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

+ CS(COMM) 808/2017

HORLICKS LTD. & ANR

..... Plaintiffs

Through

Mr. Chander M. Lall, Senior
Advocate with Mr. Ajay Bhargava,
Mr. Ankur Sangal, Ms. Sucheta Roy
and Ms. Richa Bhargava, Advocates.

versus

HEINZ INDIA PRIVATE LIMITED

..... Defendant

Through

Mr. Amit Sibal, Senior Advocate with
Mr. Sagar Chandra, Mr. Ankit Rastogi
and Mr. Bibhunanda Mishra,
Advocates.

Reserved on : 02nd November, 2018

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Date of Decision: 17th December, 2018

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

I.A. 13793/2017

1. Present suit has been filed for damages and permanent injunction restraining infringement, disparagement and unfair trade practices against the defendant. With consent of the parties, I.A. No.13793/2017, filed under Order XXXIX Rules 1 & 2 CPC, was taken up for hearing and disposal.

The prayer clause in the application is reproduced hereinbelow:-

"A. The Defendant, its directors, principals, proprietors, partners, officers, employees, agents, distributors, franchisees, representatives and assigns be restrained by an ex-parte ad-interim and interim injunction from:

- i) Issuing or otherwise howsoever, communicating to the public or publishing the Impugned advertisement or any part thereof or any other advertisement of a similar nature in any language or in any manner causing the Impugned advertisement or any part thereof or any other advertisement of a similar nature to be published or broadcast or communicated to the public or published in any media including digital/electronic or social media or in any other manner disparaging the goodwill and reputation of the Plaintiffs and their products sold under the trade mark HORLICKS;*
- ii) Using the depiction of the Plaintiffs' registered trademark HORLICKS or any other trademark or indication/product which is deceptively similar to that of the Plaintiffs' in its advertisement or in any other manner disparaging the goodwill and reputation of the Plaintiff and its product sold under the trade mark HORLICKS;*
- iii) using any other indicia whatsoever to associate with/depict the Plaintiffs or their products in its advertisements issued in any and all media whatsoever including the electronic media;*

- B. Costs of the application be awarded to the Plaintiffs; and*
- C. Any other relief which the Hon'ble Court thinks fit and proper in the circumstances of the case be allowed in favour of the Plaintiffs and against the Defendants."*

RELEVANT FACTS

2. The relevant facts of the present case are that plaintiff No.2, under license from the plaintiff No.1, has extensively used the mark HORLICKS in India since the past many decades and the revenue generated by the plaintiff No.2 in the year 2017 (Ten Months) was Rs.2668 crores and the expenditure on advertising and promoting the product HORLICKS for the same period was Rs.425 crores.
3. Further, the plaintiff No.1 is the registered proprietor of the trade mark HORLICKS in India under Classes 25, 28, 29, 30 and 32 of the Trade Marks Act, 1999.
4. It is averred in the plaint that on 11th November, 2017, it came to the plaintiffs' knowledge that that the defendant had published an advertisement for its COMPLAN branded product in the newspaper 'Telegraph' (Kolkata as well as Patna Edition), which intentionally and deliberately disparaged the plaintiffs' health food drink product HORLICKS. The impugned advertisement is reproduced hereinbelow:-



DID YOU KNOW?

ONE CUP OF COMPLAN[†] HAS THE SAME AMOUNT OF PROTEIN AS TWO CUPS OF HORLICKS[^]



FROM NOW ON, ONLY COMPLAN[†]



[†]One cup of Complan (33 g) gives 5.94 g of protein while two cups of Horlicks (27 x 2= 54g) gives 5.94 g protein both recommended on-pack dosage (August 2017 PHD of Horlicks Classic Malt Variant)

[^]Complan to be taken as a part of daily balanced diet. Protein is one of the most essential nutrients for growth in children (Nutrient Requirement and Recommended Dietary Allowance for Indians, ICMR 2016). Complan gives 2x Faster growth. Based on a clinical study conducted amongst 800 children for a period of 12 months and published in Ind. J. Nutr. Dietet., (2008), 45, 449, 450.

[†]One serve of Complan provides 2 times the nutrients* like Protein, Phosphorus, Vitamin E, Biotin, Potassium, Pantothenate and extra nutrients like Molybdenum, Manganese, Vitamin K, Inositol, Carnitine and Choline than the recommended one serve of Horlicks (* Nutrients declared on the pack)

[†]Growth is influenced by genetic, nutrition and environmental factors.

[†]Valid for following flavours and variants of Complan- Creamy Classic, Royal Chocolate, Royal Baked, Pista Baked, Strawberry, Rich Kaffi & Complan Honey. Best ever formula Complan refers to Best Ever formula from Complan.

ARGUMENTS ON BEHALF OF THE PLAINTIFFS

5. Mr. Chander M. Lall, learned senior counsel for plaintiffs stated that the plaintiffs manufacture and market a health food drink under the trade mark HORLICKS which, as of October, 2017, had 43.9% market share in the 'Health Food Drinks' category. He stated that the impugned advertisement compared one cup of COMPLAN with two cups of HORLICKS and had a disclaimer at the bottom of the page, which stated that *"One cup of Complan (33g) gives 5.94g of protein while two cups of Horlicks (27*2=54g) gives 5.94g of protein basis recommended pack dosage...."* He stated that the disclaimer in the impugned advertisement was not an integral part of the advertisement and the font size of the super did not comply with the ASCI guidelines regarding font size requirements for a disclaimer.

6. Learned senior counsel for the plaintiffs contended that the impugned advertisement wrongly stated that the amount of protein in the defendant's product was double the amount of protein in the plaintiffs' product. He stated that the serving size of COMPLAN had been manipulated to have double the protein of HORLICKS.

