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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**IN ITS COMMERCIAL DIVISION**

**NOTICE OF MOTION NO. 1094 OF 2019**

**IN**

**COMIP NO. 596 OF 2019**

Marico Limited, )  
A company incorporated under Indian Law, having )  
its registered office at 7<sup>th</sup> Floor, Grande Palladium, )  
175 CST Road, Kalina Santacruz (East) )  
Mumbai – 400 098 )...Applicant

**IN THE MATTER BETWEEN :**

Marico Limited, )  
A company incorporated under Indian Law, having )  
its registered office at 7<sup>th</sup> Floor, Grande Palladium, )  
175 CST Road, Kalina Santacruz (East) )  
Mumbai – 400 098 )...Plaintiff

**Versus**

Abhijeet Bhansali )  
an Indian Inhabitant, having his address at Mumbai )  
Maharashtra and having email address )  
itsallaboutthebeard@gmail.com and )  
beardedchokra@qyuki.com )... Defendant

Mr. Virag Tulzapurkar, Senior Advocate and Mr. Hiren Kamod, Advocate alongwith Mr. Nishad Nadkarni i/b. Khaitan & Co. for the Plaintiff  
Dr. Abhinav Chandrachud, Advocate i/b. Mr. N. Amin for the Defendant.

**CORAM: S. J. KATHAWALLA J.**  
**RESERVED ON: 23<sup>rd</sup> AUGUST 2019**



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**PRONOUNCED ON : 15<sup>th</sup> JANUARY, 2020**

**JUDGMENT:**

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1. The rapid expansion and commercialisation of the Internet has brought forth novel legal disputes which challenge the conventional principles and precedents which apply to them. The present matter is an example of just that.

### FACTS

2. According to the Plaintiff – Marico Limited, the Plaintiff is one of the leading players in the Fast Moving Consumer Goods (FMCG) market in India, that manufactures and markets *inter alia* packaged edible oil, edible coconut oil, oats, hair oil, beauty products and other personal care product(s) under its portfolio of various well-known and prestigious brands; that one of the Plaintiff's most well-known trademarks is PARACHUTE under which it markets *inter alia* its edible coconut oil; that the trademark PARACHUTE is amongst the most reputed brands owned by the Plaintiff, and the product sold under the mark PARACHUTE is known to be synonymous with edible coconut oil of excellent and impeccable quality; that the Plaintiff has secured registration of its trademark PARACHUTE bearing registration all in Class 29; that the Plaintiff has undertaken extensive promotion of its edible coconut oil sold under the brand PARACHUTE in various media; that the Plaintiff

manufactures its PARACHUTE oil in accordance with the extant regulations and the ingredients of the same are compliant with the regulations in force; that the Plaintiff has also obtained necessary licenses under the Food Safety and Standards Act, 2006 and has complied with the provisions relating to ingredients, formulation and labelling under the extant regulations; that the Plaintiff's PARACHUTE edible coconut oil is 100% pure, natural and unrefined expeller pressed coconut oil; which is a) unrefined; b) unbleached c) non-hydrogenated d) non-deodorized e) without solvents and (f) retains all its natural nutrients; that the Plaintiff's product - edible coconut oil bearing the mark PARACHUTE enjoys immense reputation and goodwill amongst the general public; that in the Indian market, the Plaintiff is the market leader in the category of edible coconut oils and holds 46.7% of the market share in respect of the same.

**2.1** The Defendant is a "YouTuber" / "V-Blogger" who has his own channel titled "Bearded Chokra" on the popular website [www.youtube.com](http://www.youtube.com). On his channel, the Defendant who claims to have a Masters degree in Bio-Technology from the Mumbai University, produces and uploads videos wherein he reviews products of various manufacturers. On or about 1<sup>st</sup> September 2018, the Defendant published a video titled "***Is Parachute Coconut Oil 100% Pure?***". In this video, the Defendant reviewed the Plaintiff's PARACHUTE coconut oil. According to the Plaintiff, in or about last week of January 2019, the Plaintiff came across the Impugned video published by the Defendant. It is the Plaintiff's case that in the Impugned Video the Defendant makes claims and statements with regard to the Plaintiff's PARACHUTE edible coconut Oil, which are false and unsubstantiated. The Plaintiff states that as a whole, the Impugned Video is disparaging and denigrating in nature.

**2.2** The Plaintiff through its Advocates sent an email dated 28<sup>th</sup> January 2019 to the Defendant whereby the Defendant was called upon to cease and desist from publishing or in any manner communicating the Impugned Video to the public and calling upon him to remove the Impugned Video from social media sites including his YouTube channel. On 29<sup>th</sup> January 2019, the Defendant replied to the Plaintiff's Advocates' email *inter alia* defending his video and also proposed to re-make / modify and / or delete portions of the Impugned Video subject to certain conditions stated therein. On 30<sup>th</sup> January 2019, the Defendant sent another email to the Plaintiff's Advocates stating that he is expecting a response from the Plaintiff. On 30<sup>th</sup> January 2019, the Plaintiff, through its Advocates, replied with a holding email stating that the contents of the Defendant's emails were being considered by the Plaintiff and called upon the Defendant to remove the Impugned Video in the meantime. Vide his email dated 31<sup>st</sup> January 2019, the Defendant refused to comply with the aforesaid request of the Plaintiff stating that he had a right to voice his opinion. On 11<sup>th</sup> February 2019, the Plaintiff filed the present suit and on 13<sup>th</sup> February 2019, the Plaintiff made an application for urgent *ad-interim* reliefs. The Defendant filed its Affidavit in Reply; the Plaintiff filed its Affidavit in Rejoinder; and the Defendant filed a Supplementary Affidavit in Reply. Since the pleadings in the matter were complete, by consent of both the sides, this Court took up the Notice of Motion for final hearing.

**2.3** The Plaintiff is *inter alia* praying for injunction against the Defendant, restraining him from (i) publishing or broadcasting or communicating to the public the Impugned Video, (ii) disparaging or denigrating the Plaintiff's PARACHUTE



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COCONUT OIL product or any other product of the Plaintiff or the Plaintiff's business and (iii) infringing the registered trademarks of the Plaintiff.

**PLAINTIFF'S SUBMISSIONS :**

**INTENTION TO MALIGN**

3. The Ld. Senior Advocate for the Plaintiff submitted that the Defendant's video is a targeted attack directed against the Plaintiff's product made with an attempt to attract more viewers towards his video. He submitted that the Impugned Video provides incorrect information and deceives the viewer into believing that the tests conducted therein substantiate the claim of the Defendant that the Plaintiff's product is of inferior quality and / or is inferior to other oils.

3.1 The Ld. Senior Advocate for the Plaintiff submitted that the impugned video as a whole is disparaging and denigrating in nature. He submitted that the Impugned Video maliciously published by the Defendant comprises of words and visuals, in respect of the Plaintiff's PARACHUTE COCONUT OIL, which are false in nature and which have not only denigrated the Plaintiff's product but also caused and likely to further cause special damage to the Plaintiff. He submitted that since the Defendant claims that creation and publication of such videos is his occupation / calling and source of livelihood, the Defendant's review cannot be equated or treated at par with any other review provided by an ordinary consumer since the intention of an ordinary consumer is not to generate viewership or hits and consequently earn revenues from the impact created by the Impugned Video. He further submitted that the Defendant promotes a competing product PURE & SURE organic cold pressed coconut oil in his Impugned Video in substitution for the product of the Plaintiff and

urges the viewers to stop using the Plaintiff's PARACHUTE COCONUT OIL. He submitted that the Defendant seeks to promote two other competing products by providing links for purchasing these products from online retailers such as [www.amazon.com](http://www.amazon.com). He submitted that the acts of the Defendant fall under the category of 'commercial activities' and not a general review of the product by an ordinary consumer.

**3.2** The Ld. Senior Advocate for the Plaintiff submitted that the Defendant in his video is spreading a false message with respect to the Plaintiff's PARACHUTE COCONUT OIL insinuating *inter alia* that:

- a)** The packaging of the Plaintiff's PARACHUTE COCONUT OIL is inferior and that the cap of the bottle of the PARACHUTE COCONUT OIL is flimsy;
- b)** The fragrance of the Plaintiff's PARACHUTE COCONUT OIL is very strong and it smells similar to a rotten coconut;
- c)** The packaging of the product does not mention the grade of the coconut used, where they have been extracted from and which coconut it has been extracted from;
- d)** From the tests conducted by the Defendant, the Plaintiff's PARACHUTE COCONUT OIL is inferior to organic cold pressed oils;
- e)** The flavour of PARACHUTE COCONUT OIL suggests that the oil is made from poor quality coconuts or is heated to a high temperature;
- f)** The Plaintiff's PARACHUTE COCONUT OIL has impurities and that the same are seen once the oil is frozen;
- g)** There is a vast difference between the nutritional value of a virgin coconut oil and that of the Plaintiff's PARACHUTE COCONUT OIL;

*h)* The antibacterial properties or antifungal properties and nutrients in PARACHUTE COCONUT OIL are less due to the processing it undergoes;

**3.3** With reference to these statements / insinuations made by the Defendant in the video, the Ld. Senior Advocate for the Plaintiff submitted:

- a)* That it is inconceivable that the Defendant who claims that he promotes PURE & SURE coconut oil since 'he consumes it himself', presumably on a regular basis and has used only one bottle of the Plaintiff's PARACHUTE COCONUT OIL is in a position to make a bald statement that the cap often breaks. He submitted that on the contrary, the Plaintiff has stated that it has received the INDIA STAR Packaging Award 2017 across 12 categories;
- b)* That the Defendant's insinuation that the Plaintiff's product is made of rotten coconuts is not an honest or fair opinion and cannot be equated in any manner or form with a hyperbole or an exaggerated statement not to be taken literally. He submitted that the truth is that the aroma of the Parachute Coconut oil is natural and characteristic of Copra;
- c)* That since the packaging of the Plaintiff's product does not mention the grade of the coconut used, where they have been extracted from and which coconut it has been extracted from, the Defendant is attempting to imply that there is some information sought to be concealed by the Plaintiff since the coconuts used are of inferior quality, which is factually incorrect;
- d)* That the Defendant fails to mention the nature of the impurities in the Plaintiff's PARACHUTE COCONUT OIL. Sedimentation and particulate matter is in fact characteristics of any coconut oil;

- e) That the nutritional values mentioned on the products produced before this Court during the course of the hearing indicate that there is no substantial difference but only a minor variance in the nutritional values between the Plaintiff's product and the products recommended by the Defendant in his video.
- f) That the Defendant admits that the PARACHUTE COCONUT OIL is unrefined and therefore has not undergone any processing but makes a contradictory claim that the antibacterial properties or anti fungal properties and nutrients in PARACHUTE COCONUT OIL are less due to the processing it undergoes.

3.4 The Ld. Senior Advocate for the Plaintiff submitted that the Defendant ought to have conducted proper research or relied on lab reports before coming to the conclusion and making the video. He submitted that the least that the Defendant could have done was to have conducted enquiries with the Plaintiff to ascertain the truth/facts before making the false, reckless and disparaging statements in the Video since the impression given by the use of forceful, decisive and assertive statements/phrases in the Impugned Video is that the Defendant is an expert and has undertaken extensive research on the topic and / or is drawing conclusions on the basis of sound and thorough groundwork, research etc.

3.5 The Ld. Senior Advocate for the Plaintiff further submitted that the Defendant's malice is evinced by the denigrating replies posted by the Defendant on the comments to the Impugned Video, such as follows:

- a) ***“This video was only to bring awareness to the general public of the inferior quality of parachute coconut oil.”***

- b) *“Also the freeze test method was only to show the impurities.”*
- c) *“I know there are many tricks which companies use to make a fool of the public and that’s what I am busting.”*

The Ld. Senior Advocate for the Plaintiff submitted that the Defendant knew fully well that the contents of the Impugned Video constituted the tort of malicious falsehood and slander of goods; that for this reason the Defendant offered to delete certain portions of the video where he sought to make a comparison and also offered to make a completely fresh video after a re-evaluation of a fresh product of the Plaintiff.

#### **Freeze Test – Wrong Test and Wrong Comparison**

4. The Ld. Senior Advocate for the Plaintiff submitted that the only test conducted by the Defendant to come to the conclusion that PARACHUTE COCONUT OIL is inferior to the other oil is that of freezing and no other test whatsoever has been conducted either by the Defendant or through an independent testing centre to actually test the quality of the Plaintiff’s PARACHUTE COCONUT OIL. He submitted that the alleged test conducted by the Defendant is a wrong test and the comparison is a wrong comparison. He submitted that the Defendant has not conducted any tests whatsoever to evaluate the nutritional value of the PARACHUTE COCONUT OIL *vis-à-vis* virgin coconut oil or even organic cold pressed coconut (copra) oil to be in a position to infer that the PARACHUTE COCONUT OIL lacks nutritional value. He submitted that the Defendant has sought to deliberately mislead the consumers by inserting sudden inconsequential references to Virgin Coconut Oil and its benefits or the differences between refined

oils and unrefined oils in the Impugned Video which have no relation to the alleged tests conducted and the alleged inferior quality of the PARACHUTE COCONUT OIL.

### **Disparagement**

- 4.1 The Ld. Senior Advocate for the Plaintiff submitted that the Plaintiff has made out a case proving that the Defendant's actions satisfy all ingredients to constitute disparagement, slander of goods, and malicious falsehood. He relied upon the *Halsbury's Laws of England Volume 8, paras 274, 275, and 277 at pages 137, 138 and 140, respectively.*
- 4.2 Relying upon the decision of this Court in *Hindustan Unilever Limited vs. Gujarat Co-operative Milk Marketing Federation Ltd & Ors.*<sup>1</sup>, the Ld. Senior Advocate for the Plaintiff further submitted that there is a difference between an action for defamation and an action for disparagement, slander of goods, malicious falsehood which was considered by this Court and it has been held that the defences available in an action for personal defamation would not be available in the case of an action for disparagement.
- 4.3 On the aspect of special damages, the Ld. Senior Advocate appearing for the Plaintiff relied upon the commentary in *Ratanlal Dhirajlal on Law of Torts 22nd Edition 1992 (Reprint 1995) in Chapter XII page 234.*
- 4.4 He submitted that even if the Plaintiff is in a position to demonstrate that one customer has been lost or a pleading which demonstrates that the action would lead or has led to such damage would suffice and satisfy the criteria of special damage.

