

Colgate Palmolive (India) Ltd.

Vs

Hindustan Lever Ltd.

With Hindustan Lever Ltd.

Vs

Colgate Palmolive (India) Ltd. and Another

Civil Appeals No. 2620 of 1998 with No. 3288 of 1998

(K. B. Kirpal, U. C. Banerjee JJ)

18.08.1999

JUDGMENT

BANERJEE, J. –

1. These two appeals under Section 55 of the Monopolies and Restrictive Trade Practices Act (hereinafter referred to as "the MRTP Act") are directed against the order of the Monopolies and Trade Practices Commission under Section 12-A of the MRTP Act dated 30-4-1998 in Matter No. UTPE 415 of 1997. The matter pertains to Colgate Toothpaste, a product of Colgate Palmolive India Limited and by reason of a complaint from M/s. Hindustan Lever Limited being the appellant in the 2nd appeal. Whereas CA No. 2620 of 1998 is against the order of the Commission containing an order of restraint as regards the display of the ring round the family as "Suraksha chakra" in Colgate Palmolive's hoardings, print advertisements and TV commercials, CA No. 3288 of 1998 filed by M/s. Hindustan Lever Limited is against the order of refusal on the part of the Commission to put a total ban on the product of Colgate Palmolive as noticed above.

2. Before advertng to the rival contentions, be it noted that the MRTP Act as originally framed did not confer any power on to the Commission to grant temporary injunction during the course of enquiry. The Sachhar Committee Report, however, recorded that power to issue temporary injunction order ought to be made available to the Commission in order to give effect and strengthen the jurisdiction and authority of the Commission and it is by reason therefor the legislature thought it fit to incorporate Section 12-A in the body of the Act by MRTP Amendment Act, 1984 conferring such a power on the Commission.

3. While it is true that the conferment of power, under Section 12-A, has very wide ramifications but the legislature was itself conscious enough to record in the body of the section certain inbuilt requirements to be fulfilled in order to clothe the Commission with the authority and jurisdiction in the matter of grant of an order of injunction and it is on this perspective that Section 12-A ought to be noticed at this juncture. Section 12-A reads as below :

"12-A. Power of the Commission to grant temporary injunctions. - (1) Where, during an enquiry before the Commission, it is proved, whether by the complainant,

Director General, any trader or class of traders or any other person, by affidavit or otherwise, that any undertaking or any person is carrying on, or is about to carry on, any monopolistic or any restrictive or unfair trade practice and such monopolistic or restrictive, or unfair trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of any consumer or consumers generally, the Commission may, for the purposes of staying or preventing the undertaking or, as the case may be, such person from causing such prejudicial effect, by order, grant a temporary injunction restraining such undertaking or person from carrying on any monopolistic or restrictive, or unfair, trade practice until the conclusion of such enquiry or until further orders.

(2) The provisions of Rules 2-A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall, as far as may be, apply to a temporary injunction issued by the Commission under this section, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to any enquiry before the Commission.

Explanation I. - For the purposes of this section, an enquiry shall be deemed to have commenced upon the receipt by the Commission of any complaint, reference or, as the case may be, application or upon its own knowledge or information reduced to writing by the Commission.

Explanation II. - For the removal of doubts, it is hereby declared that the power of the Commission with respect to temporary injunction includes power to grant a temporary injunction without giving notice to the opposite party."

4. On a plain reading of the provision the following requirements thus emerge :

(a) Temporary injunction can be granted only during an enquiry.

(b) There must be proof of certain practices mentioned therein to have been carried on or are about to be carried on by the person specified therein.

(c) Such practices are likely to affect prejudicially the public interest and there must be some evidence either by way of an affidavit or otherwise.

5. The situation thus after the incorporation of the Act of 1984 in the statute-book emerges that the Commission's power can be invoked under Section 12-A within however such limits and restrictions as noticed above. Be it placed on record, that for an appreciation of the powers under Section 12-A and to read the same in its proper perspective, Regulations 76 and 77(2) of the MRTP Regulations, 1991 ought also to be noticed. Regulation 76 provides that an application for grant of temporary injunction ought to be supported by an affidavit stating therein the circumstances under which the trade practices can be ascribed to be prejudicial to the interest of the public, consumer etc. and Regulation 77(2) provides a safeguard to the effect that the Commission before making an order under Section 12-A, may direct the Director General of Investigation to make an investigation and submit a report to the Commission and the Commission, upon consideration thereof, may pass appropriate orders in regard thereto.

6. Incidentally, be it noted that in the event of a complaint being lodged by a trader in respect of unfair trade practice, it is for the trader to convince by way of "evidence sufficient" that there is

involved an element of public interest in the complaint, in order to obtain an order of injunction in terms of Section 12-A and the Commission, in its turn, has thus to consider as to whether or not the public are being deceived or likely to be deceived and in the event, the Commission comes to a finding that there is likelihood of such a deception, then and in that event only, the question of grant of an order of injunction would arise.