7. He emphasised that the defendant's claim that one cup of COMPLAN had an equal amount of protein in comparison to two cups of HORLICKS was untrue and misleading. He stated that the defendant had not compared HORLICKS and COMPLAN taking into account the amount of protein per 100 grams, as per normal market practice. He stated that if the comparison of protein in COMPLAN and HORLICKS was made per 100 grams, then

the same would not be double. He pointed out that the defendant had itself admitted in its written statement that COMPLAN had 18 grams of protein per 100 grams, whereas HORLICKS had 11 grams of protein per 100 grams, and hence the defendant had made a false statement that the amount of protein in defendant's product was double the amount of protein in plaintiffs' product.

8. Learned senior counsel for plaintiffs stated that even if the defendant wanted to compare the two products i.e. HORLICKS and COMPLAN on the basis of 'per serving' size, then it should have taken into account the method of preparation of both the products. He stated that as per the suggested method of preparation of both the Health Food Drinks, the defendant recommended having 33 grams of COMPLAN in 150 ml. of milk, which provided 10.9 grams of protein, whereas the plaintiffs recommended having 27 grams of HORLICKS in 200 ml. of milk, which provided 9.37 grams of protein. He contended that if the comparison was made between the two health food drinks on the basis of recommended method of preparation, the claim of the defendant that one glass of COMPLAN which had 10.9 grams of protein was equal to two glasses of HORLICKS which had 18.74 grams of protein was wrong, untrue and misleading. He stated that the visual of same sized cups was therefore wrong and the visual of one cup of COMPLAN being equal to two cups of HORLICKS was to attract the maximum consumer interest. This, according to Mr. Lall, also violated Clause 6 of CODEX Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997) (hereinafter referred to as "CODEX Guidelines") which pertained to 'Comparative Claims'. He stated that the CODEX Guidelines

prescribed "taking into account further preparation required for consumption according to the instructions for use on the label." He pointed out that Clause 6.2.1 of the CODEX Guidelines stipulated that, for comparative claims, where the amount of difference related to the same quantity and was expressed as a percentage fraction, or an absolute amount, then full details of the comparison had to be given. He submitted that though there was no bar in law to show 'per serving' information on packaging, but where there was a comparison, then 'per serving' comparison was not permissible in any country nor was it permissible under the CODEX Guidelines.

9. He stated that the impugned advertisement also wrongly showed a direct correlation between the amount of protein consumed and growth in a child. He contended that the impugned advertisement over emphasized the benefits of protein and by comparing only one ingredient i.e. protein, was trying to misguide consumers into believing that consumption of the defendant's product directly leads to growth.

10. Learned counsel for the plaintiffs stated that the nutritional claim in the impugned advertisement of being "2 times more" in relation to other nutrients like phosphorus, Vitamin E, Biotin, Potassium, Pantothenate and other such nutrients was false. He submitted that "advertisements are not to be read as a testamentary provision in a will" and many consumers were likely to be misled into simply seeing the depiction that the defendant's product had double the nutrition as the plaintiffs' product. He contended that nutrition was the very basis on which both HORLICKS and COMPLAN were purchased by the consumers and any attack on the nutritional attributes

of the plaintiffs' product was a direct attack on the most essential attribute of HORLICKS and the same was therefore impermissible.

11. Learned senior counsel for the plaintiffs stated that the defendant's tagline "From Now On, Only Complam" was not a mere promotional statement and the said tagline sought a rejection of HORLICKS over COMPLAM. He stated that the impugned advertisement directly attacked the nutritional content of the plaintiffs' product which was a nutritional health food drink and such claim of the defendant was no different from the claims "Forget Chyawanprash in summers, Eat Amritprash instead" [see *Dabur India Limited v Emami Limited*, (2004) 112 DLT 73], "You need a true pain reliever" (see *Paras Pharmaceuticals Ltd. Vs. Ranbaxy Laboratories Ltd.*, AIR 2008 Guj 94), "No More Good Days only Great Days. Why have a good day, when you can have a great day" (see *Unibic Biscuits India Pvt. Ltd. Vs. Britannia Industries Limited*, MIPR 2008 (3) 347), all of which had been restrained by this Court.

12. Learned senior counsel for plaintiffs further stated that the defendant's impugned advertisement was violative of the previous orders passed by the ASCI. He pointed out that said orders had attained finality and the defendant was bound by such orders. The orders referred to by learned senior counsel for plaintiffs are as under:-

(i) The claim "*Best Ever Formula Complam*" was found by the ASCI to be misleading by implication that it was the best product as compared to other product formulae in the market (referred as X and Y).

(ii) In respect of the defendant's claim "*2X faster growth*" ASCI had held that the increase being depicted in the pack visuals was an absolute height of 2X, whereas the clinical study was about 2X increase (incremental growth). This was found to be misleading by exaggeration and was found to be objectionable.

(iii) With respect to the claim "*Naye best ever Complian ke ek cup me hain India ke do leading health drinks se bhi zyada growth protein*" accompanied with the visual of COMPLIAN = Brand X + Brand Y and calling protein as "*growth protein*" while making a comparison with the product X and Y, was found to be misleading by implication and thus objectionable.

13. Learned senior counsel for plaintiffs stated that the use of the plaintiffs' mark by the defendant violated Sections 29(8) and 30(1) of the Trade Marks Act, as the same did not permit use of a trade mark in an advertisement which took unfair advantage of and was contrary to honest practices in industrial or commercial matters or was detrimental to its distinctive character or was against the reputation of the trade mark. He stated that the HORLICKS brand is a market leader and COMPLIAN has a minimal share in the market and the plaintiffs had painstakingly developed the goodwill associated with their HORLICKS brand and the defendant was trying to take unfair advantage of it by wrongly comparing its product with the plaintiffs' product.