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<sup>1</sup> 2017 SCC Online Bom 2572

4.5 The Ld. Senior Advocate for the Plaintiff submitted that special damage does not mean special in terms of quantum but special in terms of the nature of the damage which is simpliciter monetary loss that cannot be valued and compensated. He submitted that the mere fact that the loss caused cannot be evaluated in monetary terms itself could constitute “special” damage and that it is impossible to ascertain the nature of the damage caused. He relied upon para 10.2 of the judgment of the Delhi High Court in the case of *Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd.*<sup>2</sup>

**DEFENDANT’S SUBMISSIONS :**

**No Intention to malign**

5. The Ld. Advocate for the Defendant submitted that the fact that the Defendant did not delete adverse comments against his video shows that he acted bona fide to educate his viewers. He submitted that this was to ensure that his viewers would be able to see his video, read both the positive and negative comments, and decide for themselves whether to believe the Defendant or not. He submitted that this establishes that the Defendant’s objective was to educate his viewers. He submitted that the Defendant responded to the comment posted by one “I am Jero” on the Impugned Video wherein the Defendant stated, inter alia, that companies use “*many tricks*” to “*make a fool of the public*”. He submitted that in the instant case, the Plaintiff has used a trick of showing a wet coconut alongside its product in order to fool consumers into thinking that its product was derived from wet coconut instead of copra.

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<sup>2</sup> 2009 SCC Online Del 3940

- 5.1 The Ld. Advocate for the Defendant submitted that the statements made by the Defendant in his Impugned Video are true and constitute his *bonafide* opinion.
- 5.2 The Ld. Advocate for the Defendant also submitted that the Defendant's offer to delete some portions of his video, in his reply to the Plaintiff's cease and desist notice, was a concession / good faith attempt made to finally settle the matter, not an admission of wrongdoing. Relying upon this Court's judgment in *Dilip Kumar vs. New India Assurance*<sup>3</sup> he submitted that this Court had therein explained the difference between a "concession" made in the course of good faith negotiations and an "admission". He also relied upon the Supreme Court's judgment in *Management of the Consolidated Coffee Estates vs. Workmen*<sup>4</sup>. He submitted that a concession made in the course of trying to settle a matter can never be considered to be an admission. He submitted that the Defendant's email was not an unconditional admission, but only a concession made in order to settle the dispute.
- 5.3 The Ld. Advocate for the Defendant submitted that the honesty of the Defendant in making such videos is evident from the communication exchanged between one company viz. Qraa and himself. He submitted that the email correspondence between the Defendant and Qraa establishes that the Defendant is not in the business of taking money from Companies for endorsing their products / brands and of merely becoming their mouthpiece. He submitted that this shows that the statements made by the Defendant in the Impugned Video were not made at the behest of a competitor. He submitted that the Defendant's bank statement for the year 2018 annexed to his Supplementary Affidavit shows that the Defendant had received a

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<sup>3</sup> (2014) SCC Online Bom 759

<sup>4</sup> (1970) 2 LLJ 576

sum of Rs. 4,000/- on 19<sup>th</sup> February 2018 from Qraa and that he refunded the said sum to Qraa on 26<sup>th</sup> March 2018.

**5.4** The Ld. Advocate for the Defendant submitted that the products provided in the links below the Impugned Video are organic cold pressed coconut oil and virgin organic cold pressed coconut oil and are each other's competitors / rivals. He submitted that when a viewer clicks on one of these links and purchases the product, the Defendant receives a commission from Amazon.com but not the owners of the competing products. He submitted that in the past the Defendant has received money from 13 brands / companies to promote their products on his channel and in such cases, the Defendant clearly mentions in the video itself or in the description section to the video, that the video is a paid endorsement. He submitted that the Defendant has also reviewed two products of the Plaintiff, without receiving any money from the Plaintiff wherein, in many parts, his review was favourable to the Plaintiff. He submitted that Impugned Video is not the only video that the Defendant has posted. He submitted that the Defendant has prepared, over the years, about 240 videos, of which 99 videos were for the products which were actually reviewed by the Defendant.

**5.5** The Ld. Advocate for the Defendant submitted that the Defendant has, in the past, posted links to better alternatives in the market while reviewing products, without receiving money from the said companies. He submitted that on 7<sup>th</sup> February 2018, the Defendant posted a video on YouTube reviewing a product by a company called UrbanGabru. He submitted that in the description section of the said video, the Defendant provided a link to the Amazon page of the Plaintiff's own product,

Parachute Hair Cream; that the Defendant posted this link on his own, without any instructions from the Plaintiff, and without receiving any money from the Plaintiff.

- 5.6 The Ld. Advocate for the Defendant submitted that in the case of *Hindustan Unilever vs. Gujarat Cooperative (supra)* this Court was of the view that the statements made by the Defendant were false to the knowledge of the Defendant and hence malicious.

**Comparison is of CO (Coconut Oil / Copra Oil) vs. VCO (Virgin Coconut Oil) /  
Articles relied upon by the Defendant**

6. The Ld. Advocate for the Defendant submitted that the Plaintiff's product is not branded or marketed as being "copra oil" which is how such an oil is known. He submitted that the Plaintiff's packaging merely uses the generic term "coconut oil" and the bottle shows a coconut with water gushing out. He submitted that the Plaintiff's advertisements suggest that its oil is extracted from wet coconuts and therefore it's comparison with virgin coconut oil / organic cold pressed coconut oil is justified.

- 6.1 The Ld. Advocate for the Defendant submitted that there are several scholarly articles, published in reputed scientific journals, in which clinical trials have revealed that "copra oil" is inferior in quality to 'virgin coconut oil'. He relied upon extracts articles, papers and other similar literature to compare copra oil and virgin coconut oil, in the following articles:

- a) "*Beneficial Effects of Virgin Coconut Oil on Lipid Parameters and In Vitro LDL Oxidation*" published in the Journal of Clinical Biochemistry (Vol. 37) written

by K.G. Nevin and T. Rajamohan from the Department of Biochemistry at the University of Kerala;

- b)** “*Virgin Coconut Oil Supplemented Diet Increases the Antioxidant Status in Rats*” published in the Journal of Food Chemistry (Vol. 2006) written by K.G. Nevin and T. Rajamohan from the Department of Biochemistry at the University of Kerala;
- c)** “*Virgin Coconut Oil: Emerging Functional Food Oil*” published in Journal *Trends in Food Science & Technology* (Vol. 20) written by A.M. Marina, Y.B. Che Man and I. Amin from the Department of Food Technology at the University of Putra Malaysia;
- d)** “*Supplementation of Virgin Coconut Oil Compared with Copra Oil, Olive Oil and Sunflower Oil on the Thrombotic Factors in Rats and In Vitro Platelet Aggregation*” published in the International Journal of Current Research in Biosciences and Plant Biology (Vol. 3) written by Sakunthala Arunima and Thankappan Rajamohan from the Department of Biochemistry at the University of Kerala;
- e)** “*Is Coconut Oil a Superfood?*” published by BBC News written by Dr. Michael Mosley;
- f)** “*Is Coconut Oil Good or Bad for You?*” published by New York Times written by Roni Caryn Rabin and Sophie Egan;
- g)** “What is the Difference Between Cold Pressed, Unrefined and ‘Regular’ Oils?” published on the blog Naturallynex.com.

**6.2** Relying upon the aforesaid literature, the Ld. Advocate for the Defendant submitted that the Plaintiff’s PARACHUTE COCONUT OIL which is a copra oil is a specie of

refined coconut oil. He submitted that Dr. Fife has given the following advice<sup>5</sup> for detecting good quality oil:

*“High quality virgin coconut oil should be snow white when it is solid and water clear when liquid. If you see any shade of yellow or gray it is of an inferior quality. Pure coconut oil is colorless. Any discoloration is a sign of contamination. Contamination can be from mold or smoke residue...Some virgin coconut oils have a very strong flavor or smell. These are almost always of poor quality. The smell and taste comes primarily from contaminates and not coconut. If the oil does not taste and smell like fresh coconut beware. Some of the nastiest oils I have tasted were strong flavoured and did not taste like coconut.”*

**6.3** He submitted that the statements made by the Defendant in the Impugned Video are true / constitute bona fide opinion. He submitted that the Defendant’s statement that the Plaintiff’s oil *“is of an inferior quality to other organic cold pressed coconut oils”* is absolutely correct and in accordance with the scientific literature and Dr. Fife’s tests set out above.

**6.4** He submitted that Dr. Fife’s test for determining the purity of coconut oil is also echoed by the Philippine Coconut Authority. He relied upon a presentation of the said Philippine Coconut Authority, titled “Frequently Asked Questions On Virgin Coconut Oil” and he submitted that the said authority has opined that virgin coconut oil is *“the purest form of coconut oil, water white in color”*; that it has a *“mild to intense fresh coconut aroma”* (and the intensity depends upon the extent of processing); that copra derived coconut oil is yellow in color and *“has to undergo chemical refining, bleaching and deodorization process before they can be fit for human consumption”*; that copra oil *“does not contain Vitamin E since this is removed during further processing of the oil”*; that copra oil ought to be *“odorless and tasteless”*; that yellow colour is caused by *“Bacterial contamination of the coconut meat before oil extraction”* and *“high process temperature”*; that *“Therefore, for the coconut oil to be categorized as virgin, its color*

<sup>5</sup> Exhibit J pg.100 to Defendant’s Affidavit in Reply

*should be water white.*”; that virgin coconut oil can be used not merely in consumption but also “*As a hair conditioner*”, “*As a body oil or a substitute for moisturizing lotion*”, etc.

- 6.5 He submitted that Dr. Fife’s test has been reiterated in the blog post “*7 essentials of good quality coconut oil*” published by Kapuluan. He further submitted that in an article entitled “*Coconut Ban in Kerala: Here’s a Simply Do-At-Home Test to Check If Your Coconut Oil is Adulterated*” dated 19<sup>th</sup> December 2018, published on *timesnownews.com* states that if coconut oil is adulterated, other oils will remain as a separate layer on top of the solidified oil once the oil is placed in a refrigerator.
- 6.6 The Ld. Advocate for the Defendant also relied upon an article titled “*The Nutritional Benefits of Coconut*” published in LiveMint on 12<sup>th</sup> June 2017 to state that virgin coconut oil should not be used for cooking.

### Disparagement

7. The Ld. Advocate for the Defendant submitted that the Defendant’s statement that the smell of the Plaintiff’s product is akin to “*a dried or rotten coconut*” is hyperbole / exaggeration and not meant to be taken literally. He drew an analogy with the case of *Tata Sons Ltd. vs. Greenpeace International & Anr.*<sup>6</sup> as he submitted that in the said case the Delhi High Court took a view that when Greenpeace referred to Tata as a “demon”, or to its founder, Mr. Ratan Tata, as “Ratty”, that was justifiable hyperbole / exaggeration and not meant to be taken literally.
- 7.1 The Ld. Advocate for the Defendant submitted that in *Hindustan Unilever vs. Gujarat Co-operative (supra)* this Court has held that there are three ingredients to

<sup>6</sup> 2011 SCC Online Del 466

making out a case of the tort of disparagement of goods / slander of goods: (i) the statement must be false; (ii) the statement must have been made with malice; and (iii) the Plaintiff must have suffered special damage. He submitted that none of the ingredients are present in the instant case.

7.2 Relying upon the case of *Dabur India Ltd. (supra)* the Ld. Advocate for the Defendant submitted that the Plaintiff has not suffered any “special damage” arising out of the impugned video and unlike an ordinary case of defamation, damage to the Plaintiff from a false / defamatory statement cannot be presumed in cases involving the tort of disparagement of goods. He submitted that the Plaintiff has not adduced any evidence whatsoever to show that the Plaintiff has suffered any damage arising out of the Impugned Video. He submitted that the Plaintiff has shown no proof that its revenues have gone down since the Impugned Video was uploaded and the same was a result of the Impugned Video. He submitted that the mere fact that somebody has viewed the Impugned Video does not mean that they have been influenced into refusing to buy the Plaintiff’s product. He submitted that the Defendant’s video has been “liked” only by 2,500 viewers, which is only 2.31% of those who viewed the video; that the Plaintiff has not been able to show that 2,500 of its customers have not bought the Plaintiff’s product. He submitted that the Defendant’s video has been “disliked” by 397 viewers which shows that the Defendant’s viewers are intelligent and discerning, and they exercise their independent judgment when they view the Defendant’s video. He submitted that the Defendant’s viewers are intelligent and college-educated and several comments which have been posted by viewers on the page of the Impugned Video show that the Defendant’s viewers have viewed the Defendant’s video with healthy skepticism.



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7.3 The Ld. Advocate for the Defendant submitted that the Defendant is neither a trader / manufacturer nor a rival of the Plaintiff's goods and as such, the tort of disparagement of goods / slander of goods does not apply to him. Relying upon the judgments in *Hindustan Unilever vs. Gujarat Cooperative (supra)*, *Gujarat Cooperative Milk Marketing Federation Ltd. vs. Hindustan Unilever Ltd.*<sup>7</sup> and *Hindustan Unilever Ltd. vs. Cavincare Pvt. Ltd.*<sup>8</sup> he submitted that courts in India have held that the tort of disparagement of goods / slander of goods applies only to rival manufacturers / traders / competitors of the Plaintiff.

7.4 He submitted that the tort of disparagement of goods / slander of goods is a specie of libel / defamation and the plea of justification is available to the Defendant. He submitted that the Defendant has appeared before this Court and stated that he seeks to take the plea of justification; that the Defendant has also mentioned evidence by which he will substantiate his case. He submitted that this is sufficient in order to refuse an interlocutory injunction in favor of the Plaintiff. He submitted that the Defendant has also established, *prima facie*, that he is likely to succeed at the trial. He relied on the decision of this Court in the case of *Dr. Yashwant Trivedi vs. Indian Express Newspapers*<sup>9</sup>, more particularly the second paragraph of the judgment, and submitted that the law in India is that where a Defendant merely takes the plea of justification and "mentions" evidence on which he is going to rely upon, an interim injunction must be refused.