7. Needless to record here that the Commission's powers to grant temporary injunctions is somewhat akin to that of the civil court under Rules 2-A to 5 of Order XXXIX of the Code of Civil Procedure.

8. Having dealt with, however, the broad legislative perspective in the matter of conferment of power and authority on to the Commission in regard to the grant of injunctions and whilst on the subject let us however discuss the state of the law in the matter of grant of an order of injunction be it statutory or otherwise involving equitable considerations and the same being purely discretionary in nature though ordered only on the exigencies of the situation and not as a matter of course in accordance with the known principles of law.

9. Generally, however, the interlocutory remedy by way of a grant of an order of injunction is intended to preserve and maintain in status quo the rights of the parties and to protect the plaintiff, being the initiator, of the action against incursion of his rights and for which there is no appropriate compensation being quantified in terms of damages. The basic principle of the grant of an order of injunction is to assess the right and need of the plaintiff as against that of the defendant and it is a duty incumbent on to the law courts to determine as to where the balance lies.

10. Another redeeming feature in the matter of grant of interlocutory injunction is that in the event of a grant of injunction in regard to a party defendant where the latter's enterprise has commenced, and in that event the consideration may be somewhat different from that where the defendant is yet to commence its enterprise.

11. The decision of this Court in *Wander Ltd. v. Antox India (P) Ltd.* (1990 Supp SCC 727 : 1991 SCC (Cri) 145) lends support to the observations as above.

12. This Court in para 9 of the Report observed : (SCC pp. 731-32)

"9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well-settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

'... is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting, from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the "balance of convenience" lies'.

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant

from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

13. Incidentally, the House of Lords prior to the decision in *American Cyanamid Co. v. Ethicon Ltd.* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) in *J. T. Stratford & Son Ltd. v. Lindley* (1965 AC 269 : (1964) 3 All ER 102 (HL)) in no uncertain terms laid down that the plaintiff had to show a strong prima facie case that his rights had been infringed and thereafter the plaintiff was required to show that the damages would not be an adequate remedy in the event of there being a success of the plaintiff at the trial and that the balance of convenience favoured the grant. This requirement, however, in the matter of grant of an injunction so far as the English courts are concerned, stands slightly diluted by reason of the decision in *American Cyanamid case* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) which records that in the event of there being a serious issue to decide, the grant would be available to a plaintiff on, however, compliance with the other fundamentals as noticed below. A strong prima facie case, therefore, stands substituted by a serious issue to be decided.

14. At this juncture, however, the decision of the House of Lords in *American Cyanamid case* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) though raised certain eyebrows lately, ought to be considered in slightly more greater detail.

15. Lord Diplock in *Cyanamid case* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) laid down the following guiding principles for the grant of interlocutory injunction :

"(1) The plaintiff must first satisfy the court that there is a serious issue to decide and that if the defendants were not restrained and the plaintiff won the action, damages at common law would be inadequate compensation for the plaintiffs loss.

(2) The court, once satisfied of these matters will then consider whether the balance of convenience lies in favour of granting injunction or not, that is, whether justice would be best served by an order of injunction.

(3) The court does not and cannot judge the merits of the parties' respective cases and that any decision of justice will be taken in a state of uncertainty about the parties' rights."

16. It would seem to follow, therefore, that what should be borne in mind, in addition to what has been phrased in Lord Diplock's speech, is that if there is uncertainty, the court should be doubly reluctant to issue an injunction, the effect of which is to settle the parties' rights once for all.

17. On a clear analysis of the speech of Lord Diplock, it appears that if damages, recoverable at common law, would be an adequate remedy and the defendant would be in a financial position to pay the same, no interlocutory injunction should normally be granted, howsoever strong the plaintiff's claim appears to be at that stage. Lord Diplock went on to observe further that in the event of there being any doubt, as to the adequacy of the respective remedies and damages available to either party or both, then and in that event, the question of balance of convenience arises and the same will vary from case to case.

18. Similar view has also been expressed by the House of Lords in the case of *Dimbleby & Sons*

Ltd. v. National Union of Journalists (1984) 1 All ER 751 (HL)).

19. In *Power Control Appliances v. Sumeet Machines (P) Ltd.*- ((1994) 2 SCC 448) this Court did follow the decision of this Court in *Antox India case* (1990 Supp SCC 727 : 1991 SCC (Cri) 145) and expressly approved the main dicta of the House of Lords in *American Cyanamid case* ((1975) 1 All ER 504 : 1975 AC 396 (HL)).

20. In *Gujarat Bottling Co. Ltd. v. Coca Cola CO.* ((1995) 5 SCC 545 : AIR 1995 SC 2372) this Court, however, sounded a different note, though, however, emphasised the discretionary power in the matter of grant of interlocutory injunction and in para 43 this Court observed : (SCC p. 574)

"43. The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests - (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies. [See : *Wander Ltd. v. Antox India (P) Ltd.* (1990 Supp SCC 727 : 1991 SCC (Cri) 145) (SCC at pp. 731-32).] In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."