14. Learned senior counsel for plaintiffs submitted that the fundamental right to freedom of speech under Article 19(1)(a) of the Constitution of India (for short 'Constitution') is only available to a citizen of India and not to a

corporate entity like the defendant. He stated that till date there had been no decision which discussed whether Article 19(1)(a) of the Constitution could be availed by a corporate entity and according to him, the decision in *Tata Press Ltd. Vs. Mahanagar Telephone Nigam Ltd. & Ors.*, AIR 1995 SC 2438 was *per incuriam*. He pointed out that in *Allagapuram R. Mohanraj & Ors. Vs. Tamil Nadu Legislative Assembly*, AIR 2016 SC 867, the Supreme Court had categorically held that while Article 21 of the Constitution was available to every person, the rights under Article 19 of the Constitution were available to a citizen of India only. He submitted that the judgment in *Tata Press Ltd.* (supra) was contrary to the judgment in *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Another Vs. Union of India and Others*, AIR 1960 SC 554 wherein it had been held that the right to publish and distribute commercial advertisements advertising an individual's personal business could not be a part of freedom of speech guaranteed by the Constitution. He further submitted that since the impugned advertisement was a pure product promotion exercise, the defendant did not have an inherent right under Article 19(1)(a) and/or the public did not acquire any inherent right to receive such promotional material as the defendant was claiming to provide.

15. He submitted that under Article 21 of the Constitution, the plaintiffs had a right to restrict commercial use of its mark which denigrated its goodwill and reputation in its mark. He submitted that the Supreme Court in *K.S. Puttaswamy & Anr. Vs. Union of India (2017) 10 SCC 1* had held that Article 21 of the Constitution provided a person a right to control commercial use of his/her identity and stated that the said right would also

apply to a corporate entity like the plaintiff. The relevant portion of the judgment in *K.S. Puttaswamy & Anr. Vs. Union of India (2017) 10 SCC 1* relied upon by Mr. Lall is reproduced hereinbelow:-

"625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent. [The Second Circuit's decision in Haelan Laboratories Inc. v. Topps Chewing Gum Inc., 202 F 2d 866 (2d Cir 1953) penned by Jerome Frank, J. defined the right to publicity as "the right to grant the exclusive privilege of publishing his picture".]

626. Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the "self". The right of publicity implicates a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with her. [Mark P. McKenna, "The Right of Publicity and Autonomous Self-Definition", 67 U PITT L REV 225 at p. 282 (2005).]

ARGUMENTS ON BEHALF OF THE DEFENDANT

16. At the outset, Mr. Amit Sibal, learned senior counsel for defendant stated that the defendant, on its own initiative, had modified the impugned advertisement. He undertook that the defendant would publish the modified advertisement in future and not the advertisement impugned in the present plaint. The undertaking given by Mr. Amit Sibal is accepted by this Court and defendant is held bound by the same. The modified advertisement is reproduced hereinbelow:-

BEST EVER FORMULA OF
Complan[®]

DID YOU KNOW ?

ONE CUP OF COMPLAN HAS THE SAME AMOUNT OF PROTEIN AS TWO CUPS OF HORLICKS.



AS PER ON PACK RECOMMENDED SERVE SIZE (COMPLAN 33g, HORLICKS 27g)¹

FROM NOW ON, ONLY COMPLAN[†]



¹One cup of Complan (33 g) gives 5.94 g of protein while two cups of Horlicks (27 x 2 = 54g) gives 5.94 g of protein basis on-pack recommended serving size (September 2018 PKG of Horlicks Classic Milk Variant).
[†]Complan to be taken as a part of daily balanced diet. Protein is one of the most essential nutrients for growth in children (Nutrient Requirement and Recommended Dietary Allowance for Indians, ICMR 2010).
 Complan gives 2x Faster growth - Based on a clinical study conducted amongst 888 children for a period of 12 months and published in: Ind. J. Nat. Dietet., (2006), 45, 445, 493.
 †Valid for following flavours and variants of Complan- Creamy Classic, Royal Chocolate, Kesar Badam, pista Badam, Strawberry, Rich Nutti & Complan Menny.
 © Registered Trademark.

17. Learned senior counsel for defendant stated that the advertisement of the defendant gave a visual comparison of the protein content for each product based on respective recommended 'per serving' size. He stated that the recommended serving size of 33 grams for the defendant's product had not been altered since the year 1934. He contended that the current comparison of the protein content for each product on the basis of recommended 'per serving' size was the most accurate, true and verifiable method of comparison. He submitted that 'per serving' had been recognized in the Food Safety and Standards Act, 2006 and Food Safety and Standards (Packaging and Labelling) Regulations, 2011 (for short "Regulations, 2011").

18. He stated that the impugned advertisement showed that the protein content of one cup of COMPLAN was equal to protein content of two cups of HORLICKS along with the disclaimer which stated that one cup of COMPLAN (recommended 'per serving' size of 33g) provided 5.94g of protein whereas two cups of HORLICKS (recommended 'per serving' size of 27g each) provided 5.94g of protein. He stated that the intent of the impugned advertisement was to educate the consumers about the protein content of both the products in accordance with the recommended 'per serving' size provided by the parties on their packaging. He stated that the impugned advertisement was neither disparaging nor defamatory and provided an accurate, true, verifiable and representative comparison to the consumers.

19. Learned senior counsel for defendant clarified that the disclaimer complied with the ASCI requirement for 'comparative claims' as it had been positioned immediately next to or immediately below the claim. He emphasised that in the modified advertisement, the disclaimer had been made an integral part of the advertisement and prominently displayed.

20. Mr. Amit Sibal stated that both products were meant to be consumed as per recommended 'per serving' size. Learned senior counsel for defendant stated that the argument canvassed by the plaintiffs that comparison ought to be after inclusion of Milk in the two products was incorrect for the following reasons:-

i. Because the protein content of the beverages would change every time, depending upon the type of milk used by the consumer. The defendant had no control over the type of the milk used by the consumer. He referred to the following table to illustrate the Protein content in various types of milks:

Component	Unit	Cow				Goat	Sheep	Water Buffalo
		Whole (3.25% fat)	Reduced Fat (2% fat)	Low Fat (1% fat)	Skim			
Protein	Grams	7.86	8.05	8.22	8.26	8.69	14.65	9.15

ii. Consumers did not associate milk product either with the plaintiffs or the defendant and therefore the consumers would not read the Advertisement keeping in mind the said association;

iii. The plaintiffs on their packaging recommend consumption of their product on a per serving basis along with either milk or water and it is an admitted position that water has no protein; and

iv. It was not the plaintiffs' case that the quantity of serving size would change in accordance with the solvent (Milk or Water) used by the consumer for preparing the drink. This, according to him, negated the argument of the plaintiffs that the comparison in the present advertisement ought to be on the basis of the milk added to the recommended per serving.