### **Commercial Speech / Freedom of Speech**

<sup>7</sup> Order dated 13<sup>th</sup> December 2013 in Appeal No. 340 of 2017 in Notice of Motion (L) No. 690 of 2017 in Suit (L) No. 204 of 2017, Bombay High Court (Division Bench)

<sup>8</sup> 2010 (44) PTC 270 (Del)

<sup>9</sup> Unreported order dated 29<sup>th</sup> June 1989 in Appeal No. 464 of 1989, Bombay High Court (Division Bench)

8. The Ld. Advocate for the Defendant submitted that in *Hindustan Unilever vs. Gujarat Cooperative (supra)*, this Court has held that “*Any campaign to educate the members of the public by placing before them the true and correct facts/ingredients used in a product should always be welcomed.*”. He also relied upon the Delhi High Court’s decision in *Dabur India (supra)* as under:

“8.4 Recent trends have shown that the articles even in science journals commenting on the efficacy of goods manufactured by large multinational companies, are sought to be shut out through medium of courts. While an aggrieved party's right to seek recourse to law cannot be questioned, interest of the consumers to know must be guarded - even if the dissemination of information is by way of an advertisement which exaggerates the virtues of the traders goods. Public debate is good. The only caution that the defendant-trader has to bear in mind is that his advertisement does fall within the four corners of what constitutes in law malicious falsehood. Consequently, the courts are slow to grant interim relief if the defendant has set up an arguable case that the impugned statement is true. The courts are not ordinarily a forum which should determine as to whether the plaintiff's or the defendant's goods or services are better.”

- 8.1 Relying upon the Supreme Court’s decision in *R. Rajagopal vs. State of Tamil Nadu*<sup>10</sup> the Ld. Advocate for the Defendant submitted that though prior restraints are legal in India, they can only be imposed if the statute itself clearly prescribes a prior restraint. He submitted that Section 40 of the Food Safety and Standards Act, 2006, does not impose any prior restraints, i.e., it does not require that a person must approach the statutory authority before making any comment about a product and such a requirement would impose an unduly harsh and onerous burden on the freedom of speech and expression.
- 8.2 He submitted that the famous principle known as Bonnard Principle in English law as laid down in the case of *Bonnard vs. Perryman*<sup>11</sup> stating that an interim injunction

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<sup>10</sup> (1994) 6 SCC 632

<sup>11</sup> (1891) 2 Ch 269

should not be awarded unless defence of justification by the Defendant was certain to fail at trial level, has been adopted by the Delhi High Court in *Tata Sons (supra)* and subsequently in *Yashwant Trivedi's case (surpa)*. He further submitted that in *Tata Sons (supra)* it has been held that hyperboles do not constitute defamation.

8.3 The Ld. Advocate for the Defendant submitted that the Plaintiff is not likely to suffer any irreparable harm if the Impugned Video is retained on YouTube. He submitted that the number of views on the said video has now stagnated; that it is not as though the video is going viral or that millions of viewers are viewing the video everyday. He submitted that there is no imminent likelihood of any damage to the Plaintiff. He submitted that it would be preferable for the Plaintiff to prepare its own video countering the video of the Defendant, rather than seeking to impose a prior restraint on the Defendant through an interim injunction. In support of his submission, he relied upon the US Supreme Court's decision in *Whitney vs. California*<sup>12</sup>.

8.4 The Ld. Advocate for the Defendant submitted that the above judgment of the US Supreme Court was relied upon by our Supreme Court in *Shreya Singhal vs. Union of India*<sup>13</sup>. He submitted that the Supreme Court has held that “*Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.*” He further submitted that it was held that there are only superficial differences between the U.S. Constitution and the Indian Constitution in matters governing freedom of speech, and that “*American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement.*”

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<sup>12</sup> 274 U.S. 357 (1927)

<sup>13</sup> (2015) 5 SCC 1

**PLAINTIFF'S REJOINDER:**

9. The Ld. Senior Advocate for the Plaintiff stated that the Defendant's intention is not merely to educate his audience or to inform them about the different types of coconut oils or its manufacturing processes or advantages as falsely claimed by the Defendant. He submitted that the Defendant through this Impugned Video seeks to malign the Plaintiff's PARACHUTE COCONUT OIL which is apparent from the landing screen of the video which states, "IT'S NOT AS GOOD AS YOU THINK!! I'LL PROVE IT!!!!".

9.1 He submitted that if the Defendant intended to create an educative video with the consumer's interest in mind and to bust the tricks used by companies to fool consumers, the Defendant should have approached any independent laboratory to conduct tests and to give verified results to the consumers. He submitted that the Food Safety Standards Act, 2006 in Section 40 provides for a remedy whereby a Purchaser can have a food analysed by a Food Analyst on payment of a fee and can receive a report in respect of the product from the Food Analyst. He submitted that the false reason given during the course of the hearing for not taking this recourse was high costs, whereas, the fee prescribed for the procedure under the said Act is only Rs.5000/-.

9.2 The Ld. Senior Advocate for the Plaintiff submitted that the Defendant's argument that he could not be forced to take action before making a comment since it would amount to placing a prior restraint is misplaced since, the intent is not to place a prior restraint but to test the bonafides of the Defendant in the context that bald, false,

reckless and malicious statements have been made with regard to the Plaintiff's product without due diligence.

**Comparison is of CO vs. VCO**

**10.** The Ld. Senior Advocate for the Plaintiff submitted that as per the depiction in the Impugned Video, the impression which is created by the Defendant is that the oil used by the Defendant for the purposes of comparison with the PARACHUTE COCONUT OIL and for performing the tests is a cold pressed organic coconut oil which is also made from Copra. However, the Ld. Senior Advocate for the Plaintiff pointed out that the Defendant in its Affidavit in Reply has stated that the he used “...*pure, unrefined, unprocessed, virgin, cold pressed coconut oil*” in the video. He submitted that the Defendant has in fact passed off virgin coconut oil as cold pressed organic oil in the Impugned Video and poured the same in the glass marked “ORGANIC” to falsely depict and create an impression that organic cold pressed oil made from copra was clear and to thereafter draw an incorrect conclusion that the PARACHUTE COCONUT OIL which is also made from copra was yellowish and hence of inferior quality. He submitted that the material produced by the Defendant is not for cold pressed organic oil, but for virgin coconut oils which is another category altogether.

**10.1** He submitted that the Defendant's argument that he believed the Plaintiff's product was virgin coconut oil made from wet coconuts is fallacious. He submitted that until 13<sup>th</sup> October 2017, Food Safety and Standards (Food Products Standards and Food Additives) Regulations only had one entry with respect to “Coconut oils (nariyal tel)” which defined the oil as “the oil expressed from copra obtained from the kernel

of *Cocos nucifera* nuts”. He submitted that till such time there was no entry in the regulations with respect to Virgin Coconut Oils and all coconut oils whether cold pressed or expeller pressed and whether refined or not, meant coconut oil made from dried coconut i.e. copra. He submitted that on 13<sup>th</sup> October 2017 by the Food Safety and Standards (Food Products Standards and Food Additives) Fourteenth Amendment Regulations, 2017 (“**Food Regulations 2017**”) an entry (1A) was introduced for “Virgin Coconut Oil” and defined as “means the oil expressed from the kernel of *Cocos nucifera* nuts by mechanical or natural means with or without the application of heat, which does not lead to alteration of the oil and virgin coconut oil is suitable for human consumption in its natural state without refining.” He submitted that hence, after 13<sup>th</sup> October 2017, also all references to Coconut Oil would mean oil made from Copra and a separate category of Virgin Coconut Oil was created which was not made from copra. He submitted that Virgin Coconut Oil products specifically mention that they are Virgin Coconut Oils because they are a separate category under the statute and cannot be mistaken for products which are sold as “Coconut Oils” which are made from dried coconut – copra. He submitted that this ought to have been known to the Defendant if he was an expert as he claims to be.

**10.2** The Ld. Senior Advocate for the Plaintiff submitted that the device of two coconuts splashing on the packaging of PARACHUTE COCONUT OIL is not misleading or meant to mislead. He submitted that the said device is not a depiction of a wet coconut with water splashing but is a depiction of oil between the coconuts. He submitted that the said device it is a registered trademark of the Plaintiff and the Plaintiff is entitled to use the same.

**Response to Articles relied upon by the Defendant**

11. The Ld. Senior Advocate for the Plaintiff submitted that in the Impugned Video the Defendant purported to demonstrate the freeze test between organic cold pressed coconut oil and PARACHUTE COCONUT OIL both of which are made from Copra. He submitted that the link in the description of the Impugned Video and all other material that has been produced over the course of hearing relates to virgin coconut oil and is irrelevant. He submitted that not a single article produced by the Defendant mentions that pure unrefined organic cold pressed coconut oil or the unrefined organic expeller pressed oil or normal unrefined expeller pressed coconut oil should be colourless or that a coloration suggests impurity or inferior quality.

11.1 The Ld. Senior Advocate for the Plaintiff submitted that the only document that has been produced which makes a reference to the only test conducted by the Defendant viz. “freeze test” is an internet news article titled “Coconut Oil Ban in Kerala: Here’s a simple do at home test to check if your coconut oil is adulterated”. He submitted that it being a newspaper article the document is not admissible; that the said freeze test is prescribed only with a view to ascertain if there are any adulterants in the oil; that the oil is to be considered adulterated only if it does not freeze, whereas in the impugned video the PARACHUTE COCONUT OIL of the Plaintiff admittedly froze completely and there were no other liquid layers; and that the article makes no mention of the colour of the oil once it is frozen.

11.2 The Ld. Senior Advocate for the Plaintiff submitted that the article at Exhibit J of the Defendant’s Reply “Healing Naturally By Bee” is the only article that has been relied upon in the description of the Impugned Video by the Defendant and has been

heavily relied upon by the Defendant during the course of the hearing. He submitted that no other article or material whatsoever has been relied upon in the Impugned Video or in the description thereof. He submitted that no article or material whatsoever was referred by the Defendant when he issued a response to the cease and desist notice issued by the Plaintiff. He submitted that all the articles now sought to be produced are an afterthought and yet such articles / material do not provide any assistance to the Defendant. He submitted that the said article is completely hearsay in nature and is in turn allegedly based on a source “*Coconut Research Center by Dr. Bruce Fife, an internationally recognised expert on the health and nutritional aspects of coconut and related products*”. He submitted that the said underlying research of Dr. Bruce Fife is neither produced nor relied upon. He submitted that it is not the case of the Defendant that Dr. Bruce Fife has tested the PARACHUTE COCONUT OIL so as to be in a position to comment on whether it is inferior to either virgin coconut oil or cold pressed organic coconut (copra) oil. He further submitted that just as the Defendant has sought to suggest that the view of Dr. Bruce Fife is unimpeachable, the Plaintiff has produced an article titled “*Coconut Oil: Not a cure for anything*” dated 9<sup>th</sup> July 2015 from an internet blog titled “*The Worst Things for Sale*” which refers to the said Dr. Bruce Fife as a “SCAMLORD” and states that the uses of coconut oil prescribed by him in the book “*The Coconut Oil Miracle*” (which is the same book shown in the credential documents produced by the Defendant) are incorrect. He submitted that whilst he is not arguing that Dr. Fife is in fact a “scamlord”, this makes it evident that not all material available on the internet is reliable and hence cannot constitute research or due diligence to justify the denigrating statements in the Impugned Video.

**11.3** The Ld. Senior Advocate for the Plaintiff submitted that the veracity of documents over the internet is the same as newspaper reports which are hearsay in nature and are inadmissible in law even at an *ad-interim* stage – at least as the sole basis for refusal of *interim* reliefs. He submitted that the material produced along with the suit is mostly primary evidence in the form of one on one correspondence or direct evidence. However, the reports and articles of the nature referred to above which place reliance on further other material are always hearsay in nature. Reliance was placed upon the Supreme Court’s decision in the case of *Laxmi Raj Shetty & Ors. vs. State of Tamil Nadu*<sup>14</sup>. He submitted that even though the Court’s findings were in the context of a criminal proceeding after the trial was conducted, the proposition of law would apply irrespective of whether it is the *ad-interim* stage or after trial. Similarly, he relied upon the judgment of a Division Bench of this Court in the case of *Star (India) Limited vs. Zee Entertainment Enterprises Limited & Ors.*<sup>15</sup> He submitted that in this case the Court did not permit a newspaper report to be relied upon at an interim stage as the sole evidence to attach liability.

### Disparagement

**12.** The Ld. Senior Advocate for the Plaintiff submitted that the Defendant’s reliance on the Bonnard principle is misplaced and unavailable to the Defendant. He submitted that the reliance on the judgement in *Tata Sons Limited vs. Green Peace International & Anr. (supra)* is incorrect. He submitted that the Bonnard principle is no longer applicable and was relevant only in the context of the jury system prevalent in the United Kingdom; that it has become redundant after the jury system

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<sup>14</sup> (1988) 3 SCC 319

<sup>15</sup> MANU/MH/2327/2011

has been discarded in the United Kingdom. Reliance was placed on a very recent English judgment in *Taveta Investments Ltd vs. The Financial Reporting Council & Ors.*<sup>16</sup> He submitted that in the present case, statements made by the Defendant are not hyperbolic or rhetoric or in the nature of exaggeration but are assertive statements made as a matter of fact, albeit falsely so. He submitted that an injunction was not granted in the Tata Sons matter because in the facts of the case the defendant had justified its statements on several counts as set out in various paras in the judgement. He submitted that neither the facts nor the principles of the Tata Sons case apply in the present case.

**12.1** The Ld. Senior Advocate for the Plaintiff submitted that the ability of the Impugned Video to create an impact has been misinterpreted by the Defendant. He submitted that not all viewers of a video react to the video; that the impact of the video has to be judged on the basis of the likes and dislikes that have in fact been generated and the ratio thereof. He submitted that over 85% of the viewers who have reacted have been impacted by the video and have been influenced by the false, misleading and malicious statements made by the Defendant. He submitted that no further evidence is required at an ad-interim / interim stage of special damage.

**12.2** The Ld. Senior Advocate for the Plaintiff submitted that the Defendant's argument that the comments on the Impugned Video seem to suggest that the consumers are educated consumers and shall make their own decision is incorrect. In this context he relied upon this Court's decision in *Gorbatschow Wodka KG vs. John Distilleries Ltd.*<sup>17</sup> which, he submitted, deals with a similar argument and negates it in the context of a trademark infringement action.

