IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: October 30, 2021

\+ CS(COMM) 1/2017 & I.As. 21153/2011, 4474/2014, 2645/2020, 2646/2020, 7203/2020

M/S DRS LOGISTICS (P) LTD & ANR. ..... Plaintiffs
Through: Mr. Chander M. Lall, Sr. Adv. with Ms. Nancy Roy, Adv.

versus

GOOGLE INDIA PVT LTD & ORS. ..... Defendants
Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Neel Mason, Ms. Ridhima Pabbi, Ms. Ekta Sharma, Ms. Vennela Reddy and Ms. R. Ramya, Advs. for D-3
Mr. Arun Kathpalia, Sr. Adv. with Mr. Saransh Jain, Ms. Shlok Narayan and Mr. Tejpal S. Rathore, Advs. for D-1
Mr. Kshitij Parashar, Adv. for D-2
Ms. Haripriya Padmanabhan, Adv. with Mr. Shrutanjaya Bhardwaj, Adv. for applicant in I.A. 7203/2020

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

IAs. 21153/2011 and **4474/2014**

1. The present suit has been filed by the plaintiff seeking permanent injunction against the defendants. The plaintiff has also filed the I.A. 21153/2011 under Order XXXIX Rules 1 and 2

of the Code of Civil Procedure, 1908 ('CPC' hereinafter) with the following prayers:

> *"A. The Defendants, it directors, officer, servants, agents, representatives and assigns be restrained by an order of interim and ad-interim ex-parte injunction from:*
>
> *(i) using or permitting third parties to use AGARWAL and / or AGGARWAL PACKERS & MOVERS and / or DRS LOGISTICS or any other trade mark or name similar to the Plaintiffs' registered trademark AGARWAL PACKERS & MOVES and / or DRS LOGISTICS either as a key word or as a meta tag or as a trade mark or part of a key word or meta tag or trade mark or in any other manner so as to infringe the registered trade marks of the Plaintiffs;*
>
> *(ii) permitting third parties from advertising AGARWAL and / or AGGARWAL, PACKERS & MOVERS and / or DRS LOGISTICS in various combinations on its website or any trade mark or name similar to the Plaintiffs' registered trade mark AGARWAL PACKERS & MOVERS and / or DRS LOGISTICS or any other trade mark either as a trade mark or part of a trade mark, a trade name or corporate name or as part of a trade or corporate name, or in any other manner whatsoever so as to allow third parties from passing off their services or business as and for the services or business of the Plaintiffs; except Agarwal Packers & Movers Ltd. or any other company / entity enjoying registered users licence or permission to use the name*
>
> *(iii) permitting any third parties from using any other indicia whatsoever to show any association or affiliation or connection of with the Plaintiffs or their services on its website;*
>
> *B. The Defendants, it directors, officer, servants, agents, representatives and assigns be restrained by an order of interim and ad-interim ex-parte injunction from:*

(i) remove all references on its sponsored links to third party websites, when the words AGARWAL and / or AGGARWAL, PACKERS & MOVERS and / or DRS LOGISTICS are used in various combinations in the search engine of the Defendant website. except Agarwal Packers & Movers Ltd or any other company / entity enjoying registered user license or permission to use the name:

C. The Defendants be called upon to immediately and forthwith allow inspection of their accounts to assist in ascertaining damages;

D. Costs of the present application be awarded to the Plaintiffs; and

E. Any other relief which the Hon'ble Court thinks fit and proper in the circumstances of the case be allowed in favour of the Plaintiffs and against the Defendant."