21. He further stated that jurisdictions such as India, Australia, New Zealand, Canada and United States of America recognize per serving as nutritionally and analytically significant.

22. Learned senior counsel for defendant stated that a comparative advertisement by its very name and nature was a comparison between two competing products and the trade mark of each of the competing product had to be displayed for the consumers to identify the brands sought to be compared and such use of the competitor's trade mark was allowed under Section 30(1) of the Trade Marks Act, 1999.

23. Learned senior counsel for the defendant emphasised that the primary objective of Sections 29(8) and 30(1) of the Trade Marks Act, 1999, was to allow comparative advertisement as long as the use of the competitor's mark was honest. He submitted that the use of the plaintiffs' mark HORLICKS by the defendant was honest and the impugned advertisement of the defendant only compared the product on a parameter, i.e. 'protein content', which was material, relevant, verifiable and representative and such comparison was factually true and correct. He stated that mere trade puffery, even if uncomfortable to the registered proprietor of the trade mark, would not bring the advertisement within the scope of the trade mark infringement. In

support of his contention, he relied upon *Havells India Ltd. Vs. Amritanshu Khaitan, 2015 (62) PTC 64 (Del)*.

24. Learned senior counsel for the defendant stated that the depiction of per serve of both the drinks by way of cups was covered under creative latitude to effectively communicate a message to the consumers. He stated that “From Now On, Only Complian” was a mere promotional statement, i.e., to encourage and urge consumers to purchase the product of the defendant. He stated that the said statement was not a statement of fact and that the plaintiff was being hyper sensitive by canvassing such a proposition of fact or law.

25. Learned senior counsel for the defendant stated that ASCI had rejected the objection of the plaintiffs, raised in its complaint dated 15th September, 2017, with respect to use of ‘Best Ever’ by COMPLAN and found ‘Best Ever Complian’ was not objectionable. He further stated that the plaintiff had failed to mention that the defendant had added the following disclaimer in the impugned advertisement: “Best Ever Formula Complian refers to Best Ever Formula from Complian” and therefore “Best Ever Formula Complian” was not misleading by implication and not objectionable.

26. Learned counsel for the defendant stated that the 2X appearing on the pack in the print advertisement of the present suit had been clarified as “2X faster growth clinically proven”, which was a true, verifiable and sustainable claim. He stated that ASCI found the following comparison regarding the 2X absolute increase objectionable qua the following

comparison . However, the depiction in front of the

COMPLAN pack  was not found to be misleading by ASCI.

27. Learned senior counsel for the defendant stated that the ASCI did not hold that comparison of COMPLAN *per se* with product X & Y or the use of the term "Growth Protein" to be objectionable. He contended that the ASCI held the use of the term "Growth Protein" along with comparison with product X and Y in the sentence "*Naye best ever Complan ke ek cup me hain India ke do leading health drinks se bhi zyada growth protein*" to be misleading only in conjunction with the unverifiable claim "Clinically Proven for 2X growth". He stated that the claim considered by the ASCI was a different claim and not the same as "2X Faster growth Clinically proven" as was depicted in front of the packaging of the defendant's product COMPLAN. He further stated that the term "Growth Protein" and the unverifiable claim "2X Faster growth Clinically proven" were not present in the impugned advertisement and the comparison made in the impugned advertisement was of the protein content in both products 'per serving' size which was a true, verifiable and accurate comparison.

COURT'S REASONING

ADVERTISEMENT IS A FACET OF COMMERCIAL SPEECH WHICH IS PROTECTED BY ARTICLE 19(1)(a) AND THE SAME CAN BE RESTRICTED ONLY IN ACCORDANCE WITH LAW ENACTED UNDER ARTICLE 19(2) OF THE CONSTITUTION. THE SUBMISSION THAT TATA PRESS (SUPRA) IS PER INCURIAM IS UNTENABLE IN LAW.

28. This Court is of the opinion that advertisement is a facet of commercial speech which is protected by Article 19(1)(a) of the Constitution. The same can be restricted only in accordance with law enacted under Article 19(2) of the Constitution. In a democratic country, free flow of commercial information is indispensable and the public has a right to receive the commercial speech. In fact, the protection given to an advertisement under Article 19(1)(a) of the Constitution is a necessary concomitant of the right of the public to receive the information in the advertisement.

29. In *Tata Press* (supra), the Supreme Court, after considering its earlier judgment in *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Another* (supra), equated commercial advertisement to free speech and held that a corporate entity is entitled to protection under Article 19(1)(a) of the Constitution.

30. Further, the Supreme Court in *Bennett Coleman & Co. & Ors. Vs. Union of India, (1972) 2 SCC 788* has held that fundamental rights of shareholders as citizens are not lost when they associate to form a company. The reason is that the shareholders' rights are equally and necessarily affected if the rights of a company are affected. In any event, the

defendant's right under Article 19(1)(a) of the Constitution cannot depend on whether the plaintiff, who alleges disparagement, makes the shareholders of the defendant company a party to the suit or not.

31. The plaintiffs' submission that *Tata Press* (supra) is *per incuriam* is untenable in law. The Supreme Court in *South Central Railway Employees Cooperative Credit Society Employees Union Vs. B. Yashodabai and Others*, (2015) 2 SCC 727 has held that it is not open to a High Court to hold that Supreme Court judgment is *per incuriam*. The relevant portion of the said judgment reads as under:-

"14. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies [South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies, (1998) 2 SCC 580 : 1998 SCC (L&S) 703] was per incuriam.