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<sup>16</sup> MANU/UKAD/0210/2018

<sup>17</sup> 2011 SCC Online Bom 557

**12.3** The Ld. Senior Advocate for the Plaintiff submitted that the Defendant has incorrectly relied upon the judgment in *Yashwant Trivedi (supra)*. He submitted that the said judgment is related to personal defamation and not slander of goods / disparagement. He submitted that the Court therein held that before accepting a plea of justification, the Court's must be *prima facie* satisfied that the defendant may be in a position to substantiate his case on the basis of material produced.

**12.4** He submitted that in the present case the material produced is demonstrably an after-thought and does not constitute any justification whatsoever for the statements that are made with regard to the PARACHUTE COCONUT OIL.

**12.5** He submitted that the Yashwant Trivedi judgment has been considered in detail and interpreted by this Court in the matter of *Shree Maheshwar Hydrel Power Corporation Ltd vs. Chitroopa Palit & Anr.*<sup>18</sup> The relevant excerpt of the judgment relied upon by the Plaintiff is reproduced below:

*“... it is clear that in any event, the principles of law in England and in India with regard to grant of interlocutory reliefs in a civil action, for libel are different. In England, the principle of law is that in case of an action for defamation, once the defendants raise the plea of justification at the interim stage, the Plaintiff will not be entitled to an interlocutory injunction. To put in in other words, in England, a mere plea of justification by the defendant would be sufficient to deny the plaintiff any interim relief. As far as India is concerned, as has been clearly held by this court in the judgments referred to hereinabove, specially the judgement of this court in the case of Yeshwant Trivedi.... And the judgement of Appellate Bench dated 29 June 1989 with regard to the same matter in appeal, the judgement of this court in ..... It is cler that in india a mere plea of justification would not be sufficient for denial of interim relief. The defendants, apart from taking the plea of justification wil have to show that the statements were made bonafide and were in public interest and that the defendants had taken the reasonable precaution to ascertain the truth, and that the statements were based on sufficient material which could be tested for its veracity. Therefore, in India the Court is very much entitled to scrutinse the material tendered by the defendants so as to test its veracity and to find out whether the said statements were made bonafide and that whether they*

<sup>18</sup> 2004(1) MhLJ 382

*were in public interest. Therefore, in India, even at the interlocutory stage, the court is very much entitled to look into the material produced by the defendants for the plea of justification, so as to test its veracity with regard to the allegations alleged to be defamatory.”*

**12.6** Relying upon the judgment in *Ashwani Kumar Singh vs. UP Public Service Commission & Ors.*<sup>19</sup>, the Ld. Advocate for the Plaintiff submitted that the Supreme Court has in the said judgment set out the principles on the basis of which reliance on judgements may be placed in court proceedings. It is held therein that reliance cannot be placed on a judgement or a finding contained therein without reference to the context of such finding in the facts of the case relied upon. He submitted that reliance upon a judgement otherwise than as above would be misplaced.

**12.7** The Ld. Senior Advocate for the Plaintiff submitted that the balance of convenience is entirely in favour of the Plaintiff. He submitted that the number of hits / views on the Impugned Video increase on a daily basis and the hits have not stagnated as sought to be suggested by the Defendant. He submitted that every visit to the links and / or broadcast of the same and each day of continuance of the Impugned Video has a grossly damaging effect on the Plaintiff's PARACHUTE COCONUT OIL product of the Plaintiff and the reputation of the Plaintiff and its product. He submitted that Defendant is unauthorizedly using the Plaintiff's registered mark PARACHUTE in the course of trade in the manner set out above. He submitted that such unauthorized use of the Plaintiff's registered mark PARACHUTE in the Impugned Video takes unfair advantage of and is contrary to honest practices in industrial or commercial matters. He further submitted that such unauthorized use of the mark PARACHUTE is detrimental to its distinctive character and is against the reputation of the mark. He submitted that the continuation of the Impugned Video

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<sup>19</sup> (2003) 11 SCC 584

would result in further loss of customers and loss of reputation and good will and special damage to the Plaintiff.

**Commercial Speech / Freedom of Speech**

13. The Ld. Senior Advocate for the Plaintiff submitted that the Defendant promotes other products and also invites offers from his viewers for paid consultation services through the Impugned Videos given by him and therefore, the creation and publication of the Impugned Video by the Defendant is in the nature of commercial speech and is not merely an expression of the Defendant's personal views, opinion or comment. Relying upon the judgment in *Maheshwar Hydel (supra)*, he submitted that when there is a dispute between two private parties, Article 19 would have no application.

13.1 He submitted that it is incorrect on the part of the Defendant to argue that the law of disparagement is not applicable to him or that this is not a case of trade libel since he is not a rival trader or competitor. He submitted that the Defendant has admitted that making and posting videos on the internet i.e. on his YouTube channel, Bearded Chokra, is his only source of revenue and that the Impugned Video was also therefore a part of his occupation / calling and created in the course of his trade. He submitted that the Defendant made the Impugned Video with a solely commercial purpose of generating revenue, which is also the reason why the Defendant has created all his other videos. He submitted that the Impugned Video was being monetised even until 12<sup>th</sup> February 2019 for about two weeks after the Plaintiff had issued the Defendant a cease and desist notice. He also submitted that once the video was created and used for a commercial purpose, the amount of revenue in fact generated is not relevant.

The Ld. Senior Advocate for the Plaintiff submitted that in identical circumstances this Court in the case of *Marico Limited vs. Vivek Mittal*<sup>20</sup> has granted an *ad-interim* injunction against a “YouTuber” in respect of three videos published by him.

13.2 He submitted that the judgment in *Hindustan Unilever vs. Gujarat Co-operative (supra)* was upheld by a Division bench of this Court by its order dated 13<sup>th</sup> December 2018. He relied upon the following excerpt of *Dabur vs. Colortek (supra)* which, he submitted, was referred by the Division bench in the said case:

“30. *The Delhi High Court further held that protection of Article 19(1)(a) is available to the advertisement. However, if an advertisement extends beyond grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would certainly not have the benefit of any protection. It has further been held by Delhi High Court that while comparing its product with other products, the advertiser may only highlight its positive points, but this cannot be negatively construed to mean that there is a disparagement of a rival product. It has been further held that while hypedup advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if it does so, the advertiser must have some reasonable factual basis for the assertion so made.*”

#### **DEFENDANT’S SUR-REJOINDER**

14. The Ld. Advocate for the Defendant submitted that the judgment in *Star (India) Ltd. (supra)* is not an authority for the proposition that newspaper reports cannot, under any circumstances, be relied upon at the interlocutory stage. He submitted that to hold that newspaper reports cannot be relied upon at the interim stage because they are hearsay would mean that virtually no document can be relied upon unless the author of the document is the deponent who has verified the pleadings. He submitted that at the interlocutory stage, the court must confine itself to the material which has been brought on record, without examining whether or not the same is

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<sup>20</sup> Unreported judgment dated 11<sup>th</sup> April 2018 in Notice of Motion (L) No 809 of 2018 in Commerical IP Suit (L) No. 441 of 2018

proven. He submitted that to determine whether or not there is “malice” in a case it must be ascertained whether the Defendant made the statement knowing that it is false or with reckless disregard as to whether it is true or false. He submitted that the Defendant was not actuated by malice since he referred *inter alia* to the test prescribed by the reputed Dr. Bruce Fife in evaluating the product of the Plaintiff.

14.1 He submitted that *Maheshwar Hydel (supra)* was decided contrary to *Yashwant Trivedi (supra)*, and relying upon the judgments in *Lala Shri Bhagwan vs. Shri Ram Chand*<sup>21</sup> and *Panjumal Hassomal vs. Harpal Singh*<sup>22</sup> the former may be referred under Rule 28 of the Original Side Rules of this Court, to the Hon’ble Chief Justice, for being reconsidered by a larger bench.

#### **FINDINGS AND REASONING:**

15. This is not a case where the Defendant is a competitor of the Plaintiff. However, the Defendant is also not acting as a member of the general public who is expressing his unbiased opinion / view on the Plaintiff’s product. Evidently, the Defendant is falling under a nascent category of individuals, popularly known as “social media influencers”. Social media influencers are individuals who have acquired a considerable follower base on social media alongwith a degree of credibility in their respective space. Depending on the popularity of their field of expertise, their following can range from thousands to even millions of persons. These influencers often employ the goodwill they enjoy amongst their followers / viewers to promote a brand, support a cause or persuade them to do or omit doing an act. Much like the present case, they may even dissuade their followers from purchasing a certain

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<sup>21</sup> AIR 1965 SC 1767

<sup>22</sup> AIR 1975 Bom 120

product. In my view, social media influencers are aware of the influence they wield over other audience and that their statements have a magnified and profound impact on their audience. It would not go far to say that their followers place certain trust in the social media influencers and accept their statements as facts without much scrutiny. It is apparent, that a social media influencer, such as the present Defendant, wields the power to influence the public mind. With power also comes responsibility. I do not believe that a social media influencer can deliver statements with the same impunity available to an ordinary person. Such person bears a higher burden to ensure there is a degree of truthfulness in his statements. A social media influencer is not only aware of the impact of his statement but also makes a purposeful attempt to spread his opinion to society / the public. In view of the same, the Defendant had a higher responsibility to ensure that his statements do not mislead the public and that he is disseminating correct information. The Defendant's recklessness has a much greater impact on the Plaintiff's / its product's reputation as compared to a reckless statement by an ordinary individual.

16. Storyboard of the Impugned Video and the description of the impugned video is at Exhibits H and H-1 to the Plaint, respectively. The landing page, the storyboard and the description of the Impugned Video are reproduced hereunder:

### Landing Page



### Storyboard

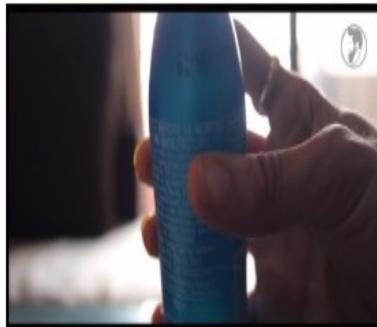


Aaj ke iss video mein we are going to talk about one of the most reputable companies and one of the most reputable products in the Indian market, **the parachute coconut oil**. Agar aap isko use karte ho, kisiko jaante ho jo is product ko use karte ho apne ghar ke andar bhi ho sakte hein, toh please is video ko pura end tak dekhiyein. With that said, let's roll the intro.

Hey guys, welcome back to the Bearded Chokra. Jaise aapne intro mein dekha, we are going to talk about the Parachute coconut oil. Toh sabse pehle, bina koi time waste kiye product ke thore details jaan lete hein.



So the price is going to be Rs. 40/- for the quantity of 100ml. Agar mein iski packaging ki baat karu, then I am going to give 3 to 3 ½ out of 5. It's been the same for a very very long time and the cap is too flimsy. Aadhi se jyaada baar toh who toot jaati hein. Apart from this, if I talk about the fragrance, then the fragrance is very very strong. **Bahut hi strong coconut ki smell aathi hein and it smells similar to a dried or rotten coconut.**



Toh agar hum ingredients ki taraf chalengey, description dekhengein toh iske undher likha hai 100% pure coconut oil from the finest coconuts. Ab yeh sirf itna bathata hein ki yeh 100% pure coconut oil hein. Iska matlab yehi hein ki iske andhar coconut oil ke alawa kuch nahi hein, but kaunsi grade ki coconut oil hein, kaha se kaise extract kiya hein, kaunse coconut se extract kiya hein, none of this is mentioned over here.





Ab mere paas ek test hein, jo mein aap se share karna chahato hu jo aap bhi use ker sakte hein to find out the quality of your coconut oil which you have. Ab maine is test ke andhar kiya hein ki maine doh clear glasses liye hein, ek ke uper maine likha hein organic aur dusre ke uper maine likha hai Parachute aur jiske uper organic likha hein jaheer si baat hein I am going to be putting organic coconut oil joh mere paas hein and in the other glass I am going to be putting parachute coconut oil . Ab dono mein maine coconut oil daala huva hein aur ab mein een dono glasses ko cover karke daalne wala hu fridge ke aandhar for 30 minutes. Ab bahut logon ko yeh pataah hoga ki jabhi bhi aap coconut oil ko ek cool place mein rakogien, toh woh solidify ho jayega and exactly aadhe ghante baad, mujhe yeh dikha hein ki dono joh glasses hai jinke andar coconut oil tha woh huva hein solid. The organic coconut oil had become completely solid but the parachute coconut oil ke andhar ek ya do drop aise liquid reh gaye teh, but that also got solidified jab maine usko aur thode dher ke liye fridge ke andar rakkha. Ab iske andhar test kya hein, freeze toh woh waise bhi honewala tha.

So the first test is when you are pouring coconut oil into a clear glass, first thing you have to check is its colour. Toh jab liquid state mein hota hein, aap yeh clearly dekh sakte hai-



The organic coconut oil is completely clear,



but jab mein parachute coconut oil daal raha hu, glass ke andhar, toh woh ek yellowish tint de raha hein.

Apart from this, the second part of the test is when you have frozen the coconut oil, jab woh solidify ho chukka hein. Ab jab aap esko test karoge, toh pure organic coconut oil should be completely snow white colour. Uske andhar koi bhi aapko koi bi impurities dikhne nahi chahiye, koi bhi stains nahi dikhne chahiye.