2. The plaintiff has subsequently filed another application numbered as I.A. 4474/2014 under Order XXXIX Rules 1 and 2, CPC, seeking *ad interim* relief against defendant No. 3, i.e., Google LLC with the following prayers:

"A. The Defendant No.3, it directors, officer, servants, agents, representatives and assigns be restrained by an order of interim and ad-interim ex-parte injunction from:

(i) using or permitting third parties to use AGARWAL and / or AGGARWAL PACKERS & MOVERS and / or DRS LOGISTICS or any other trade mark or name similar to the Plaintiffs' registered trademark AGARWAL PACKERS & MOVES and / or DRS LOGISTICS either as a key word or as a meta tag or as a trade mark or part of a key word or meta tag or trade mark or in any other manner so as to infringe the registered trade-marks of the Plaintiffs;

(ii) permitting third parties from advertising AGARWAL and / or AGGARWAL, PACKERS &

MOVERS and / or DRS LOGISTICS in various combinations on its website or any other trade mark or name similar to the Plaintiffs' registered trade mark AGARWAL PACKERS & MOVERS and / or DRS LOGISTICS or any other trade mark either as a trade mark or part of a trade mark, a trade name or corporate name or as part of a trade or corporate name, or in any other manner whatsoever so as to allow third parties from passing off their services or business as and for the services or business of the Plaintiffs; except Agarwal Packers & Movers Ltd. or any other company / entity enjoying registered users licence or permission to use the name.

(iii) permitting any third parties from using any other indicia whatsoever to show any association or affiliation or connection of with the Plaintiffs or their services on its website;

B. The Defendant No.3, it directors, officer, servants, agents, representatives and assigns be restrained by an order of interim and ad-interim ex-parte injunction from:

(i) remove all references on its sponsored links to third party websites, when the words AGARWAL and / or AGGARWAL, PACKERS & MOVERS and / or DRS LOGISTICS are used in various combinations in the search engine of the Defendant website except Agarwal Packers & Movers Ltd. or any other company / entity enjoying registered user license or permission to use the name

C. The Defendant No.3 be called upon to immediately and forthwith allow inspection of their accounts to assist in ascertaining damages;

D. Costs of the present application be awarded to the Plaintiffs; and

E. Any other relief which the Hon'ble Court thinks fit and proper in the circumstances of the case be allowed in favour of the Plaintiffs and against the Defendant No.3."

3. I shall proceed to decide both these applications simultaneously. This Court vide order dated January 22, 2020 had recorded the submission of the plaintiff wherein it had stated that the only issue which need to be decided for the purpose of injunction is, whether providing a trademark of an owner as a keyword to a third party would amount to infringement of a trademark. The same has been reproduced as under:

> *"2. In other words, he clarifies that Google does not allow any third party to put / publish / refer to a trademark of an owner in the Adtext / Adtitle as per its policy. Mr. Sethi also states that the said policy is still in vogue and shall be implemented in favour of the plaintiff.*
> *3. On this, Mr. Chander M. Lall, learned Senior Counsel appearing for the plaintiffs, states that in view of the statement of Mr. Sethi, the only issue which needs to be decided for the purpose of injunction is whether providing a trademark of an owner as a keyword to a third party shall amount to infringement of a trademark."*

I further note from the plaint that plaintiff No.1 is the owner of the trademarks and copyrights and plaintiff No.2 has been granted license for use of trademarks and copyrights vide agreement dated July 22, 2009. It is also clear from the plaint that plaintiff No.2 has filed an application before the Registrar

of Trademarks to take on record the fact that it is a registered user of the trademarks of plaintiff No.1. Plaintiff No.1 and plaintiff No.2 have been in this order collectively referred to as 'plaintiff' for the sake of brevity.

4. Mr. Lall, learned Senior Counsel who appears along with Ms. Nancy Roy on behalf of the plaintiff has stated that through the present suit the plaintiff seeks to restrain defendants Nos. 1 and 3 i.e. Google India Pvt. Ltd. and Google LLC (hereinafter 'Google') from the use of the plaintiff's registered trademarks which constitute a part of ad-title, ad-text, URL and meta-tag or keyword. Mr. Lall states that meta-tags or keywords trigger search results on Google i.e. by way of Google Ads.

5. It is the case of the plaintiff that several third party infringers use the services of Google for inserting their infringing advertisements when a user on the internet looks for the plaintiff by typing "*Agarwal Packers & Movers*". Plaintiff has moved against third parties and despite having decrees in its favour it states that Google did not stop the use of infringing advertisements on their platforms. He stated that one party namely Agarwal Packers India (Agarwal Express Links Pvt.

