Hindustan Lever Ltd.

Vs

Colgate Palmolive (I) Ltd.& Anr.

(Suhas C. Sen, M. Jagannadha Rao JJ)

17.12.1997

JUDGMENT

M.JAGANNADHA RAO, J.

1.Hindustan Lever Ltd has filed this Civil Appeal under Section 55 of the Monopplies and Restrictive Trade Practices Act, 1969 (hereinafter called the Act) against the order of the Monopolies & Restrictive Trade Practices Commission (hereinafter called the Commission). The order is dated 5/6 November, 1997 and is passed in Injunction Application No.336 of 1997 filed in the Main Case No.405 of 1997.

2.The two respondents are Colgate Palmolive (India) Ltd.and Miss Pallvi S.Desai. The said respondents were the complainants 1 and 2 respectively in the main case No.405 of 1997 which is pending before the Commission. By virtue of the impugned order, certain directions in the nature of temporary injunction have been granted in favour of the respondents complainants and against the appellant. It is to be noted further that the Commission, which directed a panel of experts to give its opinion on the issue involved, made it clear that the order that was being passed was "temporary interim order" and a final order on the Injunction Application would be passed later after receiving the opinion of the experts. The Commission said:

> "If the parties are agreeable, the order passed at present may be treated as purely temporary interim order subject to modification, variation or vacation after perusing the opinion of the aforesaid panel of experts."

3.We shall state the brief facts and the conclusions of the Commission in so far as they are material for the purposes of this appeal.

4.The 1st respondent, Colgate-Palmolive (India) Ltd.manufactures Colgate Dental Cream. The appellant too has various brands of tooth paste but we are concerned here with the 'New Pepsodent' toothpaste introduced by the appellant recently into the market. The appellant had given advertisement in the print, visual and hoarding media, claiming that its toothpaste "New Pepsodent' was "102 % better than the leading toothpaste". The advertisement contains a 'schematic' picture supposedly of samples of 'salvia sear'. It depicts on one side of the advertisement a pictorial representation of the germs in a sample taken from the mouth of a person hours after brushing with "the leading toothpaste." And another pictorial representation is of the germs from a similar sample taken from the mouth of another person using the "New Pepsodent". The former shows large number of germs remaining in the sample of saliva where the 'leading toothpaste' is used and the latter shows almost negligible quantity of germs in the sample of saliva where 'New Pepsodent' is

used. The advertisement also speaks of test conducted at the Hindustan Lever Dental Research Centre and says that the appellant's product is based on a Germ check formula which is twice as effective on germs as the leading toothpaste and that it was, in fact, 102 % better in fighting germs. In the TV advertisement of the appellant, two boys are asked the name of the toothpaste with which they had brushed their teeth in the morning. The advertisement shows Pepsodent 102% superior in killing germs which is being used by one of the boys. So far as the other boy is concerned, who is using another toothpaste which is inferior in killing germs, the lip movement, according to the respondents, indicates that the boy was using 'Colgate' though the voice is muted. Additionally, when this muting is done there is a sound of the same jingle as is used in the usual Colgate-advertisement, leaving, according to the complainants, doubt in the minds of the viewers that 'Pepsodent' was being compared with Colgate.

5.On these and other allegations, the complaint was filed by the respondents before the Commission relying upon Sections 10, 36A and 36b of the Act and in particular upon Section 36A (viii) and (x) of the Act. The respondents also filed an Injunction Application 336/1997 for grant of temporary injunction under Section 12A of the Act. It was contended that the appellant was guilty of 'unfair trade practice' under Section 36A in as much as the appellant allegedly adopted, for the purpose of promoting sales, use or supply of its goods, an unfair method or deceptive practice by making a representation as stated in Section 36A (viii) and giving false or misleading facts 'disparaging' the goods of the appellants as stated in Section 36A(x).

6.The appellant, while defending itself, contended that there was no 'unfair trade practice' practiced by it under clause (viii) or (x) of Section 36A and that no case for grant of temporary injunction under Section 12A was made out. The appellant contended that the complainants were bound to prove that the facts depicted in the advertisement as to 102% superiority of Pepsodent were false. Unless such falsity was proved in the I.A., no temporary injunction could be granted.