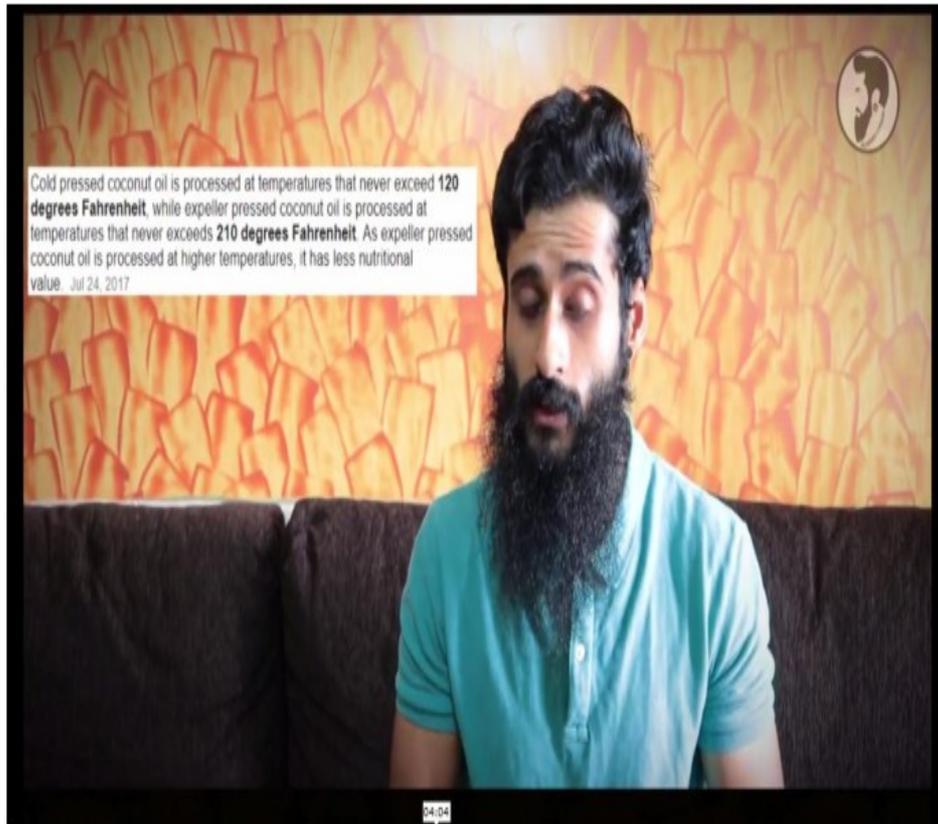
So the glass jiske andhar jisme maine organic coconut oil dala tha , woh toh pure snow white jaisa dikh raha hai



But woh glass jiske andhaar maine parachute coconut oil dala huva hein, uske andhaar aap dekh sakte hai thode impurities hein. It is of a darker greyer shade than the organic coconut oil and kaafi clearly aapko impurities oos glass ke andhar dikhne waali hein. Who solidify bhi barabar se nahi huva hein.



abyeh test share karne ki baad, aapko basically yeh toh sab pataah chal gaya hein, but now we are going into the conclusion



So Sabse pehle mein aapko yeh bataunga ki pure virgin coconut oil jo hota hein cold pressed that is never heated to or never processed at temperatures higher than 50 to 60 degree celsius Usse kum mein hi uski saari processing hoti hein. But joh expeller pressed coconut oils hote hein, those can be processed at temperatures just below 100 °C. Ab yeh dono oils pure consider hote hein, lekin dono ki nutritional value bahut jyaada vary karti hein.



Ab aur ek category hein, i.e. refined coconut oil and unrefined coconut oil. Ab refined coconut oil who hota hein jo bleach kiya jaat hein taaki who clear dikhe aur usse deoderised kiya jataah hein taaki usme se coconut oil ki smell na aayien. Ab yeh isliye karte hein, kyuki kuch logon ko coconut oil ke smell nahi pasand ya phir unhe koyi compound se allergy ho sakti hein ya irritation ho sakti hein. Toh aise refined coconut oils market mein available hein jo bahut hi jyaada saaste hote hein. They will have the fats of the coconut oil, on the other hand unrefined coconut oil matlab koi bhi bleaching process nahi hein koi bhi deoderisation process nahi hein. It has not undergone any such chemical process. Ab parachute coconut oil ek pure 100% edible oil hein , so that means it is not refined, toh abhi aapko yeh jaankari dene ke baadh, let's move on to the final verdict.



Ab is test se aur jitne bhi maine aapko information di hai, usse yeh toh prove ho chuka hein ki **parachute coconut oil is of an inferior quality to other organic cold pressed coconut oils.**

Joh yellow colour tha, it shows that it was heated to a higher temperature. Joh strong coconut flavour hai, Joh strong coconut fragrance hein, proves that it is made from poor quality coconuts or it is heated to a very high temperature. Dono reasons ho sakte hein for a strong coconut flavour...



and the main thing to note is for a 500 ml ke liye, aap Rs.200 bhar rahe hein, but on the other hand, if you buy an organic cold pressed coconut oil that is costing you Rs.260 for 500ml.

The one I am talking about is the pure and sure coconut oil. So pachaas saath rupay extra deke, agar aapko ek achchi quality ka coconut oil mil raha hein, then I don't understand why you will go for Parachute. But if you want an even higher grade of coconut oil, then you must go for something called virgin organic cold pressed coconut oil. Iske andhaar bahut saare criteria aa jaate hein. This is like the top of the line coconut oil and this will cost you a bit more. Aagar aap yeh category mein jaana chahate hein, this will have all the nutrients, all the antioxidants, all the medium chain, triglycerides which the coconut oil is known for and which it is you know beneficial for.



So abhi ek basic questionnaire le lete hain. Is parachute coconut oil Bad? I will give you reasons and I'll give you criterias.

Agar aap aise insaan hai jo coconut oil aapke skin ya hair ke liye use karne wale hai, then yes parachute coconut oil might not be the correct choice because uske andhaar who jo essential fatty acids hein which are actually going to help your hair or your skin in their anti bacterial or anti fungal properties, all those properties are going to be very less in parachute coconut oil because of its processing. Secondly if you are someone jo coconut oil raw consume karte hai jaise ki aapne agar mera salad wala video dekha hai, I recommend that you add one to two tablespoons of coconut oil raw and consume it raw. If you are someone who is going to do that, then again parachute coconut oil is not the right choice because aapko bohot saare usmein nutrients nahi milne waale hein, aapko sirf saturated fats milne waale hein. But agar aap ek aise insaan hein, jo coconut oil ko cooking ke andar use karne wale hein, then parachute coconut oil is okay because anyway you are going to heat it for long hours or at a higher temperature, so anyways sab kuch tab tak toh marne waale hein, saare nutrients toh jaane waale hein,

so it is okay, if you can save like Rs.50 and buy a parachute coconut oil, but only the 100% pure edible version. So all in all, a final verdict, if you are going to use coconut oil on your skin, on your hair or for raw consumption, then virgin organic cold pressed coconut oil is the way to go. There is no second opinion about this. Parachute coconut oil does not meet the requirements and does not hit the checklist for that. It is only good for cooking, nothing else. So guys, this was an extensive review of parachute coconut oil with the tests and proof proving that it is of an inferior quality than an organic cold pressed coconut oil.





Agar aapka yeh video pasand aaya, agar aap iss video se kuch seekh ke ja rahe hai then please neeche who like button, woh share button aur woh subscribe button dabane na bhule.. Agar aap mere koi video miss nai karna chahte toh who bell icon dabaaiye taaki aapko har baar ek notification mil jaaye. Also mere saare social media links neeche description mein honge. Personal one on one consultation chahiye aapko then you can call me on the call me4 app. Its a paid consultation but its one on one right for your needs. With that said, jab tak hum log agli baar mile, be awesome, keep your beard awesome, and I'll meet you in the next one. Bye Bye!

### Description below the Impugned Video

#### Is Parachute Coconut Oil 100% Pure? | Bearded Chokra

153,449 views

👍 3.1K    💬 519    ➦ SHARE    ⌵ SAVE    ⋮



**Bearded Chokra** ✓

Published on Sep 2, 2018

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Parachute coconut oil is one of the most sold and most consumed coconut oils in the country and it has been on the market for a very long time. In this video, I break down all the tiny details about this product and bring the truth to you as it is.

Please watch this video till the end to know all about this product be it the positives or the negatives.

Price - Rs.40

Quantity - 100ml

Packaging - 3/5

Fragrance - 3.5/5

Verdict - ??

Better alternatives in the market -

1. Organic cold pressed coconut oil - <https://amzn.to/2PeLUJ1>
2. Virgin organic cold pressed coconut oil - <https://amzn.to/2MURIPW>

Something to read -

<https://www.healingnaturallybybee.com...>

You can become an official donor/sponsor to this channel -

<https://www.patreon.com/BeardedChokra>

[please make sure you have a Paypal account/credit card]

You can get paid consultation on the CALLME4 app - <https://play.google.com/store/apps/de...>

[please link PayTm account] [search for abhijeetbhansali]

.....

Pure & Sure Organic Coconut Oil - <http://amzn.to/2jfcTo0>

ST Botanica Almond Pure Cold pressed Carrier Oil - 3 Bottles - <http://fkrt.it/!~8Sa!NNNN>

PLEASE LIKE, SHARE, COMMENT AND SUBSCRIBE!!

#BeardedChokra #Parachute #CoconutOil

Category [Howto & Style](#)

**LAW ON DISPARAGEMENT VIS-A-VIS DEFAMATION:**

17. The Defendant has relied upon several publications and other similar literature with a view to justify the statements made by the Defendant and to express that the Defendant did not disparage the Plaintiff's PARACHUTE COCONUT OIL. Before I proceed, it is necessary to consider the law governing disparagement of goods and the reliability of the literature produced by the Defendant at the interlocutory stage. In *Hindustan Unilever vs. Gujarat Co-operative (supra)* the defendant therein, albeit to support a different argument than that raised by the Defendant herein, had sought to rely on the law of defamation in a suit for slander of goods and malicious prosecution. This Court observed that the legal requirements of a personal defamation case and that of malicious falsehood and slander of goods are distinct and different. The plaintiff therein had also relied upon the paragraphs from *Halsbury's Laws of England (supra)*. The relevant paragraphs from the judgment are reproduced below:

*"43. It has rightly been pointed out by the Plaintiff that the legal requirements of a personal defamation case and that of malicious falsehood and slander of goods are distinct and different. An action for slander of goods will lie where the defendant falsely and maliciously publishes words concerning the plaintiff's goods and where the publication causes the plaintiff to suffer special damages. Paragraphs 274, 275, 277 at pages 137, 138 and 140 respectively of Halsbury's Laws of England (Fourth Edition) Volume 28 are in this regard relevant and reproduced hereunder:*

*"Page 137 Para 274 - "Malicious or Injurious falsehood. At common law an action will lie for written or oral falsehoods which are published maliciously and are calculated in the ordinary course of things to produce, and do produce, actual damage. Such an action is not one of libel or of slander, but an action for damage wilfully and intentionally done without lawful occasion or excuse. At common law special*

*damage is always necessary, but this rule has been modified by statute.*

*Page 138 para 275 - "Comparison with Defamation - Actions for malicious falsehood are in a category of their own and are quite distinct from actions for defamation. These actions are not concerned with injury to reputation. In an action for defamation, to establish cause of action, the plaintiff must prove that the words referred to him and bore a meaning defamatory of him. To establish his action in an action for slander of title or slander of goods or other malicious falsehood, the plaintiff must prove that the words were false, that they were published maliciously and unless covered by the statutory exceptions, that they caused special damage."*

*(emphasis supplied)*

*Page 140 para 277 - "Slander of goods - An action for slander of goods will lie where the defendant falsely and maliciously publishes words of and concerning the plaintiff's goods and where the publication causes the plaintiff to suffer special damages."*

44. *The entire contention of Defendant No. 1 that the present action is in the nature of defamation and as such it is mandatory for the Plaintiff to plead and prove that on viewing the Impugned TVCs the public would relate the same to the Plaintiff, is based on a complete misunderstanding of the nature of proceedings filed by the Plaintiff. The Judgments relied upon by Defendant No. 1 are those relating to personal defamation of an individual or entity and not relating to slander of goods or malicious falsehood. The above extract from Halsbury's Law of England cited hereinabove clearly brings out this distinction. This has in fact been emphasised in another Judgment relied upon by Defendant No. 1 that is Reckitt Benckiser (India) Limited vs. Naga Limited & Ors. ILR 2003 1 Del 325 wherein it has been observed as under:*

*"Clerk & Lindsell on Torts draws a distinction between malicious prosecution and defamation, in that "defamation protects the Plaintiff's reputation, while malicious falsehood protects the Plaintiff's interest in his property or trade". In its chapter on Libel and Slander, American Jurisprudence, Second Edition Volume 50 declares that - "Generally, publication of any false and malicious statement which tends to disparage the quality, condition, or value of the property*

*of another, and which causes him special injury or damage, is actionable... "*

**17.1** Having clarified that a suit for defamation stands on a slightly different footing than a suit for slander of goods and malicious falsehood such as the present one, the scope of the law applicable to the present dispute may be ascertained. It can be observed that the criteria that the Plaintiff must establish to make out a case for slander of goods and malicious falsehood, and the defenses that are available to a defendant in such a suit are distinct from a suit for defamation. The judgments relied upon by the parties shall be viewed in this context. In order to make out a case for disparagement / slander of goods the Plaintiff must show the following:

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

**WHETHER THE DEFENDANT MADE FALSE, MALICIOUS OR RECKLESS STATEMENTS?**

**18.** The issue which needs to be examined is whether the Defendant is *prima facie* guilty of making false or malicious or reckless representations to his viewers qua the PARACHUTE COCONUT OIL of the Plaintiff. In order to succeed, the Plaintiff must establish that the statements made in the impugned video were false to the knowledge of the Defendant or made with reckless disregard of the truth. There cannot be any doubt that the test of falsity or recklessness would be reliant upon the knowledge of the Defendant at the time of making the Impugned Video.

**INSTANCES OF APPARENT FALSEHOOD**

19. In the description of the Impugned Video, the Defendant states that “*Parachute coconut oil is one of the most sold and most consumed coconut oils in the country and has been in the market for a very long time. In this video, I break down all the tiny details about this product and bring the truth to you as it is*”. However, a perusal of the Impugned Video shows that save and except the colour of the Plaintiff’s oil in the liquid and frozen forms, the Defendant has not mentioned or analysed any other details of the Plaintiff’s product. Conversely, the Defendant has omitted details of the products used by him to compare with the Plaintiff’s PARACHUTE COCONUT OIL.

19.1 During his submissions, the Ld. Senior Advocate for the Plaintiff produced a tabulation of the nutritional values of the Plaintiff’s PARACHUTE COCONUT OIL and the products recommended by the Defendant in his video including the Virgin Coconut Oils which he stated to be superior to the Plaintiff’s product. A perusal of this tabulation shows that the nutritional values therein are almost identical. The Defendant has not conducted any independent tests to prove that there is a significant variance in the nutritional values of the products. However, as has been pointed out by the Plaintiff, the Defendant did have the option of having the Plaintiff’s PARACHUTE COCONUT OIL analysed under Section 40 of the Food Safety Standards Act, 2006. The notification issued under the said Act provides that if the report of the Food Analyser shows that the food product is not in compliance with law, the purchaser shall be entitled to a complete refund of the fees paid by him.<sup>23</sup> In such cases, the manufacturer also gets a fair opportunity to be heard. Had

<sup>23</sup> Notification dated 10<sup>th</sup> June 2016 bearing File No 10/QA/Labcosting/FSSAI/2016 issued by the Food Safety & Standards Authority of India

the Defendant really believed that the product of the Plaintiff was inferior and unworthy and wished to benefit other consumers, he could have utilized this statutory mechanism. Though it is not compulsory for the Defendant to always utilize this statutory mechanism before giving a review about any product, however, in the absence of any proper scientific or empirical test done by the Defendant, the use of such statutory mechanism would have definitely showed the *bonafides* of the Defendant in giving the correct and true information about the product.