Ltd.) against whom a decree has been passed, continues to appear in the keyword, Ad-title and URL.

6. It is the case of the plaintiff that obtaining orders against individual advertisers on the Google platform was ineffective and it is due to this reason that the plaintiff was compelled to initiate the present suit against defendant Nos. 1 & 3 and defendant No.2 i.e. Just Dial. Mr. Lall has pointed to the averments made in the plaint wherein it has been stated that the plaintiff has been asked to pay more money or else the defendants would advertise the infringers of the plaintiff's brand on their website.

7. Mr. Lall argued that these actions of the defendants amount to blackmailing through the AdWords Program. He has argued that there are numerous tutorials available online which suggest that by bidding for one's own brand, which is used as a keyword by the Google AdWord Services the owner can protect the advertisement panels on the search engine result page from being used by the competitors and from stopping the competitors from stealing the traffic.

8. It is the case of Mr. Lall that the suit has been initiated against Google alone and not against their customers who use Google services, which are constantly changing. The suit targets the mechanism of Google and the cause of action relates to all activities where the registered trademark of the plaintiff is used to direct internet traffic to the website of the infringer and seeks injunction from using the same as a keyword / meta tag, etc.

9. He has pointed out, that at the time of filing of the suit brand infringement was permissible on Google by use of registered trademarks in the ad-title and ad-text as also in the URL and of course keywords. However, Google has agreed to block the trade mark *"Agarwal Packers & Movers"* and other similar marks of the plaintiff from appearing in the Ad-title and Ad-text. According to him, on URL, the defendants in their written statement in paragraph 14 have also stated that, in terms of the policies of Google Inc., which are implemented by Google Inc, itself no registered trademarks will be displayed in the Ad-text and Ad-title of an advertisement or sponsored link. The trademarked term would also not appear in the URL of the

advertisement and that the said policies would be applicable to the plaintiff as well.

10. According to him, on the issue of keywords, Google had asserted that it only implements the policy to restrict keywords in certain countries which include China but does not include India. Mr. Lall has pointed to the policy of Google as existing before the Madras High Court in ***Consim Info Pvt. Ltd. vs. Google India Pvt. Ltd. & Ors. 2011 (45) PTC 575 (Mad) (SJ) ('Consim I'*** hereinafter) and ***Consim Info Pvt. Ltd. vs. Google India Pvt. Ltd. & Ors. 2013 (54) PTC 578 (Mad) (DB)*** **('*Consim II'*** hereinafter) to list the countries where it restricts the use of keywords. However, when it comes to India the defendant Nos. 1 and 3 have stated that Google would not investigate or restrict the use of a trademark term in keywords, even if a trademark complaint is received. According to him, Google does not consider use of trademarks as keywords as use, or infringement of a registered trademark.

11. As per Mr. Lall in the earlier cases before the Madras High Court viz. ***Consim I*** and ***Consim II*** both Google India and Google Inc. were parties and the stand taken by Google has

changed from 2009 to 2014 which is when the current suit was filed.

12. According to Mr. Lall, the Division Bench of the Madras High Court held the Plaintiff/Appellant therein to be entitled to an injunction. He stated that the Court had given a finding stating that Google had discriminated against the appellants therein and also arbitrarily used the trademark words as keywords; and that Google could have used some other words as keywords on sponsored link and also held that Google's action would only create confusion in the minds of the public. Further that Google was bound by the policy that has been reproduced in the order of the Division Bench.

13. He further pointed to the written statement of the defendant No. 1 to state that they have in paragraph 20 admitted to the applicability of judgment in the case of ***Consim I*** to the instant case and therefore the change in policy now is completely mischievous and contumacious. Further, he stated that in an affidavit filed by Google there was an admission that right up to 2009 the AdWords Policy applicable to India did not allow trademarks as part of keywords. According to him,

Google asserts that they revised their Ad Policy on June 4, 2009 to allow use of trademarks as keywords in more than 100 countries including India. The decision in ***Consim I*** is dated September 30, 2010 wherein Google was bound to follow the keyword policy in India prior to amendment. The policy that was to be followed for India was also clarified in paragraph 51 of ***Consim II***.