7.The commission in its order dated 5th/6th November, 1997 after referring to the facts and contentions, held that the objection based on Sections 36b and 10 as to maintainability of the complaint was not tenable because the Commission was empowered, even to act upon its own knowledge or information for purpose of inquiry under the Act. Further, the 2nd complainant, who was consumer, could rely upon Sections 10 and 36B.It found that inasmuch as the over-all market shares of Colgate was shown to be 59% in the second quarter of the year 1997 and the appellant's share was 27%, the reference in the advertisement to a 'leading' toothpaste must be taken to be reference to 'Colgate dental cream' of the 1st complainant and this was also obvious from the use of the word 'the' before the word 'leading' in the TV and newspaper advertisements. The TV advertisements with two boys shown alongwith in the 'jingle' was sufficient to identify the leading toothpaste as Colgate, according to the Commission.

8.As to the 'anti-bacterial' superiority, the Commission stated that the inference was that the appellant was not merely treating its toothpaste as superior but was treating Colgate as 102% 'inferior'. It was not necessary hat there should be any direct reference about inferiority and it was sufficient if there was an allusion, hint etc.to that effect and such a reference prima facie amounted to 'disparagement' for purposes of Section 36A(x).Adverting to the contention of the appellant that there would be no 'disparagement' if the factual data relied upon by the appellant was true, the Commission observed that the appellant had produced opinions of "certain experts to controvert the case of Colgate", that Colgate, have also brought on record certain test-reports from certains institutions including one from Haffkine Institution. According to the respondents, there was not much difference between the Pepsodent (old version) and the 'New Pepsodent' marketed by the

appellant. As the old one was not superior to Colgate, the new one was also not superior. The appellants also contended before the Commission that the protocols adopted for testing the germ-content were not uniform and that the complainant's protocols were not the correct ones. Adverting to these protocols, the Commission referred to the objection of the appellant, as follows:

> "At this state, it may be noted that the case of the applicants/complainant is that Colgate offered to the respondent that the test of the concerned toothpaste products of both Colgate and the respondent should be carried out by certain experts who should decide their own protocols for the purpose. It appears that the respondent has not agreed to it."

Having stated as above in regard to the protocols, the Commission noticed that so far as the claims of 102 % bacterial superiority was concerned, it was a matter which required a highly scientific approach and should be decided by independent experts and it would be hazardous for the commission to venture even a prima facie opinion.It then referred to the voluntary suggestion of the appellant for appointing a panel of experts, as follows:

> "In fact, the respondent has also volunteered in its reply that this may be done by a team of experts. That may be done at the stage of final hearing. If the parties agree, it can be done at the interim stages, also, provided each side furnishes the names of experts with their consent to give opinion, if so desired by the Commission, within the reasonably specified time limit."

9.Thus, by adverting to the suggestion of the appellant, and relying on the same, the Commission felt that the claims of superiority of the appellant and the respondent could be decided by an expert body, which could submit its report in 4 or 5 months. For that purpose each side could suggest the name of an expert and the Commission would nominate a third expert. Parties were to give the name in a fortnight. The Commission then stated that this was a purely temporary interim order. It said that this was:

> "a purely temporary interim order, subject to modification, variation or vacation after perusing the opinion of the panel of experts-."

10.The Commission therefore held that prima facie the reference in the appellant's advertisements were referable to Colgate and that because of the claim of anti-bacterial superiority, a prima facie case for purpose of interim relief was made. It referred to Colgate Palmolive Pvt.Ltd.Vs.Rexona Pvt.Ltd.(1981) 37 ALR 391 (Australia) where temporary injunction was granted against making "such tall claims" till the truthfulness of the claim was established at the trial. The Commission, then went into the question of 'balance of convenience' and held that the representation through the media, in particular through the TV was likely to make consumers take the appellant's claim as a 'true statement' if not as the 'gospel truth' and that there was evidence filed by Colgate showing that there was reduction of 5% of its sales in August 1997 and 8% in September 1997.The Commission observed that the appellant was not likely to suffer much if interim relief was granted and in fact, appellant would be saving on its advertisement expenses.

11.On the basis of the above reasoning, the Commission granted a temporary interim injunction against the appellant from making any reference 'directly' or indirectly in the appellant's advertisement claiming anti-bacterial superiority and also from making any 'specific quantum' of anti bacterial superiority- "till its claim of such anti bacterial superiority is fully established". This

would also before protecting the Consumer's interest. In the last paragraph of the order, the Commission clarified that the injunction would apply whether the reference to Colgate was by any allusion or hint.

12.It is against the above order of temporary interim injunction that this appeal has been preferred. We have heard elaborate arguments by Sri Harish Salve for the appellant and of Sri Soli J.Sorabjee for the 1st Complaint and of Sri Iqbal Chagla for the 2nd Complainant.