15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when CA No. 4343 of 1988 was decided [South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies, (1998) 2 SCC 580 : 1998 SCC (L&S) 703] . If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio

decidendi will have to be rewritten and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the subordinate courts would also be violating the provisions of Article 141 of the Constitution of India."

JUDGMENT IN K.S. PUTTASWAMY & ANR.(SUPRA) IS INAPPLICABLE TO THE FACTS OF THE PRESENT CASE.

32. This Court is also of the view that the judgment in ***K.S. Puttaswamy & Anr.*** (supra) was rendered in relation to the right of a person to claim privacy which includes rights in relation to commercial use of identity of such person. However, the right to privacy cannot be asserted against information that is already in the public domain. The product packaging of HORLICKS freely disseminates the information used in the impugned advertisement. Moreover, the Supreme Court in the said judgment did not ban or prohibit comparative advertisements. Consequently, the judgment in ***K.S. Puttaswamy & Anr.*** (supra) is inapplicable to the facts of the present case.

THIS COURT IN HAVELLS INDIA LTD. & ANR. VS. AMRITANSHU KHAITAN & ORS., (SUPRA) HAS HELD THAT THOUGH IN COMPARATIVE ADVERTISING A CERTAIN AMOUNT OF DISPARAGEMENT IS IMPLICIT, YET THE SAME IS LEGAL AND PERMISSIBLE SO LONG AS IT DOES NOT MISLEAD.

33. This Court in ***Havells India Ltd. & Anr. Vs. Amritanshu Khaitan & Ors.***, (supra) after defining what is advertising and comparative advertising has held that though in comparative advertising a certain amount of disparagement is implicit, yet the same is legal and permissible so long as it

does not mislead. The relevant portion of the said judgment is reproduced hereinbelow:-

“26. In the opinion of this Court, Comparative advertising is legal and permissible as it is in the interest of vigorous competition and public enlightenment. In fact, Chapter IV of the ASCI Code, relied upon by the plaintiffs, itself specifically deals with Comparative Advertising. The relevant portion of the ASCI Code reads as under:-

“CHAPTER IV

To ensure that Advertisements observe fairness in competition such that the Consumer’s need to be informed on choice in the Market-Place and the Canons of generally accepted competitive behaviour in Business are both served.

1. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interest of vigorous competition and public enlightenment provided:

(a) It is clear what aspects of the advertiser’s product are being compared with what aspects of the competitor’s product.

(b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case

(c) The comparison are factual, accurate and capable of substantiation.

(d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which is compared.

(e) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.”

27. In O2 Holdings Ltd.& Anr. v. Hutchison 3G UK Ltd, Court of Justice of the European Communities [2009] Bus. L.R. 339, has held that the use in advertising of a sign similar to a competitor’s

trade mark is one of the ways of identifying that competitor or that competitor's goods or services, at least by implication, within the meaning of Article 2(2a) of European Union, Council Directive 84/450. It has further been held that where the proprietor of a trade mark seeks to contest the use in comparative advertising of a sign similar to that trade mark, he must base his own claim on the breach of one of the conditions laid down in Article 3a of Directive 84/450. Article 3a(1) of Directive 84/450 [as inserted by Article 1(4) of Directive 97/55] reads as under:-

“Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met (a) it is not misleading according to articles 2(2), 3 and 7(1), (b) it compares goods or services meeting the same needs or intended for the same purpose, (c) it objectively compares one or more material, relevant verifiable and representative features of those goods and services, which may include price, (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor, (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor, (f) for products with designation of origin, it relates in each case to products with the same designation, “344 (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products, (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.”

28. However, comparative advertising can be resorted to only with regard to like products. After all one cannot compare apples and oranges. In the opinion of this Court, comparative advertising is permitted when the following conditions are met:-

(i) goods or services meeting the same needs or intended for the same purpose;

(ii) one or more material, relevant, verifiable and representative features (which may include price); and

(iii) products with the same designation of origin (where applicable).

29. It is pertinent to mention that in **Win Medicare Ltd. vs. Reckitt Benckiser India Ltd.** (supra), the comparative advertising was stayed as it compared two incomparable products namely, Betadine sold in standardised solution and Dettol sold in concentrated form. Further, it compared the petitioner's Betadine product without testing it for all the specific parameters mentioned in the chart. Consequently, the judgment in **Win Medicare Ltd. vs. Reckitt Benckiser India Ltd.** (supra) offers no assistance to the plaintiffs.

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36. A comparison, which is unfavourable to a competitor, does not necessarily mean that it is dishonest or unduly detrimental. A Division Bench of this Court in **Colgate Palmolive Company & Anr. vs. Hindustan Unilever Ltd., 2014 (57) PTC 47 [Del](DB)** has held that in comparative advertising, a certain amount of disparagement is implicit and as long as the advertisement is limited only to puffing, there can be no actionable claim against the same. The relevant portion of said judgment reads as under:-

“27. The law relating to disparaging advertisements is now well settled. While, it is open for a person to exaggerate the claims relating to his goods and indulge in puffery, it is not open for a person to denigrate or disparage the goods of another person. In case of comparative advertisement, a certain amount of disparagement is implicit. If a person compares its goods and claims that the same are better than that of its competitors, it is implicit that the goods of his competitor's are inferior in comparison.

To this limited extent, puffery in the context of comparative advertisement does involve showing the competitor's goods in a bad light. However, as long as the advertisement is limited only to puffing, there can be no actionable claim against the same.....

37. The judgment of **Glaxosmithkline Consumer Healthcare Ltd.** (supra) relied upon by learned counsel for plaintiffs is clearly

distinguishable as in that case the plaintiff's product had been called 'cheap' by the defendant, which expression was held to denigrate and disparage plaintiff's product. It is settled law that an advertiser can call his product the best, but at the same time, cannot rubbish the products of a competitor.