**19.2** The falsehood on the part of the Defendant is also evident from the only test i.e. 'Freeze Test' conducted by the Defendant to come to the conclusion that the Plaintiff's PARACHUTE COCONUT OIL is of an inferior quality. Before I proceed, it is necessary to understand the types of coconut oil and their different qualities. Coconut oil is broadly divided into following two types:

- a) Coconut Oil - ("CO")** – this oil is made from **Copra** - dried coconuts.
- **Organic Coconut Oil** - Copra is derived from coconut grown without fertilizers and chemicals.
  - **Cold pressed** – heat more than 60 degrees Celsius is not applied during the extraction.
  - **Expeller pressed** – heat upto 90 degrees Celsius may be applied during the extraction.
  - **Refined Coconut Oil** – The oil is processed, deodorized, bleached etc.
- b) Virgin Coconut Oil ("VCO")** – this oil is made from **Wet Coconuts** (kernels) and is cold pressed i.e. heat more than 60 degrees Celsius is not applied during the extraction.

- **Virgin Organic Coconut Oil** – Coconut used is grown without fertilizers and chemicals.

### 19.3 Food Safety and Standards (Food Products Standards and Food Additives)

Regulations, 2011 made under Section 92(2)(e) read with Section 16 of the Food Safety and Standards Act, 2006 provides standards for variety of foods products. Prior to 13<sup>th</sup> October 2017, there was a single entry in the Regulations for oils made from coconuts. This entry, titled “Coconut oil (naryal ka tel)”, is defined therein as follows:

“2.2: *FATS, OILS AND FAT EMULSIONS*

2.2.1 *OILS:*

1. **Coconut oil (naryal ka tel)** means the oil expressed from copra obtained from the kernel of *Cocos nucifera* nuts. It shall be clear and free from rancidity, suspended or other foreign matter, separated water, added colouring or flavouring substances, or mineral oil. It shall conform to the following standards: — ...”

On 13<sup>th</sup> October 2017, Food Safety and Standards (Food Products Standards and Food Additives) Fourteenth Amendment Regulations, 2017 came into force by virtue of their publication in the Official Gazette. This amendment included a new category of oil made from coconuts, to the regulations i.e. **Virgin Coconut Oil**. The definition of Virgin Coconut Oil under Clause 1(A) under the said regulations is reproduced below:

“2.2: *FATS, OILS AND FAT EMULSIONS*

2.2.1 *OILS:*

- 1(A) **Virgin Coconut Oil** means the oil expressed from the kernel of *Cocos nucifera* nuts by mechanical or natural means with or without the application of heat, which does not lead to alteration of the oil and virgin coconut oil is suitable for human consumption in its natural state without refining. It shall be clear and free from rancidity, suspended or other foreign matter, separated water, added colouring or flavouring substances, or mineral oil and it shall conform to the following standards, namely:— ...”

**19.4** The Plaintiff's PARACHUTE COCONUT Oil is an **Unrefined Expeller pressed Coconut Oil** and **not Virgin Coconut Oil**.

**19.5** In the Impugned Video, the Defendant has conducted a single test of freezing two oils in different transparent glasses of which one was the Plaintiff's PARACHUTE COCONUT OIL. The second glass is only labelled as "*organic*" and contains coconut oil which is "with the Defendant" – "*organic coconut oil joh mere pass hai*". Moving further, the Defendant then makes observations and points out the difference in the **colour** of the two oils in the liquid state wherein he states and shows that the Plaintiff's PARACHUTE COCONUT OIL has a 'yellowish tinge' whereas the other organic coconut oil is completely 'clear'. The colour of these oils in the liquid state is the 'first thing' that viewers have to check according to the Defendant. The Defendant next makes observations about these two oils when frozen. He states that 'pure organic coconut oil' should be 'completely snow white' in colour and that it should not have any kind of 'impurities' or 'stains' whatsoever. The Defendant then states and shows that while the other organic coconut oil when frozen is 'pure snow white' in colour, the Plaintiff's PARACHUTE COCONUT OIL has 'darker greyer shade' than the other organic coconut oil and has some 'impurities' in it.

**19.6** It is pertinent to note that throughout the initial part of the video, viewers are neither shown nor told which or what kind of '**organic coconut oil**' is being used by the Defendant for comparing it with the Plaintiff's PARACHUTE COCONUT OIL. Throughout the video where the freeze test is conducted by the Defendant, he consistently uses and shows the words "**organic coconut oil**" for the other oil used by the Defendant for comparing the Plaintiff's PARACHUTE COCONUT OIL. Hence, orally and visually, the clear and unambiguous impression given by the

Defendant while showing the freeze test is that the Defendant is comparing Plaintiff's PARACHUTE COCONUT OIL with some other 'organic coconut oil'. Now, we have already seen the clear distinction between an '**organic coconut oil**' and '**virgin organic coconut oil**'. At the cost of repetition, 'organic coconut oil' necessarily means the oil derived from Copra which is derived from a coconut grown without fertilizers and chemicals whereas 'virgin organic coconut oil' means the oil derived from wet coconut-kernels grown without fertilizers and chemicals. Hence, the viewers are made to believe that the comparison done by the Defendant is between two oils which belong to the same category i.e. 'organic coconut oil' and hence at the end of the test, if one oil shows different result than that of the other, necessary conclusions would follow. Naturally, if the two oils used by the Defendant for conducting the freeze test did not belong to the same category i.e. 'organic coconut oil', the parameters of colour and particulate matter used by the Defendant and the result based thereon would not only be inaccurate but also erroneous.

**19.7** At this point, I must immediately refer to the Affidavit in Reply filed by the Defendant wherein the Defendant has stated the following:

*“d. I have thereafter set out the results of an observational, scientific, empirical test I conducted myself, between the Plaintiff's product and another product which was pure, unrefined, unprocessed, **virgin**, cold-pressed coconut oil...”*

(Emphasis Supplied)

**19.8** The above statement made in the Reply was also confirmed during the hearing by the Ld. Advocate appearing for the Defendant. It is therefore evident that the other 'organic coconut oil' used by the Defendant for conducting the freeze test and comparing with the Plaintiff's PARACHUTE COCONUT OIL was in fact not an

‘organic coconut oil’ at all. What the Defendant had used for the freeze test and to compare the Plaintiff’s PARACHUTE COCONUT OIL was in fact ‘virgin coconut oil’. It therefore becomes evident that the clear and unambiguous impression given by the Defendant in the Impugned Video while showing the freeze test that he was comparing the Plaintiff’s PARACHUTE COCONUT OIL with ‘organic coconut oil’ was false.

**19.9** The question which is of paramount importance is whether the said impression was given by the Defendant knowing it to be completely false or whether it was a mistake on the part of the Defendant. The Defendant has neither pleaded nor argued that it was a mistake. Interestingly, when this anomaly was pointed out, the Ld. Advocate for the Defendant has, in fact, tried to justify the comparison done by the Defendant between the Plaintiff’s PARACHUTE COCONUT OIL and ‘virgin coconut oil’ during the freeze test by stating that the Defendant was justified in comparing the Plaintiff’s PARACHUTE COCONUT OIL to virgin coconut oil since the Plaintiff’s PARACHUTE COCONUT OIL is not branded or marketed as “Copra Oil” and that its packaging shows wet coconuts and uses the term ‘coconut oil’. I find this explanation to be rather astounding. I will turn to the merits of the said justification in a bit, but before that, assuming that the Defendant’s justification for comparing the Plaintiff’s PARACHUTE COCONUT OIL with virgin coconut oil is correct, how does that explain or justify the evident false representation made by the Defendant to its viewers in the initial parts of the Impugned Video where the Defendant has consistently stated both orally and visually that the oil used for comparison in the freeze test is ‘*organic coconut oil*’. On the contrary, the very justification given by the Defendant proves that the impression given by the Defendant in the Impugned

Video while showing the freeze test that he was comparing the Plaintiff's PARACHUTE COCONUT OIL with 'organic coconut oil' was false to his own knowledge.

**19.10** It is not and cannot be the case of the Defendant that he did not know the difference between 'virgin organic coconut oil' and 'organic coconut oil'. In the Impugned Video, after making some observations about organic cold pressed coconut oils, the Defendant specifically mentions the following in the latter part of the Impugned Video:

*“But if you want an even higher grade of coconut oil, then you must go for something called virgin organic cold pressed coconut oil...”*

*(Emphasis Supplied)*

It is therefore evident that the Defendant has purposely and knowingly misrepresented to the viewers that he was comparing the Plaintiff's PARACHUTE COCONUT OIL with 'organic coconut oil' when in reality he was comparing it with 'virgin coconut oil'.

**19.11** Now, turning to the merits of the justification given by the Defendant, after 13<sup>th</sup> October 2017, the Food Regulations 2017 introduced a separate category of coconut oil being - Virgin Coconut Oil. After the said amendment, it is specifically mentioned on the packaging of every Virgin Coconut Oil that the same is Virgin Coconut Oil and in the absence of such labelling, the product is assumed to be Coconut Oil. In short, ordinary coconut oil (which is not virgin coconut oil) is not required to mention that the same is made out of copra but it is sufficient for them to only mention 'coconut oil' on their product. The Defendant who claims to be an expert or is assumed to have more knowledge in the field than an ordinary customer in view of him being a

social media influencer, could have easily checked for this difference and would have concluded that the Plaintiff's product is in fact coconut oil and not virgin coconut oil. Further, a simple search on the internet would elicit that the Plaintiff's product is made from copra. The information is freely available in the public domain. The Plaintiff has not contravened FSSAI packaging regulations or any other regulation which impose any liability upon the Plaintiff to state that it is using copra to manufacture its oil. The device of coconuts with water splashing is a trademark of the Plaintiff which the Plaintiff is entitled to use in its advertisements and packaging. The registration certificate in respect of this trade mark is at Exhibit B-8 to the Plaintiff. Hence, even on merits, the justification given by the Defendant is erroneous.

**WHETHER THE STATEMENTS WERE PUBLISHED RECKLESSLY OR MALICIOUSLY? / DUE DILIGENCE EXERCISED BY THE DEFENDANT**

20. In order to ascertain whether the statements made by Defendant were malicious or reckless, it is important to consider the research done and the caution exercised by the Defendant BEFORE making the Impugned Video. Some of the statements made by the Defendant are reproduced hereunder:

- a) On the landing screen: ***"IT'S NOT AS GOOD AS YOU THINK!! I'LL PROVE IT!!!! #BEARDED CHOKRA"***;
- b) ***"... it smells similar to a dried or rotten coconut."***
- c) ***"... toh who ek yellowish tint de raha hai"***
- d) ***"But who glass jiske andhar maine parachute coconut oil dalaa huva hai, uske andhar aap dekh sakte hai thode impurities hain. It is of a darker greyer shade"***

*than the organic coconut oil and kaafi clearly aapko impurities oos glass ke andhar dikhne waali hein.”*

- e) *“Wo solidify bhi barabar se nahi hua hai”*
- f) *“... parachute oil is of an inferior quality to other organic cold pressed coconut oils.”*
- g) *“Jo yellow colour tha, it shows that it was heated to a higher temperature. Jo strong coconut flavour hai, jo strong coconut fragrance hai, proves that it is made from poor quality coconuts or it is heated to a very high temperature.”*
- h) In the background of a few slides *“Is Parachute coconut oil BAD?  
1. For Skin/Hair – YES 2. For raw consumption – YES 3. For cooking – NOT REALLY”*
- i) *“agar aap aise insaan hai jo coconut oil skin ya hair ke liye use karne wale hain, then yes parachute coconut oil might not be the correct choice because uske andhar wo jo essential fatty acids hain which are actually going to help your hair or your skin in their anti-bacterial or anti-fungal properties, all those properties are going to be very less in parachute coconut oil because of its processing.”*
- j) *“If you are someone who is going to do that, then again parachute coconut oil is not the right choice because aapko bahaut saare usmein nutrients nahi milne waale hain, aapko sirf saturated fats milne waale hein.”*
- k) *“It is only good for cooking, nothing else.”*
- l) *“So guys, this was an extensive review of the parachute coconut oil with the tests and proof proving that is it of an inferior quality than an organic cold pressed coconut oil.”*

**20.1** Further, In the Impugned Video, the Defendant has made use of forceful, decisive and assertive statements / phrases such as follows:

- **“I will prove it”;**
- **“bring the truth to you”;**
- **“verdict”**

By use of such forceful, decisive and assertive statements / phrases the Defendant has portrayed himself to his viewers as an expert who has undertaken extensive research on the topic and / or is drawing conclusions on the basis of sound groundwork, study and research. However, in the extensive list of links in the video description, the Defendant has cited only one article to support his video viz. *“How Do You Identify a Good Quality Coconut Oil?”* published on the blog [www.healingnaturallybybee.com](http://www.healingnaturallybybee.com). The Defendant has heavily relied upon the work of one Dr. Bruce Fife who is apparently an eminent certified nutritionist, naturopathic physician and director of the Coconut Research Center in Colorado, USA. The Ld. Advocate for the Defendant has relied upon an excerpt from pg.100 of the Defendant’s Affidavit in Reply which he claims to be Dr. Fife’s advice for detecting good quality oil. However, it seems that the excerpt is in fact from the aforesaid article *“How Do You Identify a Good Quality Coconut Oil?”* published on the blog [www.healingnaturallybybee.com](http://www.healingnaturallybybee.com). The article only cites Dr. Bruce Fife as a source for the article. The Defendant in his filings or during the oral arguments has not produced any actual work of Dr. Fife to show that any research or tests were in fact conducted by Dr. Fife to arrive at his conclusions. The said article is in fact the article posted in the description of the Defendant’s video. A perusal of the articles reveals that it doesn’t discuss a freeze test for ‘Coconut Oil’ or that discolouration /

yellowish tint in 'Coconut Oil' or a strong smell in 'Coconut Oil' is a sign of inferiority. The article almost exclusively provides parameters for gauging the quality of '**Virgin Coconut Oil**' and thus I do not see how the same can be applied to the Plaintiff's PARACHUTE COCONUT Oil which is not Virgin Coconut Oil. The reference to the yellow colour and the inference that it is inferior, in the article, applies only to Virgin Coconut Oil as it states "*High quality virgin coconut oil should be snow white in color when it is solid and water clear when liquid. If you see any shade of yellow or gray it is of inferior quality*". No reference is made to the colour of unrefined oils made from copra i.e. 'Coconut Oil' or that any inference is to be drawn in respect of colors of unrefined 'Coconut Oil'. In the context of oils made from copra i.e. 'Coconut Oil' the article only mentions that the same may contain mold (fungus) but the same is not harmful in any nature or form. Thus, the article in no manner or form lends credence to the findings made by the Defendant. More particularly the article also makes no reference to the quality of PARACHUTE COCONUT OIL in particular that can assist the Defendant in any manner or form.