21. As noted above, lately the "triable issue concept" as introduced by Lord Diplock in *Cyanamid case* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) has been thought to be much too rigid and wide even conceptually and doubts are even raised as to its legal efficacy having regard to the facts of adequate compensation theory. As a matter of fact the courts in England have even gone to the extent of ascribing the judgment to be beneficial for the richer sections of the society ! We, however, cannot subscribe to such a view, neither find any justification for such uncharitable comments and it seems that *Cyanamid decision* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) has been more misunderstood than understood and in this regard we record our concurrence with the views expressed by Laddie, J. in *Series 5 Software v. Clarke* ((1996) 1 All ER 853 (Ch D)) wherein the learned Judge has explained the judgment of *American Cyanamid* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) with extreme competency and in our view also correctly. Laddie, J. observed :

"In many cases before *American Cyanamid* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) the prospect of success was one of the important factors taken into account in

assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid ((1975) 1 All ER 504 : 1975 AC 396 (HL)) is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.

Lord Diplock said in American Cyanamid (All ER at 511 : AC at 409) :

'... if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case.'

It appears to me that there is nothing in this which is inconsistent with the old practice. Although couched in terms 'it may not be improper', this means that it is legitimate for the court to look at the relative strength of the parties' case as disclosed by the affidavits. The warning contained in the second of the quoted sentences is to avoid courts at the interlocutory stage engaging in mini-trials, which is what happened, at least in the Court of Appeal, in American Cyanamid ((1975) 1 All ER 504 : 1975 AC 396 (HL)) itself.

Interlocutory applications are meant to come on quickly and to be disposed of quickly.

The supposed problem with American Cyanamid ((1975) 1 All ER 504 : 1975 AC 396 (HL)) centres on the following statement by Lord Diplock (AC at 409) :

'[Assessing the relative strength of the parties' cases], however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.'

If this means that the court cannot take into account its view of the strength of each party's case if there is any dispute on the evidence, as suggested by the use of the words 'only' and 'no credible dispute', then a new inflexible rule has been introduced to replace that applied by the Court of Appeal. For example, all a defendant would have to do is raise a non-demurrable dispute as to relevant facts in his affidavit evidence and then he could invite the court to ignore the apparent strength of the plaintiff's case. This would be inconsistent with the flexible approach suggested in Hubbard v. Vosper ((1972) 1 All ER 1023 : (1972) 2 QB 84 (CA)) which was cited with approval earlier in American Cyanamid ((1975) 1 All ER 504 : 1975 AC 396 (HL)) All ER at 510 : AC at 407. Furthermore, it would be somewhat strange, since American Cyanamid ((1975) 1 All ER 504 : 1975 AC 396 (HL)) directs courts to

assess the adequacy of damages and the balance of convenience, yet these too are topics which will almost always be the subject of unresolved conflicts in the affidavit evidence.

In my view Lord Diplock did not intend by the last-quoted passage to exclude consideration of the strength of the cases in most applications for interlocutory relief. It appears to me that what is intended is that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence, then it can do so."

22. The learned Judge thereafter went on to record that the House of Lords in *American Cyanamid* ((1975) 1 All ER 504 : 1975 AC 396 (HL)) did not suggest that it was changing the basis upon which most courts had approached the exercise of discretion in this important area.

23. Thus on an analysis of the decisions as noticed above, there does not seem to be any difficulty in appreciating the view as expressed by Lord Diplock in *American Cyanamid* ((1975) 1 All ER 504 : 1975 AC 396 (HL)). As a matter of fact, Laddie, J.'s decision in *Series 5 Software* case ((1996) 1 All ER 853 (Ch D)) has been able to resolve the issue without any departure from the true perspective of the judgment as noticed above.

24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below :

(i) extent of damages being an adequate remedy;

(ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;

(iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;

(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.

25. It is on this backdrop that exercise of discretion by the Commission shall have to be considered

and it is at this juncture certain further factual details ought to be noted.

26. On the factual score it appears that the appellant started its advertisement campaign for "Colgate Dental Cream" using the phrase "stops bad breath" and "fights tooth decay" from 1960. The user of the words "Suraksha chakra" commenced however from the year 1985.

27. The records depict that in March 1997 the respondent in Civil Appeal No. 2620 of 1998 being Hindustan Lever, complained to the Advertising Standards Council of India (ASCI) against the appellant's advertisement in respect of Colgate Dental Cream. The Consumer Complaints Council of ASCI scrutinised the appellant's advertisement in detail and came to a finding that the same cannot in any way be termed to be unfair or deceptive. Significantly, however, though there is existing a provision for review, the respondent has chosen not to proceed with the matter and allowed the matter to be set at rest.