COMPETITORS CAN CERTAINLY COMPARE BUT CANNOT MISLEAD

38. *In the opinion of this Court, the purpose of the provisions in the Act, 1999 and the ASCI Code which lists the conditions under which comparative advertising is permitted is to stimulate competition between suppliers of goods and services to the consumer's advantage, by allowing competitors to highlight objectively the merits of the various comparative products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice.*

39. *This Court is of the view that it is duty bound to interpret the Act, 1999 and the ASCI Code in a sense favourable to comparative advertising while at the same time always ensuring consumers are protected from possibly misleading advertising.*

MISLEADING ADVERTISING

40. *Misleading advertising has been defined in Article 2(2) of the European Union Council Directive 84/450 as "any advertising which is in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."*

41. *This Court is also of the view that for any advertisement to be considered misleading, two essential elements must be satisfied. First, misleading advertising must deceive the persons to whom it is addressed or at least, must have the potential to deceive them. Secondly, as a consequence of its deceptive nature, misleading advertising must be likely to affect the economic behaviour of the public to whom it is addressed, or harm a competitor of the advertiser. (See **Lidi SNC v Vierzon Distribution SA [2011] E.T.M.R. 6**).*

42. *However, the same has to be harmonized with competitive interests. In the present case, the features being compared are not misleading and the said issue has to be seen not from a hyper sensitive viewpoint, but from the eyes of an average consumer who is used to certain hyperbole and rhetoric."*

THE CONCEPT OF 'PER SERVING' SIZE IS WELL RECOGNIZED NOT ONLY BY THE INDUSTRY BUT ALSO UNDER THE STATUTE. THE PLAINTIFFS THEMSELVES PRESCRIBE A RECOMMENDED 'PER SERVING' SIZE ON THEIR PACKAGING TO ENSURE SAFE CONSUMPTION OF THEIR PRODUCTS.

34. The concept of 'per serving' size is well recognized not only by the industry but also under the Statute. The Regulation No. 2.2.2.(3) of the Regulations, 2011 prescribes that all pre packaging food labels must provide the nutritional information / nutritional facts either per 100 grams or per 100 ml or 'per serving' of the product. Regulation No. 2.2.2.(3) of the Regulations, 2011 reads: "*3. Nutritional information - Nutritional Information or nutritional facts per 100 gm or 100 ml or per serving of the product shall be given on the label....."*

35. The plaintiffs themselves prescribe a recommended 'per serving' size on their packaging to ensure safe consumption of their products in accordance with Regulation No. 2.12.1(6) of Regulations, 2011. The said Regulation reads as under:-

"(6) The Food Business Operator shall be fully responsible for safety of the proprietary food in respect of human consumption."

36. The reason for recommending a 'per serving' size by both the parties on their respective packagings is that consumption of any health food drink in excess of the recommended dietary allowance could distort the macro and

micro nutritional requirements of a consumer. This Court is of the view that in the absence of a recommended 'per serving' size, a consumer may drink the parties' product in excess and jeopardize his health. In such a situation, the parties feel that they may be held liable for such harm. Consequently, 'per serving' size is a prudent industry practice and the parties prescribe a recommended 'per serving' size with intent to protect themselves from such liability.

37. This Court is also in agreement with the submission of the defendant that a comparison of hundred (100) grams of plaintiffs and defendant's products would be incorrect and misleading as it would induce the consumers to consume three times the recommended 'per serving' size i.e., ten (10) spoons of HORLICKS per cup which could risk the safety of the consumers.

38. Since both parties recommend 'per serving' on their labels as a method of preparation before consumption, 'per serving' is the only correct way in which a comparison can be made. In any event, the plaintiffs cannot be permitted to approbate and reprobate at the same time.

THE IMPUGNED ADVERTISEMENT COMPARES A MATERIAL, RELEVANT, VERIFIABLE, REPRESENTATIVE FEATURE OF THE GOODS IN QUESTION AND IS FACTUALLY TRUE. THE DEFENDANT HAS NOT MANIPULATED ITS SERVING SIZE AS IT HAS BEEN CONSTANT SINCE 1934.

39. This Court is of the opinion that the impugned advertisement compares a material, relevant, verifiable and representative feature of the goods in question.

40. The defendant in the impugned advertisement has compared an important component of the health drink i.e. the protein content. Admittedly, protein is one of the essential components of a health drink. No one can deny that a large number of nutritionists believe that protein is good for bones and increases muscle mass and strength. It is also believed that protein can boost metabolism, increase fat burning and help the body repair itself after injury. Consequently, the advertisement deals with one of the important characteristics/parameters of a health drink. It is also not possible to lay down an exhaustive list of features which should be mentioned in a comparative advertising as such features differ from proprietor/manufacturer to proprietor/manufacturer and also from consumer to consumer.

41. The allegation that the serving size of COMPLAN had been manipulated to have double the amount of protein of HORLICKS is prima facie incorrect as the recommended serving size of 33 grams for the defendant's product has not been altered since the year 1934.

42. As per the comparison made by the defendant, COMPLAN contains eighteen (18) grams of protein per hundred (100) grams of the product and HORLICKS contains eleven (11) grams of protein per hundred (100) grams of the product. The protein comparison as per recommended per serving sizes is as under:-

$$\begin{aligned} 1 \text{ Cup of COMPLAN} &: 18/100 \times 33 \text{ grams} = 5.94 \text{ grams} \\ 1 \text{ Cup of HORLICKS} &: 11/100 \times 27 \text{ grams} = 2.97 \text{ grams} \\ 1 \text{ Cup of COMPLAN} &= 1 \text{ Cup of HORLICKS} + 1 \text{ Cup of HORLICKS} \\ 5.94 &= 2.97 + 2.97 \end{aligned}$$

43. Consequently, the impugned advertisement seeks only to compare the protein content in the recommended 'per serving' sizes of both products which is factually true and not misleading in any way. In fact, the information is nutritionally and analytically significant for the recipient customer.