14. Mr. Lall relied on the judgment of the Bomaby High Court in the case of ***People Interactive (I) Pvt. Ltd. vs. Gaurav Jerry, MIPR 2014 (3) 101***, to state that, meta-tags are special lines of code embedded in the web pages which provide structured data (meta data) about the web page and that these meta-tags are used by search engine robots to assess webpage contents and other relevant material relating to a webpage in the building of search engine indices. The illicit use of meta-tags could be severely damaging and that this is a form of hijacking the plaintiff's reputation and goodwill. Similarly, ***Mattel Inc. & Ors. vs. Jayant Agarwalla & Ors., 2008 (38) PTC (416) (Del)*** held that meta-tags are machine readable codes used by search engines to index sites. Additionally, he stated that meta-tags are

included in the code that defines the functionality of a website by a website owner and that the use of trademarks as meta-tags constitutes infringement and passing off since the defendant Nos. 1 and 3 through such tags divert internet traffic away from the plaintiff's website.

15. By placing reliance on ***Consim I***, he also argued that keywords are meta-tags which have been commercialised and are available to third parties for a price. According to him, defendant No.3 describes a keyword as words or phrases you choose that can trigger your ad to show on search and other sites; these keywords are used synonymously with 'search terms' and 'AdWords'.

16. Mr. Lall argued that Google is not an intermediary, but rather a direct beneficiary through the sale of keywords. As per the judgement of ***Consim II***, Google explained that advertisers who vie with one another are asked to bid upon the basic price fixed by the search engine for selection of the keyword; and parties can advertise their services on the sponsored links by paying necessary charges to Google. According to the written statement of defendant No.3, Google India is the reseller of

Adwords Program in India and as per ***Consim I***. Google guides the advertiser in selection of the keyword and charges them either a fixed rate or gives it to the highest bidder.

17. Mr. Lall has pointed to Google's policy to state that Google maximises its revenues by linking keywords with the goods/services of the advertisers and that these keywords enable the advertisements to appear on diverse Google platforms. The relevant section of Google's policy has been reproduced as under.

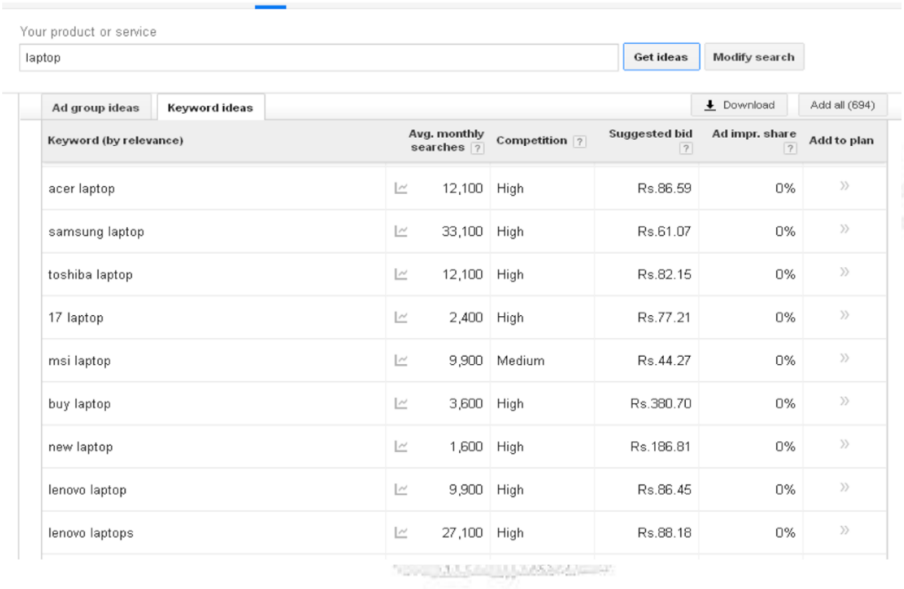
> *"With a keyword-targeted ad on Google and its search partners, your bid is based on your maximum cost-per-click (max. CPC) bid, the maximum amount you're willing to pay for each click on your ad (though the final amount you're charged per click - your actual CPC - could end up being less). Your Quality Score is based on the relevance of your keywords, the quality of your landing page, your ad's click through rate (CTR), adjusted for its position on the page, and a few other factors.*
>
> *xxx xxx xxx*
>
> *Keywords can trigger your ads to appear next to search results on Google and other search sites. But keywords can also trigger your ads to show on other sites across the Internet - Google-owned properties like YouTube as well as Google's partner sites like NYTimes.com or Families.com, for example. We call these placements, which are part of what we call the Display Network."*