28. Subsequently, however, on 15-10-1997, the appellant herein filed a complaint before the MRTP Commission being No. UTPE 405 of 1997 against the respondent by reason of the respondent's advertisement wherein it has been stated that the respondent's product "New Pepsodent" had 102% more germ-fighting capability as compared to the "leading toothpaste". According to the appellant this "leading toothpaste" cannot but refer to "Colgate Toothpaste" and as such the advertisement is directly aimed at disparagement of the appellant's product namely Colgate Dental Cream and it was only thereafter the respondent herein on 22-10-1997, filed a complaint before the MRTP Commission against the appellant's advertisement in respect of "Colgate Dental Cream" which is ascribed to be purely a counterblast. We are not, however, expressing any opinion in that regard.

29. Be that as it may, records depict that the complaint initiated by the respondent herein contained three specific grievances. Relevant extracts thereof are set out hereinbelow :

"For the purpose of promoting the sale, use and supply of its said product, Colgate Dental Cream, the respondent has been using television, PoP (point of purchase), hoardings, radio and press advertisement campaigns, which contain statements which are false and misleading. TV advertisements and storyboards of the same in Hindi, along with their English translation, is annexed hereto and marked as Annexure 1 (collectively). A copy of PoP is also enclosed as Annexure 2.

In the said advertisements for promotion of sale of Colgate Dental Cream (CDC), the respondent has, inter alia, made the following claims, which it is submitted, are both false and misleading :

(a) The respondent's CDC toothpaste is claimed to have action of 'germ fighter', which is projected as a process by which germ activity (which is the root cause of oral problems viz. tooth decay and bad breath) is controlled.

(b) The respondent's CDC toothpaste is stated to have the ability to 'fight tooth decay'.

(c) The respondent's toothpaste is stated to have the ability to 'stop bad breath'.

The above-mentioned claims are false and highly misleading qua the consumers and trade.

It is submitted that the advertisement of the respondent's CDC toothpaste purport to set up 'germs' as the cause of both tooth decay and bad breath. It then suggests that Colgate Dental Cream has a special 'germ fighter'. The advertising then goes on to suggest that as a result the toothpaste offers the benefit of 'stops bad breath' and 'fights tooth decay' and provides a ring or circle of safety or protection. The complainant craves leave to refer to and rely upon cassettes of all these TV advertisements at the time of hearing.

The complainant/informant believe the impugned advertisement of Colgate Dental Cream has been on air since August 1996 claiming 'germ fighter' proposition. Prior to the impugned advertisement no claim of any 'germ fighter' was made in respect of CDC. However, for the last more than one year the respondent has introduced new advertising in which this new claim has been made even though there has been no change in the ingredients of Colgate Dental Cream. Storyboards of the advertising before August 1996 are annexed hereto and marked Annexure 3."

30. It, therefore, appears that the principal grievance of the respondent herein before the Commission is that the claim of the appellant that its toothpaste is a "germ fighter" having the ability to "stop bad breath" and its ability to "fight tooth decay" are highly misleading qua the consumers and the trade. The complaint itself further records that the advertisement of the appellant purports to suggest that Colgate Dental Cream has a special germ fighter and thereafter the complainant records as a result, the toothpaste offers the benefit of stoppage of "bad breath" and "tooth decay" and thus provides the ring of safety or protection and it is on this perspective Mr. Desai contended that since the principal grievance pertains to the three broad heads as above and the ring cannot but be termed to be an incidental issue on which the order of injunction is wholly unwarranted.

31. Mr. Desai, in support of the appeal further contended that the allegations of unfair and restrictive trade practices is rather a serious allegation of misconduct as regards the trade and there ought to be a specific pleading in the complaint as also in the notice of enquiry together with full particulars thereof and in the absence of which, the question of any credence thereto does not arise, far less the grant of an order of injunction as has been granted by the Commission and impugned in this appeal.

32. In order, however, to assess the substance of the point in issue as raised by Mr. Desai, a look at Section 36-A may be convenient at this juncture. Section 36-A defines "unfair trade practice" as a trade practice which for the purpose of promoting the sale, use or supply of any goods or for provision of any services, adopts any unfair method or unfair or deceptive practice as mentioned in the section and thereby causes loss or injury to the consumer of such goods or services, whether by eliminating or restricting competition or otherwise and in this context specific reference may be made to specific sub-sections appended thereunder which are of some relevance and as such noted hereinbelow :

"36-A. (1)(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii)-(iv)

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii) makes to the public a representation in a form that purports to be -

(i) a warranty or guarantee of a product or of any goods or services;

or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) * * *

(x) gives false or misleading facts disparaging the goods, services or trade of another person."

