

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

IA NO. GA-COM/1/2024
IA NO. GA-COM/2/2024
In IP-COM/18/2024

Emami Limited
Vs
Dabur India Limited

For the plaintiff : Mr. Ranjan Bachawat, Senior. Advocate
Mr. Debnath Ghosh, Senior. Advocate
Mr. Subhasis Sengupta, Advocate
Mr. Biswaroop Mukherjee, Advocate
Ms. Pubali Sinha, Advocate
Ms. Mini Agarwal, Advocate

For the defendant : Mr. Sudipto Sarkar, Sr. Advocate
Mr. Sourojit Dasgupta, Advocate
Mr. Abir Debnath, Advocate
Mr. Nilankan Banerjee, Advocate
Mr. Pradipta Bose, Advocate

Judgment on : 17.01.2025

Ravi Krishan Kapur J.

1. In a suit for disparagement and infringement, the petitioner seeks interim orders of restraint against the respondent, inter alia, from telecasting, displaying, airing, disseminating a television commercial launched by the

respondent on 28 June, 2024 for its product “Dabur Cool King Icey Perfume Talc” (the impugned advertisement).

2. Briefly, the petitioner is *inter alia* engaged in the Fast Moving Consumer Goods (FMCG) sector and manufactures talcum powder sold under the mark ‘Navratna’ and ‘Dermi Cool’. It is alleged that the market share of both the above products of the petitioner is approximately 17% and 25.5% respectively. It is contended that the colour combination of sea green and white colour skin in relation to talc and the distinctive bottle and cap design alongwith the green and white colour combination in respect of prickly heat powders are exclusively associated with the petitioner’s products. The respondent is a trade rival and manufacturer of FMCG products including talcum powder.

3. The story board of the offending commercial is as follows:



THE SCENE OPENS WITH A GROUP OF GIRLS FIRING HEAT WAVES



GROUP OF GIRLS FIRING HEAT WAVES



THE HEAT IS TERRIBLE AND PEOPLE ARE LOOKING UNCOMFORTABLE IN THE HEAT



DIALOGUE STARTS



VO: "KOI NAHI BACH PAYEGA,"
CLOSE UP SHOT OF PERSON SWEATING



VO: "GARMi AUR PASEENE SE,"
A PERSON APPLYING TALC and SEEN UNHAPPY
WITH THE RESULTS



THIS PERSON AFTER SPRINKLING PRICKLY HEAT POWDER
STILL LOOKS HOT AND SWEATY, AS IF THE TALC APPLIED IS
NOT EFFECTIVE



VO: "KAHAN HAI TUMHARA DABUR COOL KING'SUDDENLY
GET SURPRISED, HEAR SOME NOISE AND LOOKUP



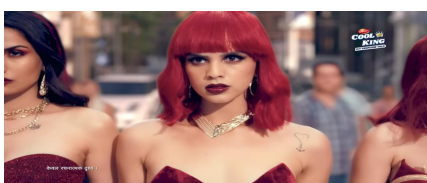
DABUR COOL KING TALC APPEARS FROM THE TOP AND
BACKGROUND MUSIC STARTS PLAYING



BACKGROUND MUSIC CONTINUES TOPLAY, THE PACK LANDS
ON THE GROUND



IT IS SHOWN, APPARENTLY COOL WAVE HITS PEOPLE, AS IF
THIS NEW TALC(DABUR COOL KING TALC) IS PERCEIVED TO
DELIVER SUPERIOR COOLING THAN TALC SHOWN EARLIER IN
THE FILM



GIRLS CONTINUE STARING AT THE DABUR COOL KING PACK



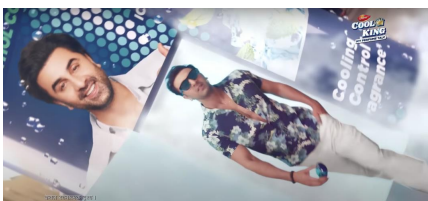
BACKGROUND MUSIC IN CREASES, REACHING A CRESSENDO



THE TALC BOTTLE DOOR OPENS, RANBIR KAPOOR APPEARS



RANBIR KAPOOR COMES OUT OF DABUR COOL KING TALC, WALKING ON THE STREET



THE SCREEN TITLS, ALONGWITH THIS THE SONG STARTS



GIRLS START LOOKING AT DABUR COOL KING, SONG CONTIUES-BACHNAAE HASEENO



RANBIR KAPOOR HOLDS UPTO THE DCK TALC TO INTRODUCE IT – SONG CONTINUES – DABUR COOL KING TALC AA GAYA



RANBIR KAPOOR APPLIES THE PRODUCT



THE APPLIED TALC, THEN TRANSLATES INTRO COOLING CRYSTAL LIKE UNITS WHICH ARE THEN SHOWN TO BE FLYING OUT IN THE STREET



RANBIR KAPOOR IS THEN SHOWN TO BE RECOMMENDING AND GIVING DABUR COOL KING TALC TO A PERSON EARLIER USING THE PRODUCT MUSIC CONTINUES