**20.2** In the course of the submission made before this Court, the Defendant has produced various other material to support the statements made in the Impugned Video that the Plaintiff's PARACHUTE COCONUT OIL is inferior to Virgin Coconut Oil. This includes the papers titled "Beneficial Effects of Virgin Coconut Oil on Lipid Parameters and In Vitro LDL Oxidation", "Virgin Coconut Oil Supplemented Diet Increases the Antioxidant Status in Rats", "Virgin Coconut Oil: Emerging Functional Food Oil" and "Supplementation of Virgin Coconut Oil Compared with Copra Oil, Olive Oil and Sunflower Oil on the Thrombotic Factors in Rats and In Vitro Platelet Aggregation". He has also relied upon the articles "Is Coconut Oil a

Superfood?” and “Is Coconut Oil Good or Bad for You?” on this subject. The Defendant has in fact insinuated the cause for the differences between the Plaintiff’s PARACHUTE COCONUT OIL and the Virgin Coconut Oil such as the odour and colour to the possibility that the Plaintiff’s PARACHUTE COCONUT OIL is made from poor quality and / or rotten coconuts. From a bare perusal of the relevant excerpts relied upon by the Defendant from this material it appears that the content therein is inconsistent with the statements made by the Defendant in the Impugned Video.

**20.3** The Defendant has reproduced the aforesaid literature in an attempt to justify his statements as the truth. I don’t see how the publications / papers and articles produced by the Defendant assist his case. The question before this Court is whether the Defendant has used the correct tests to draw a comparison between the rival coconut oils. The papers relied upon by the Defendant (most of which are studies done on rats and not humans) and articles are all on the subject of comparisons between **Virgin Coconut Oils** and **Coconut Oils**. Could the tests applied by the Defendant still be relied upon? In my opinion, acceding to the relevance of the said literature would be to promote the Defendant in passing off his Virgin Coconut Oil as Coconut Oil to demonstrate a false distinction between oils. The literature does not state or even suggest anywhere that the same tests to compare a Virgin Coconut Oil and a Coconut Oil may be used to compare two Coconut Oils.

**20.4** In his email dated 29<sup>th</sup> January 2019 in reply to the Plaintiff’s cease and desist notice, the Defendant stated that the statements made by him in his Impugned Video constituted his personal opinion; however, he did not refer to any research or any

other material even in this email. The literature does not support the test purported by the Defendant and thus would be of no assistance to the Defendant.

**20.5** Interestingly, the Ld. Senior Advocate for the Plaintiff has produced an article titled “Coconut Oil: Not a cure for anything” dated 9<sup>th</sup> July 2015 from an internet blog titled “*The Worst Things for Sale*” which refers to the said Dr. Bruce Fife as a “SCAMLORD” and states that the uses of coconut oil prescribed by him in the book “The Coconut Oil Miracle” (which is the same book shown in the credential documents produced by the Defendant) are incorrect. I am in agreement with the submission that not all material available on the internet is reliable and hence such material cannot by itself constitute research or due diligence to justify the denigrating statements in the Impugned Video.

**20.6** While there is no quarrel with the principles set out by the Supreme Court in *Laxmi Raj Shetty (supra)* since I have already observed that the said papers and articles are not relevant to the tests shown in the video by the Defendant, I do not presently deem it necessary to delve into the question whether the same is hearsay evidence or not.

**21.** In view of the above, I am of the opinion that the Defendant had no reason to believe that the statements he was making were the truth since there is no material produced in respect of the PARACHUTE COCONUT OIL to demonstrate that such a belief was even possible; that the statements have been made with recklessness and without caring whether they were true or false. Neither the test conducted by the Defendant in his Impugned Video, nor the articles sought to be relied upon by the Defendant indicate that the statements made and published by the Defendant are true or that

any reasonable person could on the basis of such test or articles have believed that the statements constitute the truth or that there is a reasonable possibility of the statements being believed to be true. The Impugned Video made by the Defendant therefore reeks of malice and I have no difficulty in holding that the first two requirements to make out a case for disparagement / slander of goods as stated in paragraph 17.1 hereinabove have been made out.

**WHETHER SPECIAL DAMAGES ARE SUFFERED BY THE PLAINTIFF?**

22. The final criteria for the Plaintiff to fulfil is that it suffered special damage. The Delhi High Court has held in *Dabur vs. Colortek (supra)* that to calculate special damage the Court must step into the shoes of a reasonable and prudent man and assess the injury caused by the impugned material. In an IP suit for infringement of trade mark or passing off, the injury suffered by the plaintiff therein may be gauged from the profits accrued by the infringer from the sale of the infringing products. However, the same principles do not apply to a case for disparagement / slander of goods. In such cases the reputation of the plaintiff's product is impacted whereby its customers are induced to not purchase the product of the plaintiff. It is impossible to precisely ascertain how many customers, as a result of the disparaging action / slander of goods, have refrained from purchasing the product of the Plaintiff. However, one need not go far from the Defendant's channel to see the impact of the Impugned Video. The comments on the page of the Impugned Video show a number of the Plaintiff's customers who have expressed their decision to stop purchasing the Plaintiff's PARACHUTE COCONUT OIL after watching the impugned video. Following are some of the comments posted on the Impugned video:

a) Ravi Nigam: "Good knowledge... left parachute today"

Nitin

- b) Siddharth Naik: *“I’m speechless after seeing this video. Branded reputed company is doing like this then what 2 tell”*
- c) Furqan Mudabbir: *“Bhai Shukriya bachpan se parachute coconut oil use karta that aaj se nai”*
- d) 100 subscriber’s without any videos challenge: *“Bro have you ever wondered how valuable youtuber yo are for us. You really have helped us a lot then any other youtuber(IMO). Love you man. I will also be sharing your this particular video to all my friends who always trolled me that all oils and products are the same but in reality it isn’t. Thanks for the time and video”*

**22.1** It would be erroneous to say that the Impugned Video had no impact and / or special damage since it generated a mere 2500 “likes” from 1,08,000 views. I agree with the submission made on behalf of the plaintiff that not all viewers necessarily express “likes” or “dislikes”. Furthermore, only those persons who have a YouTube account can like or dislike a video, including the Impugned Video. Thirdly, of the 2897 persons who have reacted to the Impugned Video, 2500 persons have liked it. This shows that over 85% of the voting segment was convinced by the Defendant and consequently was impacted by it. Further, the number of persons watching the Impugned Video during one “view” may be in the plural and hence the number of views may not be a reflection of the actual number of persons that have viewed the video and the impact that it has on them.

**22.2** Further, the Defendant himself has stated the following towards the end of the Impugned Video:

*“Agar aapko yeh video pasand aaya, agar aap iss video se kuch seekh ke ja rahe hai then please neeche woh like button, woh share button aur woh subscribe button dabana na bhule...”*

It would therefore be safe to assume that the 2500 persons who have liked the video have learnt something from the video and hence the impact of the Impugned Video upon the reputation of the Plaintiff's PARACHUTE COCONUT OIL and the damage caused to the Plaintiff cannot be underestimated. The issue of whether special damages are suffered by the Plaintiff is also answered in the affirmative.

**Ratio laid down by Gujarat Co-operative vs. Hindustan Unilever (supra)**

23. A Division Bench of this Court in the case of *Gujarat Co-operative vs. Hindustan Unilever (supra)* considered an appeal against an injunction order preventing the broadcast of an advertisement commercial of the Appellant therein. The Court laid down therein the material factors which need to be considered while deciding a question of disparagement. Relying upon this Court's decision in the case of *Godrej Consumer Products Limited vs. Initiative Media Advertising & Anr.*<sup>24</sup>, the Division Bench held as under:

"24. ....

"18. *It is equally settled that to decide the question of disparagement, the following factors are to be kept in mind:*

- (i) Intent of commercial*
- (ii) Manner of the commercial*
- (iii) Storyline of the commercial and the message sought to be conveyed by the commercial.*

*Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable."*

<sup>24</sup> 2012 (52) PTC 260 (Bom.)

*It could thus be seen that for deciding the question of disparagement, Court will have to take into consideration intent of the commercial, manner of the commercial and storyline of the commercial and the message sought to be conveyed by the commercial. We will also be required to consider as to whether manner of the commercial is ridiculing or condemning product of the competitor, to come to the conclusion that it amounts to disparagement. However, if manner of the commercial only shows advertiser's product better or best without derogating the other's product then the same would not amount to disparagement.”*

(Emphasis Supplied herein)

23.1 While the above judgment has been relied upon by the Plaintiff and the Defendant, it is pertinent to observe that the judgment was in respect of a commercial advertisement as against the present suit wherein the Impugned Video is a commercial review of the Plaintiff's product. The Impugned Video is not an educational video in respect of coconut oils, but a video targeted at the Plaintiff's PARACHUTE COCONUT OIL. Since I have already concluded that the statements in the Impugned Video were false and made maliciously by the Defendant with an intention to show the Plaintiff's PARACHUTE COCONUT OIL in a negative light, I need not delve into a further inquiry of the Defendant's intent and manner in which the Impugned Video has been made or the message which is sought to be conveyed. However, one more important aspect which according to me shows the real intention of the Defendant behind publishing the Impugned Video is his reply to the comment posted by one "I am Jero" on his Impugned Video, wherein the Defendant has categorically stated that:

*“This video was only to bring awareness to the general public of the inferior quality of parachute coconut oil. Also the freeze test method was*

*only to show the impurities. I know there are many tricks which companies use to make a fool of the public and that's what I'm busting. Refined oils are clearly labeled as refined, no refined oil will get a fssai certification as a pure organic cold pressed oil. If lab testing all products was so easy, trust me i would do it and make sure the consumer segment in cosmetics and consumables changed for good.”*

(Emphasis Supplied)

**23.2** The Defendant in his impugned video pointed out that the Plaintiff’s packaging does not state the grade of the coconut used, where they have been extracted from or from which coconuts has the oil been extracted from which seems to imply that the Plaintiff is concealing the information since the coconuts used are inferior. The FSSAI packaging regulations do not require the Plaintiff to state the grade of the coconuts or the manner in which the oil was extracted on the packaging of coconut oils. Further, a perusal of the products which were produced before this Court during the hearing and which were also recommended by the Defendant in his Impugned Video, show that none of the products mention the grade of coconuts used, where they have been extracted from or from which coconuts they have been extracted. This is an additional factor which shows that the Defendant was making every effort to show the Plaintiff’s PARACHUTE COCONUT OIL in a negative light. From all that is stated hereinabove, the Defendant’s agenda seems to be clear that the Impugned Video is a deliberate attack on not only PARACHUTE COCONUT OIL, but also the Plaintiff’s company.

**23.3** In my opinion, the Impugned Video is hit by all three factors of “*intent, manner and message sought to be conveyed*” as laid down by the Division Bench in *Gujarat Co-operative vs. Hindustan Unilever (supra)*.

**ANCILLARY DEFENCES RAISED BY THE DEFENDANT**

24. I shall now deal with the ancillary defences raised by the Defendant to avert an injunction order.

**The Defendant is not a trader or competitor**

24.1 I have already observed that the legal principles governing defamation and disparagement / malicious falsehood / slander of goods are distinct. I do not agree with the Defendant's argument that an action for disparagement / malicious falsehood / slander of goods can only be against a trader or a competitor. The judgments in the facts of the case involved competitors who had issued comparative advertisements which were alleged to be disparaging and did not in any manner hold that an action cannot lie against an individual or an entity which is not a competitor. In an action for disparagement / malicious falsehood / slander of goods it is irrelevant whether the Defendant is a trader or not so long as the necessary ingredients are satisfied. There is no judgment holding that there would be no disparagement / slander of goods in case the defendant is not a trader or a rival or a competitor of the plaintiff. If the argument of the Defendant that the law of disparagement is not applicable to him and is applicable only to the manufacturers or traders is accepted, it would create havoc since all the manufacturers or traders would then hire people like the present Defendant to make disparaging statements about their competitor's products under the garb of making a "review" and thereby cause serious damage to its competitors who would be left remediless.

**Defendant's use of strong language is hyperbole / exaggeration**

**24.2** The Defendant has made use of strong language in his video to positively assert that the Plaintiff's product is of inferior quality. He has stated that the Plaintiff's product smells like "dried or rotten coconuts". The Defendant has argued that the use of the term rotten coconuts was meant to be a hyperbole / an exaggeration and should not be taken literally. In *Tata Sons (supra)* the Court took the view that the use of the word "Demons" and "Ratty" must be taken as an attempt at exaggeration since it would be impossible that anyone would truly believe that the Tatas were in fact demons. In the present case it is not impossible to believe that the Plaintiff's PARACHUTE COCONUT OIL could be made from or has a smell of rotten coconuts. Further, in that case, the defendant therein had justified the use of demons by *inter alia* pointing out the use of the term demons is to vilify the Tata's act of damaging the environment. The present Defendant has afforded no explanation for using the term "rotten coconuts" in the context of the Plaintiff's product. Furthermore, later in his video the Defendant has once again insinuated that the Plaintiff's product might be made from poor quality coconuts. In view of the above, the principles relied upon by the Defendant in *Tata Sons Limited (supra)* shall be of no assistance to him.