13.The point for consideration is: whether the discretionary order of temporary interim injunction granted by the Commission pending the passing of final orders in the Injunction application filed by the respondents-complaints, is liable to be set aside or modified?

14.From the fact set out above, it is clear that the Commission has granted a temporary injunction which is of an' interim' nature and the Commission is yet to pass further orders in the same injunction application, after receipt of the opinion of the panel of experts. It is also to be noted that the Commission proposed the appointment of an expert penal for two reasons. The first reason was that both sides were relying upon laboratory tests or opinions of their own experts. These opinions were conflicting and the Commission had no machinery of its own to verify the claims of the parties unless a body of experts could give its opinion to the Commission. The second reason according to the Commission The second reason according to the Commission was that the appellant itself volunteered and suggested that such a panel of experts could be appointed.

15.There was some argument before us by the learned counsel for the appellant that appellant had not agreed for the panel as stated in the order. In this behalf, we are satisfied that what the Commission had stated in its order is correct and is clearly borne out by what the appellant had stated in its reply before the Commission. In fact, after the Commission had passed its orders on 5/6 November, 1997, the appellant gave an advertisement on 6.11.1997 in the press to the effect that the Commission had appointed a panel of exports at the suggestion of the appellant.

16.It was, however, vehemently argued by Sri Harish Salve for the appellant that the 1st complainant put forward its case upon clause (x) of Section 36A and under that clause, unless it was "proved" by the complainant that the appellant had "given false or misleading facts disparaging the goods, services or trade" of the 1st complainant, it could not be said, even prima facie, "that the appellant was guilty of any 'unfair trade practice' referred to in that sub-clause. Learned Counsel relied upon Lakhanpal National Ltd.Vs MRTP Commission-1989(3) SCC 251-which has also been referred to by the Commission in the impugned order- and to judgment of Courts in UK and USA and to the principles of law stated in several books, for contending that unless it was established by the complainant that the facts stated in the advertisement were 'false' or 'untrue', it could not be said that there was unfair trade practice or disapragment. Learned counsel also relied upon Section 12A of the Act which deals with grant of temporary injunction by the Commission and contended that the said provisions require 'proof' of an 'unfair trade practice' and also that such practice was likely to affect prejudicially public interest or the interests of trades or consumers generally.

17.On the other hand, it was contended by Sri Soli Sorabjee for the espondent and by Sri Iqbal Chagla for the 2nd respondent that the above contentions are not correct and that this was an appeal under Section 55 of the Act and the grounds available in the appeal are the same grounds as specified in Section 100 C.P.C.(before the 1976 Amendment) and that the discretion exercised by the Commission was proper in the circumstances of the case, that the claim of the 1st complainant was not only under Section 36A(x) but also under Section 36A (viii), and under the latter clause. It

was sufficient for the purpose of proving an 'unfair trade practice' that the appellant had made a representation in a form which purported to be warranty or guarantee and which was materially misleading or that there was no reasonable prospect that such warranty or guarantee would be carried out. It was also argued that the conduct of the appellant in having voluntarily proposed the appointment of a panel of experts has to be taken into account in deciding whether the Commission went wrong in directing an expert body, which was to be nominated as stated in the order, to give its opinion.

18.On a consideration of the above contentions and on a careful appraisal of the reasons given by Commission we are of the view that the order passed by the Commission was a purely discretionary order and was also an interim order pending the passing of a final order of temporary injunction and is not liable to be interfered with in this appeal. As stated earlier, a reading of the Commission's order snows that it noticed that the appellant was relying upon opinions of experts to substantiate its claim of 102% superiority in anti-bacterial action while the respondent, 1st complainant was also relying upon the opinion of its experts to contradict the appellant's claim. The matter being technical in nature, if the Commission felt, as suggested by the appellant is its reply, that a panel of experts could go into the correctness of rival claims and give its opinion and if the Commission further said that after the opinion was given, parties could make their final submissions in the Injunction application and if the Commission felt that till then, an order of an interim nature should operate, we do not think that it is a fit case for interference's with such a discretionary order. We do not therefore propose to go into the merits of the contentions. Further, any expression of opinion by this Court on merits at this preliminary stage could cause prejudice to the claims and contentions of one or other of the parties.

19.For the aforesaid reasons, this appeal fails and is dismissed. We may make it clear that we should not be understood as having stated anything on the merits of contentions either of complainants or of the appellant. In the circumstances of the case, there will be no order as to costs.