33. It is in this context, however, that the observations of this Court in Lakhanpal case (Lakhanpal National Ltd. v. M. R. T. P. Commission ((1989) 3 SCC 251) are rather apposite. This Court in para 7 of the Report observed : (SCC pp. 255-56)

"7. However, the question in controversy has to be answered by construing the relevant provisions of the Act. The definition of 'unfair trade practice' in Section 36-A mentioned above is not inclusive or flexible, but specific and limited in its contents. The object is to bring honesty and truth in the relationship between the manufacturer and the consumer. When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such a representation made by the manufacturer on the common man ? Does it lead a reasonable person in the position of a buyer to a wrong conclusion ? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer

by using tricky language. Similarly a statement, which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively than a literally correct statement. It is, therefore, necessary to examine whether the representation, complained of, contains the element of misleading the buyer. Does a reasonable man on reading the advertisement form a belief different from what the truth is ? The position will have to be viewed with objectivity, in an impersonal manner. It is stated in Halsbury's Laws of England (4th Edn., paras 1044 and 1045) that a representation will be deemed to be false if it is false in substance and in fact; and the test by which the representation is to be judged is to see whether the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee. 'Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to establish a misrepresentation' and 'that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, even though there may have been any number of inaccuracies in unimportant details. Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true'. Let us examine the relevant facts of this case in this background."

Similar is the finding of this Court (at SCC p. 490, para 9) that

"for holding a trade practice to be an unfair trade practice, therefore, it must be found that it causes loss or injury to the consumer". (H. M. M. Ltd. v. Director General, Monopolies & Restrictive Trade Practices Commission ((1998) 6 SCC 485, 490)).

34. In the instant matter there are no allegations in the complaint against the term "Suraksha chakra" nor even an allegation that the same is misleading or an unfair trade practice. The notice of enquiry also does not contain any reference to "Suraksha chakra" as unfair trade practice or there being any involvement or any falsity or that in any way the same tantamounts to a misleading information to the people at large. The allegations in the complaint filed by Hindustan Lever stand restricted or confined to Colgate's claim in respect of "germ fighting", "bad breath" and "tooth decay".

35. On the factual analyses as above, would we be justified in ascribing the grant of the order of injunction by the Commission that the same is in accordance with the known principles of law and the factors which ought to weigh with the court in the matter of grant of injunction as indicated above - the answer obviously cannot possibly be in the affirmative. The rigours of American Cyanamid ((1975) 1 All ER 504 : 1975 AC 396 (HL)) and subsequent modulations thereof by the other English decisions along with the observations of Laddie, J. (supra) do not in any event run counter to the observations as above. The decision of this Court in Antox India (1990 Supp SCC 727 : 1991 SCC (Cri) 145) cannot but lend concurrence to the view expressed above to the effect that the object of interlocutory injunction is to protect the plaintiff against the injury by reason of violation of his right and relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty could be resolved - three specific features available in the complaint have not in any way been disturbed by reason of lack of evidence but an incidental issue wholly dependent upon those three specific features has been taken up for consideration and an order of injunction granted. This is where the Commission is in error. The vindication of public right or public injury as contended by Mr. Salve does not, however, make a dent in the contextual facts, since the case with which a party comes to court ought to be considered in all fairness, in its proper perspective but unfortunately there is a total lack of the same in the

instant matter.

36. In any event, a distinction shall always have to be made and a latitude is allowed in the event of there being an advertisement to gain a purchaser or two. The latitude spoken of, however, cannot and does not mean any misrepresentation but by a description of permissible assertion. In this context a passage from Anson's Law of Contract (27th Edn.) may be of some relevance and the same is quoted hereinbelow :

"Commendatory expressions, such as advertisements to the effect that a certain brand of beer 'refreshes the parts that other beers cannot reach', or that an aftershave lotion is irresistibly attractive to the opposite sex, are not dealt with as serious representations of fact. A similar latitude is allowed in private contracts to a man who wants to gain a purchaser, though it must be admitted that the borderline of permissible assertion is not always easily discernible. At a sale by auction, land was stated to be 'fertile and improvable'; it was in fact partly abandoned and useless. This was held to be 'a mere flourishing description by an auctioneer'. (*Dimmock v. Hallett* ((1866) 2 Ch App 21 : 15 LT 374)). But where in a sale of a hotel the property was said to be let to 'a most desirable tenant', whereas his rent could only be obtained under pressure and was currently much in arrear, such a statement was held to entitle the purchaser to rescind the contract." (*Smith v. Land and House Property Corpn.* ((1884) 28 Ch D 7 : 51 LT 718 (CA))).

37. Further, assuming there was in fact an express warranty but that by itself would not necessarily result from a "simple commendation of the quality of goods by the seller": for in this case the rule of civil law, "simpler commendatio non obligat" - simple commendation can only be regarded as a mere invitation to a customer without any obligation as regards the quality of goods : every seller will naturally try and affirm that his wares are otherwise good to be purchased unless of course the same appears to be on evidence that the commendation was intended to be a warranty. The popular English saying "in a purchase without warranty, one's eyes, tastes and senses must be his protector" has its definite connotation and its application in matters of the nature as the present one.