THE PEOPLE THEN SEE THE DABUR COOL KING PRODUCT SHOT



THE CONSUMER IS THEN SHOWN APPLYING DABUR COOL KING TALC AND HAS A LOOK OF RELIEF ON HIS FACE



THE DABUR COOL KING TALC, THEN TRANSLATES INTO COOL CRYSTALS OF ICE AND IT IS SHOWN THAT THE PERSON FEELS ICEY COOL WITH ALL ICE AND MENTHOL BACKGROUND-SONG CONTINUES-MENTHOL CRYSTALS KE



WE THEN SEE RANBIR KAPOOR DANCING WITH THE SONG, SONG CONTINUOUS-ICEY PERFUME CHA GAYA



THEN A COOL SWIRL OF ICE AND MENTHOL GETS FORMED AROUND RANBIR KAPOOR, AND THE SONG CONTINUES-COOLING KA AASHIQ



RANBIR KAPOOR THEN THROWS SOMETHING LIKE A COOL BLAST OF ICE ON TO THE HEAT WAVE, SONG CONTINUES-GARMI KA DUSHMAN



COOL WAVE OF DABUR COOL KING AND THE GIRLS FIRING HEAT WAVES COLLIDES



THE COOL WAVE FREEZES OVER THE HEAT WAVES



THE GIRLS THEN FEEL A SENSATION OF ICEY CRSTAL AND THEIR HAIR TURNS BLUE, WHEN COLLIDING WITH DCK TALC'S COOL WAVE



BACKGROUND VO NAYA DABUR COOL KING PERFUME TALCUM POWDER PACK IS SHOWN AGAINST A BACK GROUND OF COOLING CRYSTALS



RANBIR KAPOOR APPLIES DCK TALC



THE POWDER TURNS INTO CRYSTALS OF ICE VO-ICEY MENTHOL COOLING CRYSTALS RAKHE 12 GHANTE TAAZA



RANBIR THEN COMPARES THE PRICKLY HEAT POWDER CALLING IT OUT "SADHARAN" AND INDICATES THAT DABUR COOL KING TALC HAS SUPERIOR COOLING RANBIR DIAGLOUE "SAADHARAN" NAHI, SIRF DABUR COOL KING DE SUPER ICEY COOLING



THE AD ENDS WITH RANVEER SURROUNDED BY THE WOMEN AND EVERY ONE IS SURROUNDED BY ICE COOLING CRYSTAL LIKE UNITS

4. It is contended that the impugned advertisement makes a direct reference to the products of the petitioner. The same feature, configuration, design and colour of the container bottle with the unique cap depicted in the impugned

advertisement which is only identifiable with the petitioner's product. It is also contended that the word '*sadharan*' displayed on the bottle in the impugned advertisement in white colour with a green coloured cap having a distinctive tapered notch end can only be identified with the petitioner's products. The use of the word '*sadharan*' also reflects poorly on the petitioner's products. In conclusion, the impugned advertisement seeks to convey that the products of the petitioner are ineffective and useless.

5. It is contended that the impugned advertisement has also been deliberately and intentionally conveyed in the electronic and social media which has a higher impact and outreach and has been displayed more than 2000 times over different media formats including You Tube and Instagram. As such, by airing the impugned advertisement the respondent has particularly identified the petitioner's product while also seeking to run down the entire class of talcum and prickly heat powders.
6. In such above circumstances, by specifically identifying the petitioner's product and describing them as '*ordinary*' or '*sadharan*', the idea conveyed in the mind of any reasonable consumer is that the petitioner's products are bad. The respondent is also guilty of denigrating and disparaging all other powder products by describing the entire class of talcum powders to be ordinary, ineffective and useless. As such, the impugned advertisement also disparages the genus of talcum and prickly heat powders in general and specifically targets the products of the petitioner. In support of its contentions, the petitioner relies on the decisions in *Hindustan Unilever*