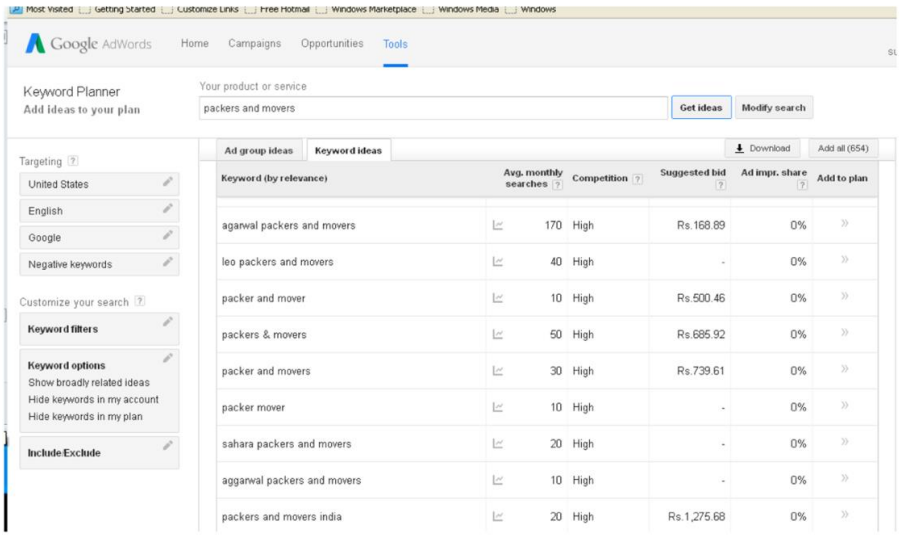
18. Mr. Lall points out to the averments made by the defendant No.3 in their written statement that the sponsored results / ads are obtained by the mechanism put in place under the AdWords Program. Only advertisers having an AdWords account can access the AdWords Program, which allows advertisers to create, select, edit and manage keywords based on which their advertisements can show up as a 'sponsored links' / ads in response to a search query entered by any user. He stated that the defendant admitted that the keyword mechanism is at the heart of Google's programming, as they have stated in the written statement that, the automated response which Google search engine makes to a user's search request by displaying a sponsored link is wholly determined by the keywords and other content of the sponsored link which the advertiser has chosen.

19. Mr. Lall has pointed to the Plaintiff's affidavit with a screenshot of how the keyword Planner which assists the advertisers in selecting certain terms and combinations thereof as keywords under the AdWords Program which can help improve the likelihood of an advertisement receiving a higher relevancy score of Ad rank; which reads that the keyword