38. On this score Mr. Desai contended that when there is an advertisement and the same is said to have constituted an unfair trade practice, the Commission has to examine the advertisement as a whole and assess its impact on the users and viewers. An advertiser is permitted to indulge in some amount of exaggeration or hyperbole since an advertisement is not an affidavit and as such the question of going into the same to its "letter" does not arise and it is in this context, strong reliance was placed on the decision of this Court in the case of *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.* ((1995) 5 SCC 139) in which this Court held that commercial speech is a part of the freedom of speech and expression of guarantee under Article 19(1)(a) of the Constitution. We do not, however, think it fit to express any opinion in regard thereto since the matter does not warrant such a detailed discussion on this aspect of the matter at this stage.

39. The other aspect of the matter on which strong reliance was placed by Mr. Desai is the delay involved in the matter. Admittedly "Suraksha chakra" featured continuously in the appellant's advertisement since the year 1985 without any demur or protest from any quarter and not even from the complainant. As noticed above on the factual score the complaint was filed as late as on 22-10-1997 immediately after the appellant's complaint against the advertisement in respect of "New Pepsodent" and it is on this score that Mr. Desai contended that the finding of the Commission as regards "Suraksha chakra" or the grant of an interim order of injunction in regard thereto does not

and cannot arise. Mr. Desai ascribed this move of the respondent herein as nothing but a counterblast and we do find some justification in regard thereto. The Commission according to Mr. Desai was in clear error when it recorded that "Suraksha chakra" was assailed first before the Commission. Mr. Desai contended that "Suraksha chakra" was not at all an independent complaint and at least cannot but be ascribed to be merely an incidental one by reason of the three specific complaints as noticed above. Mr. Desai contended that the Commission as a matter of fact was persuaded to issue interim order pertaining to "Suraksha chakra" by reason of the factum of an order of injunction granted by the Federal Trade Commission in the United States of America wherein a complaint was made in respect of Colgate Dental Cream with Gardol in November 1959 in the United States. In the US advertisement incidentally, there was an invisible shield protecting the tooth. But in the facts of the matter under consideration, there is no such protection as was offered in the United States but it is the resultant effect of the foaming action which stops bad breath and tooth decay and the entire family would be safe so far as tooth decay is concerned. "Suraksha" has a meaning in common acceptance and implies safety and "chakra" mean a wheel or a disc and the words put together as "Suraksha chakra" cannot be equated or be understood to mean an invisible shield which would protect the tooth as was available in the US advertisement. In this context it would be pertinent to note the observations of the Commission pertaining to its order of the grant of injunction. The Commission stated :

"In the complaint the respondent's parent company in USA was alleged to have made false, misleading and deceptive representations in advertising CDC with Gardol. The print and television advertisements gave the impression to the prospective purchasers of CDC with Gardol that persons who brush their teeth with that toothpaste would prevent decay from getting to their teeth as an invisible protective shield around the teeth is formed by CDC with Gardol. The TV advertisement depicted a coconut, tennis ball and lariat being thrown towards a person but, the coconut, tennis ball and lariat bounce off and do not reach the person at whom they are thrown because of an invisible transparent glass shield as also in no way damaged or penetrated. The advertisement of invisible shield and representation as to the degree or extent of protection was found to be false, misleading and deceptive by FTC and an order was passed directing the respondent's parent company to cease and desist from representing directly or by implication that CDC with Gardol afforded to users complete protection against tooth decay or development of cavities in their teeth. It was also brought to our notice that although the respondent had voluntarily abandoned the impugned advertisements and TV commercials during the course of hearing before FTC and gave an undertaking not to display the advertisement, containing the objectionable claim of invisible protective shield, the above cease and desist order was passed because the assurance given by the respondent's parent company was not considered sufficient for ruling out the likelihood of resumption of the impugned advertisements and unfair trade practice in some other form. It was also pointed out that since no appeal was filed, this order of FTC had become final."

40. Let us now, however, consider the observations of the Commission itself which runs to this effect :

"... falsity or otherwise of these claims can be established conclusively at the stage of trial when evidence will be adduced by the informant/complainant by examining experts and their cross-examination by the respondent. Due weight and consideration has to be given to the opinions of experts while appreciating and evaluating evidence

in order to arrive at a just conclusion and this can be done at the final stage of the enquiry."

In our view the observation or expression of opinion as above, as a matter of fact, runs counter to an order of injunction as has been granted by the Commission. Obviously the Commission was persuaded to pass the order of injunction pertaining to "Suraksha chakra" as and by way of an interlocutory order by reason of the factum of the injunction as granted by the Federal Trade Commission in the United States of America and we have already noticed earlier that in the advertisement under controversy no invisible shield to protect the tooth is available. It is the complainant's definite case that the advertisement pertaining to the foaming action, stopping bad breath and tooth decay cannot but be said to be a misrepresentation of facts and as such ought not to be permitted to be continued with such an advertisement and it is in this perspective as a matter of fact the complainant records in the complaint :

"The complainant carried out in their Research Centre well-accepted test to study the anti-bacterial efficacy, if any, of CDC. The executive summary of the test shows that :

Contact germ kill test [Ref. - Spangler S. K. Jacobs, M.R., and Applebaum, P.C., J of Antimicro Chemotherapy 39 (suppl. B) p. 23, 1997]

'The test data shows that Colgate Dental Cream has no significant impact on the survival rate of oral bacteria during the contact of 60 seconds which is more than the average brushing time of consumers. The same test done for toothpaste with standard anti-bacterial agent shows a significant drop in the survival rate of these bacteria under similar conditions.'