Limited vs. Reckitt Benckiser (India) Pvt. Ltd. MANU/DE/2447/2023, Pepsi Co. Inc. vs. Hindustan Coca Coal Ltd. 2003 SCC OnLine Del 802, Annamalayar Agencies vs. WS & Sons Pvt. Ltd. 2007 SCC OnLine Mad 1645, Dabur India Limited vs. Colgate Palmolive India Ltd. 2005 (79) DRJ 461, Parle Products Private Limited vs. Britannia Industries Ltd. 2022 SCC OnLine Del 4141, Procter & Gamble Hygiene and Healthcare Limited vs. Reckitt Benckiser (India) Pvt. Ltd. 2022 SCC Online Mad 1747, Dabur India Limited vs. Emami Limited 2004 (75) DRJ 356, Dabur India Limited vs. Colgate Palmolive India Ltd. 2004 (77) DRJ 415, Marico Limited vs. Dabur India Limited MANU/WB/1083/2022.

7. On behalf of the respondent it is contended that word 'sadharan' can never *per se* be disparaging and has only been used in a comparative sense without any sense of malice. The entire case of generic disparagement is also untenable. In any event, the petitioner themselves have on numerous occasions in selling and marketing their products used the word 'ordinary' and this is common in the industry. In support of their contentions, the respondent relies on *Hindustan Unilever Limited vs. Emami Limited* 2019 SCC OnLine Del 7809, *Dabur India Limited vs. Emami Limited* 2019 SCC OnLine Del 9022, *Reckitt Benckiser (India) Pvt. Ltd. vs. Gillete India Limited* 2016 SCC OnLine Del 4737, *Eveready Industries India Limited vs. Gillete India Limited* 2012 SCC OnLine Cal 12500, *Tata Sons Pvt. Ltd. & Anr. Vs. Puro Wellness Private Limited & Anr.* 2023 SCC OnLine Del 6338, *Procter & Gamble Home Products Pvt. Ltd. vs. Hindustan Unilever Limited* 2017 SCC OnLine Del 7072

and *Dabur India Limited vs. WIPRO Limited, Bangalore 2006 SCC OnLine Del 391.*

8. Upon filing of this suit, an *ad interim* order dated 11 July 2024 was passed *inter alia* restraining the respondent from telecasting the impugned advertisement. The *ad interim* order dated 11 July 2024 is as follows:

“In view of the above, the respondent, its men, servants, agents, representatives and/or anyone claiming through the respondent is restrained from displaying and/or playing and/or airing and/or telecasting in their advertisement “Cool King” by showing the bottle/container of “Dermi Cool” and “Navratna” of the petitioner by referring the same as “sadharan” till 9th August, 2024.”

9. Thereafter, the respondent filed GA 2 of 2024, *inter alia* seeking modification of the impugned order on the ground that the respondent was willing to vary the impugned advertisement by changing the design of the bottle and by removing the green cap as well as any other reference to the colour green. Despite repeated opportunities, the parties were unable to arrive at any consensus. The primary bone of contention being that the use of the word ‘ordinary’ even in the modified advertisement was not acceptable to the petitioner.
10. It is true that the concession made on behalf of the respondent at the *ad interim* stage to remove the bottle in the impugned advertisement and the colour green is not binding. However, in view of the offer to modify the impugned advertisement by changing the unlabelled white & green container shown in the impugned advertisement alongwith the cylindrical bottle any further discussion on this aspect of the matter with reference to the

impugned advertisement is academic at this stage. Once the reference to the products of the petitioner is removed in the impugned advertisement both by colour and by the shape of the bottle, the only question which remains for consideration is whether the word 'ordinary' or 'sadharan' *per se* can attract any prohibition.

11. It is necessary to add a touch of reality in such matters. Consumers are not ignorant. In someways, trade mark law and for that reason all intellectual property law is primarily meant to protect the public from confusion or deception. It is not the role of trade mark law to pander to *illusion* and amplify the image of any product. Undoubtedly, the role of advertising or marketing cannot be undermined. The use of words like ordinary, extra-ordinary, exceptional or unexceptional without any reference to a particular manufacturer or particular product are adjectives, descriptors or attributes which only add to puffery by any manufacturer and no rival can afford to be hypersensitive. It is also necessary to consider the context in which the word *ordinary* or *sadharan* has been used. *Prima facie*, the word 'sadharan' or 'ordinary' is being used more in a neutral sense without any negative connotation. An underlying interest which also needs to be balanced is the freedom of speech enshrined in Article 19(1) of the Constitution of India. In such circumstances, the use of the word 'ordinary' *per se* without any reference to a particular manufacturer cannot be interpreted to be defamatory, disparaging or offensive. [*Tata Sons Private Limited vs. Puro*

Wellness Private Limited & Anr 2023 SCC OnLine Del 6338 and Dabur India Ltd. vs. Wipro Limited Bangalore 2006 SCC OnLine Del 391].