**Defendant's claim of honest conduct**

**24.3** Once the Impugned Video is ascertained to be disparaging the Plaintiff's product, the fact that the Defendant has given positive reviews on other products of the Plaintiff or that he has given a link for the purchase of the Plaintiff's other products does not alter the nature of the disparaging nature of the Impugned Video. Likewise, merely

because the Defendant has made similar videos for products of other manufacturers who have not taken action against the Defendant does not preclude the Plaintiff from acting against the Impugned Video. In the presence of glaring evidence of providing incorrect information in the Impugned Video and the obviously derogatory statements against the Plaintiff's product, the Defendant's past "honest" conduct in previous videos would be of little consequence.

**24.4** The Defendant has argued that not deleting the comments defending the Plaintiff's product shows his *bona fides*. However, he has replied to nearly all comments reiterating that the Plaintiff's product is inferior.

**24.5** The video being sponsored or the Defendant receiving payment from a competitor of the Plaintiff would be an additive factor to substantiate the Defendant's malice. However, once the Impugned Video is ascertained to be disparaging the Plaintiff's product, the absence of these factors would be of no pertinence.

**24.6** In the Impugned Video, the Defendant has concluded that the Pure & Sure organic Coconut Oil is of better quality than the Plaintiff's PARACHUTE COCONUT OIL. It is not a matter of co-incidence that the Defendant has provided links below his video to the oil of Pure & Sure brand, where upon clicking the links, the viewers are taken to a site where Pure & Sure oil can be purchased by the viewers. Admittedly, every time a product is purchased by the viewers by clicking these links, the Defendant gains monetarily.

**24.7** The Defendant has sought to prove his ethics by stating an instance where he was offered money by a company (QRAA Men) to give positive reviews on their product. The Defendant claims that he declined to make any video that was not on his true opinion and refunded the money he received from the company. I have in fact read

through the correspondence with QRAA and in my view the Defendant did not *simpliciter* refuse to create a video. The Defendant in fact suggested delaying the creation of the Video and also held back the refund for a considerable period of time under the pretext that he had not heard from QRAA. In any event even if the Defendant showed some integrity in his dealings with QRAA, it does not change the facts of the present case. The Defendant's Impugned Video in my view smacks of malice.

#### **Viewers Special Ability to Discern**

24.8 Merely because some viewers in the comment section to the Impugned Video have demonstrated their astuteness and parried the false allegations made by the Defendant against the Plaintiff's product, does not prove that the Defendant's viewers are educated or unlikely to be deceived. The Defendant has not substantiated a case that his viewers have a special ability to discern the truth from the Defendant's video. I am reminded of the quote made by Lord Justice Lindley, "... *Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do*". Therefore, where the Defendant is obviously misleading his viewers and applying false tests, and customers who were using the Plaintiff's products have decided to stop using them after watching the Impugned Video, there is no impetus for me to assume that a viewer would not be misled by the Impugned Video.

#### **Plea of Justification / Bonnard Principle**

24.9 The Ld. Single judge of this Court in *Shree Maheshwar Hydrel Power (supra)*, after considering the decision in *Yeshwant Trivedi (supra)* has held that in India, at the

interim stage, merely raising a plea for justification is not sufficient and the Defendant must show that he made the statements *bona fide* and in public interest, and that he took reasonable precaution to ascertain the truth, and that his statements were based on sufficient material which could be tested for its veracity. The Defendant herein is unable to establish his *bona fides* and provide any material to support the statements made by him in the Impugned Video. All material produced by him is for comparison between Virgin Coconut Oil and Coconut Oil which do not state that the same tests apply to a comparison between two Coconut Oils. Furthermore, the Defendant has admitted that the oil used by him in the freeze test was in fact Virgin Coconut Oil and not Organic Coconut oil as wrongly depicted in the Impugned Video. In view of the same, the principle of justification is not available to the Defendant.

**24.10** In my view, the judgment in *Shree Maheshwar Hydrel Power (supra)* is sound and is not conflicting with *Yeshwant Trivedi (supra)*. I do not see any reason to refer the matter to the Chief Justice.

**24.11** The Bonnard Principle was developed in the English Court in United Kingdom. However, in a recent judgment in *Taveta Investments Ltd. (supra)* the England and Wales High Court has held that in view of the change in circumstances and removal of the jury system for trial in defamation actions pursuant to Section 11 of the Defamation Act 2013 in United Kingdom the Bonnard Principle is no more applicable. Furthermore, the principle is a defense used in defamation cases. In the absence of a jury system in India and the present case being one of disparagement /

slander of goods, not of defamation, the Bonnard Principle will not be applicable here.

**Freedom of Speech and Expression / Art. 19 of the Constitution of India**

**24.12** Admittedly, the Defendant is regularly creating and publishing content on his YouTube channel “Bearded Chokra” which is his fulltime occupation and only source of livelihood. Unlike a normal consumer, the Defendant strives to generate viewership and regular subscribers to his channel to generate revenue from the content published by him. The Defendant intended to generate revenue from the Impugned Video and it was not until two weeks after he was served with the Plaintiff’s legal notice that he demonetized the Impugned Video. It was a commercial purpose of earning revenue which is also the reason why the Defendant has created all his other videos. The publication of the Impugned Video is thus a commercial activity and the Defendant’s “opinion” in this view amounts to commercial speech.

**24.13** In the *Shree Maheshwar Hydrel case (supra)* this Court has observed that in a dispute between two private parties, one cannot claim an unfettered right of freedom of speech and expression against the other. The Defendant for his monetary gain is attacking the Plaintiff / its product in an attempt to attract more viewers to his YouTube channel / video and thereafter divert such viewer traffic to various other related and unrelated products by means of links to purchase such products from various shopping portals and also towards requesting / inviting monetary donations / sponsors towards its channel. Even though he is an individual, the Defendant cannot assert a fundamental right to abuse the Plaintiff’s product by making false / malicious allegations against it to gain monetary benefit. The tests with regard to limitations on

the right to commercial speech under Article 19(1)(a) and 19(2) of the Constitution of India would therefore apply to the present case.

**24.14** The fundamental right to freedom of speech and expression is not an unfettered right. While it is absolutely necessary to maintain and preserve the freedom of speech and expression, it is equally necessary to have some restrictions on this freedom of speech and expression for the maintenance of social order in democracy. Since no freedom can be absolutely unlimited, Article 19(2) of the Constitution of India provides the grounds on which reasonable restrictions on the freedom of speech and expression can be imposed. It is not in dispute that commercial speech is a part of the fundamental right guaranteed under Article 19(1)(a) of the Constitution of India, however, it cannot be that the fundamental right so guaranteed under the Constitution can be abused by any individual by maligning or disparaging the product of others as is done in the present case. In the case of *Hindustan Unilever vs. Cavincare (supra)*, the Court held as follows:

*“10.1 ... The litmus test, in my opinion is, whether (Sic) reasonable or prudent man" would take the statement "seriously"- attributing a defect in the rival traders goods. It is because ultimately it is for the consumers to decide which product is better equipped to meet his needs. ... Since advertisements is a form of commercial speech it is protected under Article 19(1)(a) of the Constitution of India, albeit with reasonable restrictions as provided by law. Therefore, as long as advertisements operate within the permissible areas, in other words, do not denigrate the goods of a rival, the courts should be slow in injuncting such acts.”*

In the case of *Hindustan Unilever vs. Gujarat Co-operative (supra)*, it was held as follows:

“49. *It cannot be disputed that advertisements and/or commercial speech is a part of the fundamental right guaranteed under Article 19 (1) (a) of the Constitution of India. However, it cannot be that the fundamental right so guaranteed under the Constitution can be abused by any individual and/or manufacturer of a product by maligning, discrediting and/or belittling the product of another manufacturer by way of negative campaign as is done in the present case.*”

24.15 Lastly, with respect to the Defendant’s reliance upon the judgments in *Whitney (supra)* and *Shreya Singhal (supra)* to argue that the Plaintiff should release a counter statement or counter video, the same does not impress me. The judgment in *Whitney (supra)* is of a foreign Court and not binding upon this Court. Further, principles set out in the aforesaid judgments were not in respect of an action for disparagement of goods and therefore the same do not assist the Defendant. The findings in that judgment were given in an entirely different context i.e. the case related to a prosecution and challenge to a conviction for violation of a specific statute being the Criminal Syndicalism Act of California. In my view, the discretion whether or not to counter with another video is that of the Plaintiff and that does not preclude the Plaintiff from seeking legal recourse as sought in the present case.

25. The Defendant cannot under the garb of educating / bring the true facts to public, provide misleading information to disparage the Plaintiff’s product. Any campaign to educate the members of the public by placing before them the true and correct facts may be welcomed. However, under the garb of educating and / or bringing the correct facts before the members of the public, no one should put misleading information which disparages / discredits or belittles someone else’s product or

influences the consumer not to buy the said product. Additionally, the unauthorized use of the Plaintiff's registered trademarks by the Defendant in a manner which is detrimental to its distinctive character or reputation cannot ever be in accordance with the honest practices in industrial or commercial matters.

### **BALANCE OF CONVENIENCE**

26. In so far as the aspect of the balance of convenience is concerned, the Ld. Advocate for Defendant has argued that the balance of convenience is in favour of the Defendant and that no irreparable harm or injury would be caused to the Plaintiff if the injunction is not granted. He submitted that it is not as though the Impugned Video is going viral or that millions of viewers are viewing the video everyday and hence there is no imminent likelihood of any damage to the Plaintiff. I do not think that this is a correct standard for ascertaining whether the balance of convenience is in favour of the Plaintiff or whether no irreparable harm or injury would be caused to the Plaintiff. I agree with the submissions made by the Ld. Senior Advocate for the Plaintiff that with the advent of internet and social media platforms like YouTube, there has been increasing trend whereby several videos like the Impugned Video are being created in the garb of providing a review of products available in the market where product images are being used without authorization, reckless statements are made in respect of such products under the garb of freedom of speech and expression without due regard to the reasonable restrictions thereon with a view to target maximum views for the videos so posted on such social media sites and to make unfair gains on the basis of the views generated. I have already come to a conclusion that the Impugned Video is disparaging in nature. With every passing day, the

number of views on the Impugned Video are increasing. Today, internet has a vast audience and an immediate and much greater impact than some other forms of communication. The harm or damage that would be caused to the Plaintiff is irreparable and cannot be ascertained in terms of money. The Defendant has already demonetized the Impugned Video. The balance of convenience is therefore in favour of the Plaintiff and against the Defendant.

27. In view of the above finding that the Defendant's Impugned Video is disparaging in nature, another issue which requires deliberation is to what extent should the Impugned Video be censored to cease further injury to the Plaintiff's goodwill and reputation. In the case of *Gujarat Co-operative vs. Hindustan Unilever (supra)*, the Division Bench of this Court held that certain slides of the subject commercial advertisement that depicted "Vanaspati" / "Vanaspati Tel" being poured into a cup of frozen dessert were disparaging the plaintiff's product (frozen desserts). Hence, while the plaintiff therein had impugned the entire video in its suit, the Division Bench of this Court ordered the removal of only those slides that were disparaging the plaintiff's product. Much like the said case, the present Plaintiff has also impugned the entire video of the Defendant. However, the facts and circumstances of the present case demand a different verdict. The intent of the Defendant to disparage the product of the Plaintiff pervades throughout the Impugned Video. The Impugned Video is consistently riddled with disparaging references to the Plaintiff's product, including *inter alia* its title, its landing page, the description and the comments posted by the Defendant. In my opinion, it is not possible to dissect the innocuous parts of the video to create a coherent and acceptable version of it. Had it

been a case where the disparaging content of the Impugned Video was limited to certain portions of the video, my conclusion may have been different. However, in the present case, the entire video must go. Having said that, I do not agree with the Plaintiff that a blanket injunction should operate against the Defendant in respect of any of his future works. Whether any content created by the Defendant in the future is disparaging or not is a matter to be decided in the facts and circumstances of the case. In my view, *albeit* the Plaintiff has made out a case to show that the Impugned Video is objectionable, it would be unfair that the present injunction would apply to a work of the Defendant that has not even been created yet as sought for by the Plaintiff. I am therefore not granting the prayer clause (b) to the Plaintiff. I am also restricting the injunction in prayer clause (a) as mentioned below.

- 28.** Before I part with the judgment, a word of caution which I believe is required in the context of the present case. Today, social media influencing is one of the most impactful and effective ways of marketing and advertising. A social media influencer who has or claims to have a sound knowledge on what they claim their niche is and uses that knowledge to influence people in believing and subscribing to the same set of ideas or thoughts they are trying to propagate on social media, have the power to influence people, to change attitudes and mindset. This mindset can be changed for the better, and scarily, even for the worse. This is a responsibility that should be assumed carefully. But first of all, there needs to be a deep awareness about the basic fact that this indeed is a responsibility. In today's time, when people from all over the world are harnessing the potential of social media influencing, there is a need to understand what these responsibilities are and why they matter so much. Social Media Influencers, whether their audience is significant or small, impact the lives of

everybody who watches their content. They do have a responsibility to ensure what they are publishing is not harmful or offensive<sup>25</sup>.

29. In view of the above, I am satisfied that the Plaintiff has made out a prima facie case for grant of *interim* reliefs. The balance of convenience is in favour of the Plaintiff. If the injunction as prayed for by the Plaintiff is not granted, the Plaintiff is likely to suffer irreparable harm and injury. Accordingly, the above Notice of Motion is made absolute in terms of prayer clause (a) except the bracketed portion, which is reproduced hereunder:

*“a. That pending hearing and final disposal of the present suit, the Defendant his employees, representatives, agents and all other persons claiming under him or acting in concert with him or on his behalf or acting on his instructions be directed by an order and injunction of this Court to take down / remove and / or block / restrict access to the Impugned Video from the URLs set out in the Plaint (i.e. <https://www.youtube.com/watch?v=CVeFO161CU>) or any other URL on the youtube platform or on any other medium whatsoever including on the internet or any other platform and to cease and desist from in any manner either directly or indirectly creating, producing, hosting, telecasting or broadcasting or otherwise howsoever communicating to the public or publishing the Impugned Video or any part thereof (or any other audio or video of a similar nature in any language) or in any manner causing the Impugned Video or any part thereof (or any other audio or video of a similar nature in any language) to be created, produced, hosted, telecast or broadcast or communicated to the public or published in any manner.*

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<sup>25</sup> The Real Responsibility of Being a Social Media Influencer - <https://digest.myhq.in/social-media-influencer-job/>



Nitin

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**30.** No order as to costs.

**(S. J. KATHAWALLA, J.)**