'agarwal packers and movers' has 170 as average monthly searches and the screenshot reads that the competition against this keyword as *'High'* and suggests a bid of ₹168.69. The keyword planner tool according to them provides data and information to an advertiser relating to popular keywords in the same field of business and gives information such as average monthly searches for any popular keyword or a suggested value of the bid amount to help the advertiser plan its bid value, keeping in mind other advertisers in the same field of business. Mr. Lall argued that by the virtue of the above acts, Google cannot be termed as an intermediary, as the term has been defined under the Information Technology Act, 2000 ('IT Act' for short). It is not entitled to claim the harbour of Section 79 of IT Act as it is Google itself which provides the service of keywords, selects the people who can participate and actually shepherds them through the process and conspires and abets the commission of unlawful acts. Mr. Lall has placed reliance on the affidavit of Ramesh Agarwal filed on April 19, 2014, wherein screen-shots of the Keyword Suggestion Tool which shows the advertiser the *Ad group ideas* along with *keyword*

ideas as well as country specific options, language, *negative keywords*, etc. This is also succeeded by a column for *Keyword filters* with *Keyword options*, *Show broadly related ideas*, *Hide keywords in my account*, *Hide keywords in my plan*. The prospective advertiser is offered a menu of keywords to choose with the following information:





20. He argued that Google's argument is merely an afterthought. Its AdWords Policy itself acknowledged that the use of trademarks as part of keywords constituted violation of trademark rights and merely because they now unilaterally decide to change that policy, the legal position remains unchanged and Google is estopped from claiming to the contrary. He further anchors his argument on the fact that the use of keywords by search engines require licenses, a fact which has been acknowledged by Google; as per the plaint wherein the plaintiff has submitted that the plaintiff also participates in the Google AdWords Program and when it does, in such a case the plaintiff licenses the use of its registered trademark to the defendant No.1 and the defendant No.3 for use as a keyword. According to him defendants specifically admit the position that its AdWords Policy, Terms of Service requires the trademark owner to grant to Google a license to use the keywords in future. The need to obtain a license by Google constitutes an admission that unlicensed use is not authorised.

21. He submitted, that as per section 29(7) of the Trade Marks Act, 1999 (TM Act 'for short') clearly sets out that a

registered trademark is infringed by a person who applies such registered mark to a material intended to be used for advertisement of goods or services and here the goods or services are not restricted to goods/services for which the trademark is registered.

22. Mr. Lall has argued that defendant No.2 Just Dial is another service provider which collaborates with Google and its AdWords Policy; when one searches for the plaintiff's registered trademark a Just Dial advertisement appears on top. The name of Just Dial is in juxtaposition to the trademark of the plaintiff. Just Dial is then able to direct traffic to a telephone number who pays them the highest fee, just like Google. The first number that appears on Just Dial is of the person who pays the highest fee for the listing.

23. Mr. Sandeep Sethi and Mr. Arun Kathpalia, learned Senior Counsels who appear with Mr. Neel Mason and Mr. Saransh Jain on behalf of defendant Nos. 1 and 3 (collectively referred to as 'Counsels for Google'), argued that the Google Ads program, is an advertising service where any advertiser can create and display an online advertisement in relation to its

website, including search-based advertising on the Google search engine. The search results on the first page of the Google Search engine are of two types, i.e., 'Sponsored Search Results' and 'Organic Search Results'. The former comprises of advertisements and appear separately from the organic search results; and are differentiated from the label 'Ad'.

24. The Counsels for Google have submitted that for creation of an advertisement, the advertiser *inter alia* has to provide the text of his Ad, i.e., the Ad-Text and also provide the search terms or phrases, which are known as keyword(s), which the advertiser believes are most relevant to its business. When the said keyword is typed in by any internet user on the Google Search Engine, as a search query, the Ad of the advertiser may be eligible for display on the Google Search Engine Results Page. Counsels for Google have maintained that each and every element of the Ad is created and provided solely by the advertiser, whereas the Google Ads program merely provides an advertising platform and interface for creating and placing such an Ad on Google Search. A keyword provided by the advertiser is treated as just a backend trigger for an Ad to be

displayed and is never used in a trademark sense. Keywords provided by the Advertiser are not visible anywhere within the advertisement nor are they used in any tangible or perceptible manner to the end user.