THIS COURT IS OF THE VIEW THAT IN ACCORDANCE WITH SECTION 6 OF THE CODEX GUIDELINES, THE DEFENDANT HAS TAKEN INTO ACCOUNT METHOD OF PREPARATION REQUIRED FOR CONSUMPTION ACCORDING TO INSTRUCTIONS FOR USE ON LABEL.

44. Codex General Guidelines on Claims state that the comparative claims must be made taking into account preparation required for consumption according to the instructions for use on the label. As both the parties recommend 'per serving' size on their labels as a method of preparation before consumption, 'per serving' is the only basis on which a comparison can be made.

45. Further, the defendant has taken into account method of preparation according to instructions for use on label. The products of both the parties are to be consumed in the same recommended 'per serving' size regardless whether they are mixed with 'milk' or 'water' and it is an admitted position that water has no protein. All reasonable readers would appreciate that the impugned advertisement is not about the type of milk they may use as they do not associate milk production with either the plaintiffs or the defendant. This Court is of the view that a variable like milk cannot be taken into account, while comparing the protein content in both the products, especially when plaintiffs' product can be had with water. Consequently,

this Court is of the opinion that in accordance with Section 6 of the CODEX Guidelines, the defendant has taken into account method of preparation required for consumption according to instructions for use on label.

THE DEFENDANT IS NOT OBLIGED TO COMPARE ALL PARAMETERS

46. The defendant is not obliged to compare all parameters. It is open to an advertiser to highlight a special feature/characteristic of his product which would set its product apart from its competitors and make a comparison with other products, as long as it is true. This Court in *Havells India Ltd.* (supra) has held as under:-

"47. In Barclays Bank Plc v. RBS Advanta [1996] R.P.C. 307, an application for interlocutory injunction to restrain the defendant from distributing advertising literature which included a brochure carrying a comparative table of fees and interest rates for various credit cards was dismissed. It was argued in the said case that the failure of the defendant to point out the advantages of the plaintiff bank services was misleading and not honest. The English Court after referring to Section 10(6) of the English Trademark Act of 1994 which is almost identical to Sections 29(8) and 30(1) of the Act, 1999 has held as under:-

"The nub of the plaintiff's complaint is that the contents of the leaflet are not honest. As Mr. Young explained it, the leaflet indicated the 15 'bullet points' which were being put forward by the defendant as showing that its credit card was better than the plaintiff's. He accepted that the plaintiff could not complain if the defendant merely said that its credit card was better. However he said that in this case the defendant had descended to detail - to be precise, 15 details - and these were not accurate since they did not compare like with like. In particular he relied on paragraph 15 of the affidavit of Mr. Macfarlane sworn

on behalf of the plaintiff which complains that the defendant's literature makes no mention of other ancillary benefits which the plaintiff offers its cardholders and which the defendant does not have, such as a 24 hour service relating to emergencies on the road and an overseas emergency service.....

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*In my view the plaintiff's case on this issue is very weak. It has the onus of showing that the defendant's use of the BARCLAYCARD mark in its advertising is not honest. It appears to me that it is most unlikely that any reasonable reader would take that view. On the contrary, read fairly, the advertisements convey the message that the package of 15 features, **taken as a whole**, is believed by the defendant to offer the customer a better deal. It seems most unlikely that a reasonable reader, and particularly one to whom this advertisement is being directed - that is to say one who is being tempted to change from an existing VISA card - would be misled into thinking that the 15 features in the defendant's leaflet are, individually, only available to users of the defendant's credit card. For example it is a matter of common knowledge that all VISA cards are accepted wherever a VISA sign is displayed and can be used to draw cash from VISA ATM machines. Furthermore the advertisement does not say, and I think it is unlikely that a reasonable reader would take it to mean, that there are no features of the plaintiff's service which are better than the defendant's. The advertisement merely picks out the features taken together which are being promoted as making the defendant's product a good package."*

48. *In the opinion of this Court, it is open to an advertiser to highlight a special feature/characteristic of his product which sets it apart from its competitors and to make a comparison as long as it is true. For instance, if a chocolate biscuit manufacturer issues a comparative advertising highlighting*

that his product has the highest chocolate content and the lowest price, then in the opinion of this Court the rival manufacturer cannot seek an injunction on the ground that fibre content or calorific value or protein content had not been compared.

49. *In other words, it is open to an advertiser to objectively compare one or more material, relevant, verifiable and representative feature of the goods and services in question which may include price. There is no requirement in law to disclose each and every factor/characteristic in comparative advertisement. No reasonable observer would expect one trader to point to all the advantages of its competitor's business and failure to do so does not per se take the advertising outside what reasonable people would regard as 'honest'.*

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52. *In fact, mere trade puffery, even if uncomfortable to the registered proprietor, does not bring the advertising within the scope of trade mark infringement. Much advertising copy is recognised by the public as hyperbole. The Act, 1999 does not impose on the courts an obligation to try to enforce, through the back door of trade mark legislation, a more puritanical standard."*

OBJECTIVE OF SECTIONS 29(8) AND 30(1) OF THE TRADE MARKS ACT, 1999, IS TO ALLOW HONEST COMPARATIVE ADVERTISING. FAILURE TO POINT OUT A COMPETITOR'S ADVANTAGES IS NOT NECESSARILY DISHONEST

47. The primary objective of Sections 29(8) and 30(1) of the Trade Marks Act, 1999, is to allow comparative advertising as long as the use of a competitor's mark is honest. In the present case, there is no detriment to the distinctive character of the plaintiffs' mark, as there exists a clear distinction

between the plaintiffs and defendant's product. HORLICKS remains the source indicator of plaintiffs' product. In the opinion of this Court, plaintiffs cannot prevent use of their trade mark for the purpose of identification of their product.