The complainant craves leave to refer to and rely upon the detailed report, enclosed as Annexure 6.

The analytical report clearly establishes that Colgate Dental Cream has no proven anti-bacterial ingredient nor does it have any significant anti-bacterial activity or effect. The claim made in the advertising are not proved and/or substantiated scientifically/technically and are thus false and misleading.

In India the ability of a toothpaste to protect against harmful oral germs is a very compelling consumer benefit. A national survey of consumers done by the complainant/informant in 1994 showed that 55% of all consumers see 'ability to fight germs' as the most important attribute of a toothpaste. In fact, germ protection is a strong source of competitive advantage in the market. As such, any claim in this area, must be backed by proven efficacy of the product to combat the threat of harmful oral bacteria.

The respondent is thus making advertising claims on Colgate Dental Cream for promoting sale of Colgate Dental Cream that are misleading and false, to gain unfair advantage in the marketplace to the extent of monopolising the toothpaste market, beyond the intrinsic quality of the product. The respondent has also been making the claim of 'fights tooth decay' for promoting sale of Colgate Dental Cream. This claim again is false and absolutely misleading. It is a scientifically established fact that the

well-known agent that can fight 'tooth decay' is fluoride. More than 100 long-term clinicals have been carried out to show in unequivocal terms that fluoride is capable of reducing tooth decay. The complainant encloses a summary of literature on tooth decay and the role of fluoride in reducing the same in support of the fact that presence of 'fluoride' can help in reducing tooth decay [Annexure 8 (Colly)].

The complainant/informant submits that Colgate Dental Cream does not have soluble fluoride. The fact that Colgate Dental Cream does not have soluble fluoride can be ascertained from the pack of Colgate Dental Cream (copy CDC pack photocopy is enclosed as Annexure 9).

The complainant further submits that even the claim of 'stops bad breath' is false and misleading, as bad breath is the result, of action of oral bacteria that act on proteins present in saliva or food particles giving volatile sulphur compounds (VSC) like hydrogen sulphide and indoles. These compounds are volatile and are currently considered as root cause of bad breath. Process of generation of VSCs is well reported [Steenberghe Van D and Rosenberg M (ed.), Lueven University Press, 1995].

The respondent has also published a report (Niles H.P., J dent. Res. 73 sp. issue, Abst. No. 1579) demonstrating that reduction in VSCc can be achieved by using triclosan in the toothpaste. A placebo (without triclosan) showed no effect over and above the negative control. Demonstration of reduction in VSC is prerequisite for making claims on bad breath. It is, therefore, clear that Colgate Dental Cream which does not contain triclosan, cannot suppress the bad breath leave alone 'stops' it."

41. The averments as above unmistakably, therefore, depict that it is on the basis of laboratory tests that the complainant has found that representation is not correct and it is on this perspective that Mr Desai also contended that the entire grievance of the complainant has to be decided on the basis of the evidence at the time of the trial but not at any stage prior thereto. As a matter of fact the Commission itself, as noted above, has recorded such a finding, but after recording the same, came to find about "Suraksha chakra" and we find some justification in Mr Desai's criticism as regards the non-application of mind in the matter of passing of an order of injunction as impugned in this appeal. On a perusal of the complaint "Suraksha chakra" cannot be said to be within the ambit of the foaming action and has been referred therein only to complete the advertisement portion as an incidental issue and obviously the Commission was persuaded more by the US Trade Commission's Report rather than consideration of the allegations in the complaint itself.

42. Mr Salve appearing for the respondent complainant strongly contended that by using "Suraksha chakra" in the commercial advertisement specially in Hindi, the appellant has, in fact, targeted the ordinary common man in the Hindi belt so as to give an expression that the toothpaste as a matter of fact provides a durable and permanent protection with respect to germs, tooth decay and bad breath to the entire family and "Suraksha chakra" depicts the same. Mr Salve contended that at this stage, the question of there being any definite finding on any of the issues would not arise since only an arguable case is required to be made out at this juncture. Probably an arguable case leading to the establishment of the prima facie case is required - we have dealt with this issue in the early part of this judgment and as such we need not detain ourselves on this score but the fact remains that the question of the balance of convenience of the parties have not been dealt with or discussed in the order of the Commission. Mr Salve in continuation of his submission contended that there is, in

fact, a cross-appeal by the complainant by reason of the failure of the Commission to pass orders as regards the three limbs of the advertisement namely "germ fighting", "tooth decay" and "bad breath" and the fact, however, remains that the Commission was otherwise satisfied that this cannot but be termed to be a case similar in nature as was heard by the Federal Trade Commission wherein the invisible shield was taken recourse to by the appellants. Mr Salve contended that at least there would be an arguable case by reason of the order of FTC and as such the question of interference in appeal by this Court in terms of the provisions of Section 55 does not arise more so by reason of the fact that the Commission has not returned any finding as regards the three principal issues but passed an order of injunction only as regards the "Suraksha chakra" by reason of the specific order of FTC as noticed above.