25. The Counsels for Google have explained that the search-based Ads are triggered by a way of automated software algorithms that match the search query entered by a user with the set of keywords provided by various advertisers and algorithmically determines which Ad is most relevant to the search query and should be triggered, if at all. The actual display and ranking of an Ad is not determined by the selection of keywords alone nor the highest bid, but is a function of a combination of the bid amount, quality score (that factors the relevance of the Ad), the context of a user's search and the expected impact of Ad formats and extensions. It is the case of Google that revenue is not earned or generated by Google merely by an advertiser participating in the Google Ads program or upon the mere display of an Ad. A charge is made to the advertiser only if the Ad is clicked upon by the end user.

26. It has been argued by the Counsels for Google that the keywords are neither sold by Google nor are they purchased by the advertiser in the sense of exclusively reserving the term or phrase for the purpose of triggering Ads. Google has stated that none of the Advertisers acquire any proprietary rights in the keywords provided by them to Google and that multiple advertisers can select the same keyword.

27. With regard to the keyword Planner Tool, the Counsels for Google have argued that, this is a standalone research tool, i.e., the keyword planner which was earlier known as Keyword Suggestion Tool. They have submitted that this is a tool for the benefit of advertisers to gain statistical information and understanding about the kind of words, expressions, combinations that may be relevant for an advertiser to consider as keywords for triggering their advertisements. They state that, the keyword planner tool is not a mandatory step for creating or running advertisements on Google Ads and is simply a free facility or a software tool that is separately available to the advertiser and can be used to help plan an advertisement campaign, should the advertiser choose to avail of it. This

keyword planner is only for the internal reference of advertises and is not publicly accessible except to advertisers who specifically look for this tool on the Google Ads program. According to them, prospective advertisers can use this tool to generate and compile lists containing some relevant statistical data e.g., number of average monthly searches, the competition level, the amounts bid by advertisers for a keyword, etc., regarding a given business field and learn which keywords and search phrases would generate an optimum value for the advertiser. They have stated that, the information that is ultimately displayed using this tool is based on the millions of bits of data that is being stored dynamically to the extent it matches with the queries fed in by the user of the tool; and Google has taken a stand that the advertiser is free at all times whether or not to use the keyword planner tool and has the full discretion and choice to provide or not provide a keyword, irrespective of whether it forms a part of keyword planner or not and may even provide a keyword that is not a part of the keyword planner at all. Google has maintained that the said tool

is line, both with the applicable law in India as well as honest commercial/industrial practices.

28. In context of their trademark policy vis-a-vis the Google Ads, the Counsels for Google have stated that the Google Ads Trademark policy explicitly prohibits any advertisements that infringe the trademark rights of others. They have also stated that under the policy, Google investigates the use of trademarked terms in the Ad-Text of competitor ads, i.e., in the visible portion of the ad that appears on the search results page. Google does not restrict or investigate use of trademarks as keywords. They have stated that the, trademark policy permits use of the trademark term in the Ad-text by resellers, informational sites and authorized advertisers, if they meet the necessary requirements, consistent with the applicable law in India. According to them, Google Ads Trademark policy which is applicable globally including in India is aligned with global legal precedent, finding that a mere use of a trademark as a keyword, without more, does not amount to infringement or unfair competition. They have stated that the said policy had been recorded and accepted in ***Consim I*** and reiterated by the

Division bench in ***Consim II***. The said policy has not undergone any significant change since then, contrary to what the plaintiff has alleged. They have stated that the only issue subsisting in the present matter is whether permitting a third party to register a keyword that is a registered trademark amounts to infringement, which according to them is a question answered in the negative, based on the findings of numerous foreign Courts.

29. It is the case of Google that, once the Ad is created or edited by an advertiser, the Ad is reviewed in an automated manner for compliance with the Google Ads policies and applicable laws. The process of review involves the Ad being reviewed in an automated manner and algorithmically without any human intervention to check any Ad that may be placed in the system for violations of applicable laws. The content, including headline, description, keywords, destination and any images and videos are reviewed within one business day. Ads which on the face of it violate Google Ad policies; for instance, Google algorithms will automatically track and block advertisements which are prohibited under the Pre-Conception

and Pre-natal Diagnostic Techniques Act, 1994 ('PCPNDT Act', for short). At the same time, for certain policy violations such as trademark violations (in the Ad Text), the Ads tools can detect and block the misuse of a trademarked term in the Ad Text once the owner of such rights has informed Google of its valid and existing rights and as to how a particular advertisement is in violation of such rights. It is Google's case that the plaintiff itself has benefitted from the said feature and is very well aware of the nature and functioning of review of Ads by Google.

