. 5404 of 2019, Bombay High Court]



## News Nuggets

### Functioning of Trade Marks Registry – Delhi High Court issues various directions and asks stakeholders to submit suggestions

Considering the issues in respect of the renewal of the registered trademarks and irregularity in respect of renewal notices (Form – O-3) being not received by the registered proprietors, the Delhi High Court has directed the Trademark Registry to process the renewal of the marks and grant renewal certificates. The Court, in the previous hearings, had noticed that there was a need for streamlining the process of registration of Trademarks as O-3 notices were not being sent to the parties, leading to the abandonment of the marks. The Petitioners had argued that their marks could not be considered as ‘abandoned’ without service of O-3 notices.

The Single Judge perused the various affidavits submitted by the Trademarks Registry which attempted to justify the functioning of its comprehensive e-filing services and provided the actions taken by the Registry in response to stakeholder’s suggestions received for improving the Registry’s functioning. The Single Judge in the case *Kishore Kumar and Others v. Union of India and Another* disposed the petitions by providing its observations and directions in respect of various issues. It directed that all forms filed till the stage of registration are to be processed by one officer and that at the time of show-cause hearing, any pending TM-M shall also be disposed of before the mark proceeds for advertisement. In respect of a

suggestion to put the applications related to similar trademark before same officers, the Court directed that there is no requirement for clubbing applications of similar trade-marks as issues as to which marks are similar will also arise. Amongst other directions, the Court also stated that in the case of multi-class applications, the trade mark should be advertised in each of the classes. It also permitted the Petitioners and other stakeholders to submit any further suggestions to the Registrar of Trade Marks.

### Copyrights – Bombay High Court refuses to grant interim injunction against ‘De Dhakka 2’ and in favour of copyright owner of ‘De Dhakka’

The Single-Judge Bench of the Bombay High Court has denied the *ad-interim* reliefs prayed for by the Plaintiff in the case *In Zee Entertainment Enterprises v. Ameya Vinod Khopkar & Ors.*, for alleged copyright infringement and passing off in respect of the original film ‘*De Dhakka*’. The Plaintiff sought to restrain the Defendants from releasing ‘*De Dhakka 2*’ (impugned film) which according to the Plaintiff was a sequel to the original film, ‘*De Dhakka*’, over which the Plaintiff had copyright ownership. The Defendants were making a sequel to the original film and were also the Producers of the original film.

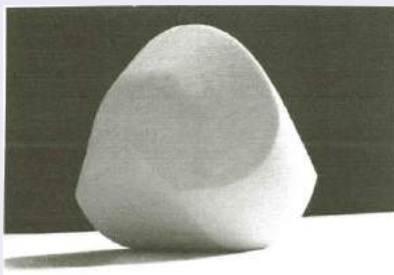
The Court in its Order in Commercial IP Suit (L) no. 1287 of 2019, perused the deed of assignment and observed that when read as a whole, the deed did not assign rights to produce a sequel to the movie ‘*De Dhakka*’ to the Plaintiff and that what was assigned was only the film ‘*De Dhakka*’ and not any right



with reference to a sequel or prequel to the said film. It was further held that there was no question of passing off the impugned film as that of the original film in view of submissions of the Defendants that the music of the impugned film was different and not a single dialogue or music was copied from the original film. The Court also noted that a title of a work could not be considered to be the subject-matter of copyright since a title without the work is not complete by itself. It held that there was no question of claiming any copyright in the title 'De Dhakka'.

### 3D trademarks – When does a shape gives a 'technical result' or 'substantial value' – CJEU provides insights

In response to the questions referred by the Supreme Court of Hungary in relation to exclusion to registrability of 3D Trademarks, the Court of Justice of the European Union has provided the much-needed insights. The dispute in question involved registration of 3D object Gömböc, a 3D homogenous object which always returns to its position of balance on a horizontal surface due to its external design and the homogeneous material used. The Hungarian Intellectual Property Office had refused registration relying upon Article 2(2)(b) of the Hungarian Trade Mark Law which excluded the registration of a sign from trade mark protection if it consisted exclusively of the shape which '*... is necessary to obtain a technical result or which gives substantial value to the goods*'.



The Court in *Gömböc Kutató, Szolgáltató és Kereskedelmi Kft v. Szellemi Tulajdon Nemzeti Hivatala* ruled that to establish whether a sign consists exclusively of the shape of goods which is necessary to obtain a technical result, assessment does not have to be limited to the graphic representation of that sign. It further held that the perception of the relevant public regarding technical result is not a decisive factor and may, at most, be a relevant criterion of assessment when identifying the essential characteristics of the sign. It was also held that information, apart from graphic representation of that sign, being considered in order to establish whether the essential characteristics perform a technical function, must originate from objective and reliable sources like surveys, expert opinions, scientific publications, catalogues, websites, etc. which describe the technical features of the product.

The CJEU ruled that to establish whether the shape of the sign gives substantial value to the product, it has to be ascertained whether the consumer's decision to purchase the product in question is determined by the essential characteristic, and that such consumer's decision has to be determined based on objective and reliable evidence. It was ruled that the designs and trademarks laws act independently and, therefore, registration of a shape as a design or merely because its aesthetic appearance gives the product a certain value, it does not automatically bar the registration of the trademark. The Court further, in its judgment dated 23-04-2020 noted that the substantial value of an item may result from factors other than its shape, such as, *inter alia*, the story of its creation, its method of production, whether it is industrial or artisanal, the materials that it contains which may be rare or precious, or even the identity of its designer.

## Disparaging advertisements – Lifebuoy soap and Dettol Antiseptic Liquid whether not comparable?

Relying on Calcutta High Court decision restricting comparative advertising of Lifebuoy soap with Dettol Antiseptic Liquid, holding the two products to be different and hence comparison thereof to be unfair, the Delhi High Court has granted interim injunction against the Defendants from airing their advertisement comparing their product (Lifebuoy soap) with the product of the Plaintiff (Dettol Antiseptic Liquid). The Court in its Order dated 22-04-2020 rejected the plea that Delhi High Court cannot restrain comparison as it itself earlier had permitted comparative advertising of the two products and only required the defendant to make certain changes/deletion in the advertisement impugned therein. It held that if it would not grant injunction against the defendant, the same would amount to this

Court permitting the defendant to violate the order of the High Court of Calcutta. It observed that though the judgments/orders of the Calcutta High Court may not bind the Delhi High Court, they bind the defendant. Further, observing that the advertisements are aired on television channels having national coverage and even if not having national coverage, are aired on various other electronic platforms having viewership throughout the country, the Court held that it is not as if the defendant in Calcutta would be bound by the judgment of the Calcutta High Court and in Delhi would be entitled to act in contravention thereof. The Court in the case *Reckitt Benckiser (India) Private Limited v. Hindustan Unilever Limited* also noted that the advertisement now impugned had the same hint of malice though in different form, as it existed in the advertisement impugned before it earlier which was restrained.

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