12. There is also no merit in the case of generic disparagement. Significantly, the respondent is a rival manufacturer and distributor of talcum powders. Both the petitioner and respondent are trade rivals selling the similar genus of goods. In any event, keeping in mind the size of the class targeted, the generality of the charge and the extravagance of the accusation there is no basis to the allegation of generic disparagement. (*Knuffer vs. London Express Newspaper Ltd. [1944] 1 ALL ER 495*).
13. Similarly, there is no substance in the argument that the identification in the impugned advertisement is so pervasive that even if all references to the petitioner's products are removed, the viewers and prospective customers would immediately associate and identify any modified advertisement with the petitioner's product. Admittedly, the impugned advertisement has neither been telecast nor broadcast for nearly six months. The creation of such advertisements is time consuming and expensive. In some cases, it may be more practical and commercially prudent to modify an existing advertisement rather than conceive of a new advertisement. In view of the above, there is no merit in the contention of recall value and the same stands rejected.
14. There is also no question of pre-approving any proposed TVC as contended by the petitioner. It is true that the modified or changed advertisement is not the subject matter of this suit. Nevertheless, the contention that a modified

advertisement can never be looked into is unsustainable. In order to do complete justice between the parties and bring a quietus to litigation, Courts when adjudicating such matters do take into consideration modifications, alterations and variations to the impugned advertisement in order to come out of the mischief of the restraint orders or negate any possible element of disparagement. [*Hindustan Unilever Limited vs. Emami Ltd.* 2019 SCC OnLine Del 7809, *Dabur India Ltd. vs. Emami Ltd.* 2019 SCC OnLine Del 9022, *Reckitt Benckiser (India) Pvt. Ltd. vs. Gillete India Ltd.* 2016 SCC OnLine Del 4737, *Reckitt & Coleman of India Ltd. vs. Kiwi TTK Ltd.* 1996 (16) PTC 393 (Del) and *Eveready Industries India Ltd. vs. Gillete India Ltd.* 2012 SCC OnLine Cal 12500].

15. The authorities cited by the petitioner on the aspect of *ordinary* or *sadharan* are distinguishable and inapposite. In *Hindustan Unilever Limited vs. Reckitt Benckiser (India) Private Limited* (2023) 95 PTC 239 (Del), the Court had arrived at a finding that the impugned advertisement clearly indicated an intention to compare the two rival products i.e. 'Domex Freshguard' and that of 'Harpic Power Plus 10x Max Clean'. It was held that the clear inference from impugned advertisement which could be drawn by a customer viewing the impugned video is that the product of the defendant 'Harpic' was ineffective. Similarly, in *Parle Products Pvt. Ltd. vs. Britannia Industries* 2022 SCC OnLine Del 4141, it was held that the use of the letter 'G' in the print advertisement as also the use of the similar looking packaging in the impugned video left no matter of doubt that it was the defendant's product

which was being identified and compared. Moreover, in *Dabur India Limited vs. Colgate Palmolive India Ltd.* 2005 (79) DRJ 461, the interpretation of the word 'sadharan' was in the facts and circumstances of that case comparing *Chawanprash* with *Lal Danta Manjan*. Hence, the genus of the two products were distinct, separate and altogether different and the above decision has to be read in that context. In such circumstances, none of the above decisions support the proposition that the use of the word 'ordinary' or 'sadharan' *per se* without any identification can be interpreted to be defamatory or disparaging.

16. In view of the above, the petitioner has been able to demonstrate a strong *prima facie* case on merits insofar as the impugned advertisement is concerned. The balance of convenience and irreparable injury is also in favour of orders being passed as prayed for by the petitioner.

17. In view of the above, the *ad interim* order dated 11 July 2024 is modified to the extent that there shall be an interim order of restraint of the impugned advertisement. It is made clear that the order of restraint is limited to the impugned advertisement as a whole and not to any particular portion or any particular word in the impugned advertisement. With the above directions, both the applications being GA 1 of 2024 and GA 2 of 2024, stand disposed of.

(Ravi Krishan Kapur, J.)