48. The test of honest use is an objective test which depends on whether the use is considered honest by members of a reasonable audience. Failure to point out a competitor's advantages is not necessarily dishonest. This Court in *Havells India Ltd. & Anr. Vs. Amritanshu Khaitan & Ors.*, (supra) has held as under:-

"33. Failure to point out a competitor's advantages is not necessarily dishonest. However, care must be taken in ensuring that statements of comparison with the competitors' products are not defamatory or libelous or confusing or misleading. In a recent decision of R (Sainsbury's Supermarkets Limited) v. The Independent Reviewer of Advertising Standards Authority Adjudications v. Advertising Standards Authority Limited, Tesco Stores Limited, CO/17656/2013, the High Court of Justice Queens Division Bench Division Administrative Court of the UK upheld the decisions of Independent Reviewer of Advertising Standards Authority Adjudications (IR) and of the Council of the Advertising Standards Authority (ASA) and held there was no flaw in the advertising campaign involving price comparison carried on by Tesco Stores. In the complaint before the ASA, one of the contentions advanced by Sainsbury was that non-price elements, relating to product quality, corporate responsibility, sustainability and other ethical matters, had not been factored in by Tesco in their product comparison and that Tesco had failed properly to weigh the non-price elements. Sainsbury also contended that higher cost of the product was worth paying as its products were certifiably superior in the aforementioned categories. Sainsbury's argument before all three forums was that considering these non-price elements would render the "sufficiently interchangeable" test as not satisfied and thus, Tesco could not have compared the

products. The ASA had concluded,

“The Code allowed advertisers to objectively compare one or more material, relevant, verifiable and representative feature of products which could include price. We considered that Tesco had objectively compared price and the ad made clear that Tesco were comparing their own prices against brands, own labels, and fresh produce prices at “Sainsbury’s, Asda, and Morrisons and that some products would be excluded from the comparison. While we noted Sainsbury’s concerns, in the context of an ad which explained clearly the basis of Tesco’s pricing comparison we concluded the claim “You won’t lose out on big brands, own label or fresh food” had been substantiated and was not misleading. In addition, we concluded the basis of the comparison was clear and did not breach the Code.”

34. *The Court, analysing the appeal preferred to the IR held that the conclusion arrived at in the appeal was that the essential feature or the key element being compared in the impugned advertisement was price and not quality, provenance or ethical treatment. The Court upheld the decisions of the two authorities and held that the Claimants (Sainsbury) were calling for an “inflexible application of the ‘sufficiently interchangeable’ rule by asserting that provided the non-price factors were capable of being objectively established and were material factors or considerations for a reasonable proportion of customers, then the ‘sufficiently interchangeable’ test could not be found by the ASA to have been satisfied.” The Court held that there was no such hard-edged rule and thus, there was no irrationality in the decisions of the ASA and the IR.*

35. *In Indian law similarly, there is no rule which requires that all the features of a product have to be necessarily compared in an advertisement.....”*

IMPUGNED ADVERTISMENT IS PRIMA FACIE NOT VIOLATIVE OF THE PREVIOUS ORDERS PASSED BY THE ASCI. ALLEGATIONS WITH REGARD TO 'BEST EVER FORMULA' OR THE FONT SIZE OF DISCLAIMER, DO NOT SURVIVE AS DEFENDANT IN THE MODIFIED ADVERTISEMENT USES THE TERM 'BEST EVER FORMULA OF COMPLAN' AND THE SAID DISCLAIMER HAS BEEN MADE AN INTEGRAL PART OF THE ADVERTISEMENT. THE CLAIM OF BEING "2 TIMES THE NUTRIENTS" HAS BEEN DELETED.



49. ASCI has allowed the depiction on the packaging as . In any event, in the present proceedings only the advertisement of the defendant is impugned and not its packaging.

50. This Court finds that the modified advertisement neither uses the expression "growth protein" nor claims that drinking COMPLAN gives 2X faster growth than drinking HORLICKS.

51. The allegations with regard to the heading 'Best Ever Formula' or font size of the disclaimer with regard to recommended 'per serve' size, do not survive as the defendant in the modified advertisement has clarified the heading as '*Best Ever Formula of Complan*' and the disclaimer has been made an integral part of the advertisement.

52. This Court is of the view that depiction of per serving of both the drinks by way of cups is covered under creative latitude. Further, in the modified advertisement, the claim of providing '2 times the nutrients' has been deleted. Moreover, impugned advertisement does not make any

comparison between Formula of COMPLAN with Formula of HORLICKS. The modified advertisement compares the protein content between the two products only and that too on basis of 'per serving' size.

53. The statement "From Now on, only COMPLAN" is an exhortation, to urge consumer to purchase defendant's product and the target customers expect a certain amount of hyperbole. In *Mc Donalds Hamburgers Ltd. vs. Burgerking (UK) Ld. [1987] F.S.R. 112* followed in *Glaxosmithkline Consumer Healthcare Ltd. Vs. Heinz India* (supra), it has been held that advertisements are not to be read as if they are some testamentary provision in a Will or a clause in some agreement with every word being carefully considered and the words as a whole being compared. The advertisements is to be viewed as readers normally view it. In *Marico Ltd. vs. Adani Wilmar Ltd. CS(OS) No.246/2013* it has been held that in determining the meaning of an advertisement, the Court has to take into account the fact that public expects a certain amount of hyperbole in advertising and the test to be applied is whether a reasonable man would take the claim being made as one made seriously. Consequently, the said statement in the modified advertisement is certainly not disparaging and does not amount to rejection or denigration of plaintiffs' product.

CONCLUSION

54. From the aforesaid discussion, it is apparent that the impugned modified advertisement is not misleading and there is no denigration or disparagement of plaintiffs' mark. Further, the factor compared is material,

relevant, verifiable and representative feature. Consequently, present application is dismissed, but with no order as to costs.

MANMOHAN, J

DECEMBER 17, 2018

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