43. The submission of Mr Salve at the first blush is rather attractive that at this stage we are not really concerned with the factum of establishment of any truth or falsity but merely a prima facie case or an arguable case resulting in establishment of a prima facie case and in that perspective the issue therefore emerges as to whether such a prima facie case has been made out or not - we are, however, afraid that the answer cannot but be in the negative. The Federal Trade Commission was confronted with an invisible shield which was protecting the tooth from a coconut, tennis ball and a piece of stone and it is on this factual backdrop that FTC came to a conclusion that withstanding of the pressure of the coconut or resistance by an invisible shield by reason of the user of the toothpaste would not arise. The situation in the present context is however totally dissimilar. No material object is bouncing back after hitting the tooth by reason of "Suraksha chakra". "Suraksha chakra" comes up by reason of the factum of fighting of germs, tooth decay and bad breath - it has not been proved or even enquired as to whether Colgate Dental Cream can avoid decay or germs or whether it does or does not stop bad breath - it is only against these three items that there is "Suraksha" by means of a "chakra". There is no claim that the toothpaste would act as a shield against any hard substance which may or may not tantamount to misleading the common unwary purchaser in the Clapham omnibus. This "Suraksha chakra" refers to two basic elements, namely "tooth decay" and "germ fighting" coupled with stopping of bad breath. It does not as a matter of fact require any special knowledge to appreciate or understand as to the effect of the "Suraksha chakra". No evidence has been led as to whether there would be avoidance of "tooth decay" or "germ fighting" by reason of the user of the toothpaste and without rendering evidence on these two basic elements in our view, the question of there being a prima facie case for establishment for the grant of interlocutory injunction does not and cannot arise. The Commission, as appears, was totally obsessed with FTC's finding in regard to the invisible shield without however any factual support in the matter under consideration. The Commission it seems in fact misapplied and misread the observations of the Federal Trade Commission since there is no factual similarity between the two. A prima facie case or at least an arguable case does not and cannot possibly suggest an order of injunction without any factual support. There ought to be some such support on facts without which there would not be any justification for grant of an interim order.

44. Mr Salve next contended that the complaint pertains to vindication of a public right and since the public interest is involved, the question of any delay for moving the Commission does not arise and more so, it is a remedy to public wrong and not a personal relief. We are, however, unable to record our concurrence at this juncture. Public wrong, if any, needs to be assessed and proved, without which the question of having an order of injunction would not arise. While it is true that the relief prayed for is statutory in nature but that does not clothe the Commission to pass orders de hors the basic principles of law.

45. In fine, the submission of Mr Desai as regards the bona fides of the application under Section

12-A cannot also be brushed aside and in our view non-consideration thereof by the Commission has resulted in a clear error on the part of the Commission. The fact that within a period of 10 days of the application by the appellant herein before the Commission, the respondent files the instant complaint with an application for an interim prayer - though, however, this "Suraksha chakra" admittedly is available in the commercial advertisement since 1985 and in the visual advertisement in Hindi at least since 1987 - there was no lodgement of any protest or complaint in public interest but it only filed as a backlash on the appellant's complaint as noticed above and the motive therein in our view cannot also be ruled out.

46. The appeal preferred by the complainant as against the failure of the Commission to pass orders on the other three elements of the advertisement in our view at this stage cannot be entertained and we record our concurrence with the finding of the Commission that without going through the evidence, it is neither feasible nor proper in any event to pass any orders thereon at this juncture. We are dismayed, however, by the fact that after recording a finding on that score as noticed above, the Commission passed an order of injunction in regard to an issue without, however, any material on record.

47. As a matter of fact there is no evidence of a single consumer being misled and not a whisper as to what constituted an unfair trade practice pertaining to "Suraksha chakra". The Commission also thought it fit not to record any reason or justification for the grant of an interim order of injunction in spite of finding as above and before the matter is investigated and complaint is finally heard. This apart, the factum of non-availability of any explanation for more than 13 years' delay has also not been delved into by the Commission at all.

48. In that view of the matter the question of there being any order of injunction at this stage of the proceedings on the face of the finding as passed by the Commission itself does not and cannot arise. Appeal No. 2620 of 1998 [Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.] therefore succeeds. The appeal as filed by the complainant being No. 3288 of 1998 [Hindustan Lever Ltd. v. Colgate Palmolive (India) Ltd.] stands dismissed. Each party to bear its own cost.

49. Be it recorded that any observation made in this order shall not in any way affect the hearing of the matter before the Commission and the Commission would be at liberty to deal with the matter in accordance with the law and without being inhibited by any observations made in this order.