30. According to the counsels for Google, Google Advertisement Policies also include the Misrepresentation Policy. The thrust of the said policy is to route out ads that seek to mislead users or misrepresent themselves to offer genuine or authorised goods or services or in any manner seek to play a fraud on the users. For instance, Ads scamming users by impersonating brands or businesses by referencing the brand content in the ads, URL, destinations or an advertiser misrepresenting itself as the brand or business in user interactions is not permitted under the said policy. An Ad which

is suspended for violation of this policy also leads to suspension of the associated accounts of advertisers of such Ads, since this is considered to be a gross violation of the Ad policies. It had also been submitted, that the Plaintiff in the present proceedings had reported certain Ads for violation of their trademark rights. However according to Google, such ads were not found to be in violation of the Trademark policy of Google Ads because they did not feature the plaintiff's trademark in the Ad Text, the same were found to be in violation of the Misrepresentation policy and had been acted upon accordingly. It has been submitted that, Google Ads program does not permit bad ads, that are intended to deceive users by excluding relevant information or providing misleading information and such ads will be reviewed under the Misrepresentation Policy, as and when reported by the Plaintiff.

31. Another limb of argument advanced by the Counsels for Google, has been that keywords are not meta-tags. According to them, meta-tags are neither used by Google in the organic search result nor are they part of sponsored links/Ads section.

On the specific issue of meta-tags the Counsels for Google addressed the following issues:

i. That there is neither any pleading nor any factual foundation laid down in the plaint to allege what meta-tags are or how Google is allegedly infringing the Plaintiff's trademark rights through meta-tags. According to them the only reference is in the prayer clause of the plaint, which is entirely unsupported by pleadings. The arguments raised regarding meta-tags have been raised for the first time in rejoinder arguments and that too only in oral submissions. It is a well settled principle that a party cannot be allowed to bring a fresh cause of action at the stage of rejoinder.

ii. It is their argument that the plaintiff should be precluded from raising this argument at this stage. It has been their submission that meta-tags are 'website descriptors' or 'tags' that can be words, expressions or phrases that are put in the source coding of any website to help describe the contents of their website. If the website owner puts certain keywords in his website's source coding and

designates them as met-tags, they are referred as 'keyword meta-tags'. However 'keyword meta-tags' cannot be confused with 'keywords'. A keyword is conceptually different from a meta-tag. A keyword is a word/phrase that is provided by an advertiser to act as a trigger for its ad. It is not embedded, included or incorporated into any source code or other text of either the ad or the advertiser's website. On the other hand a meta-tag is a word /phrase put in source code by a website developer.

iii. According to them the difference had been discussed by the Federal Court of Australia in the judgement of ***Veda Advantage Ltd. vs. Malouf Group Enterprises Pvt. Ltd. [2016] FCA 255***, wherein it has been noted that "keyword meta-tags" were trademarked words embedded in the source code of a website and its pages by the creator/editor of the site. It had also been that unlike the 'keywords' employed by Google as a trigger at the backend, 'keyword meta-tags' were not entirely invisible

and were visible to those who know what to look for, in the source data.

iv. They have argued that the reliance placed by the plaintiff on the judgments in the cases of ***People Interactive (supra)*** and ***Mattel (supra)***, is misplaced and unsustainable. According to them the Courts have not in any way held a search engine responsible for use of meta-tags by a website owner in his website's coding and are being read by the Plaintiff to suit his own case. They have argued that the aforesaid cases are inapplicable to the facts of the present case and that the plaintiff has read orders as well as concept of meta-tags to its own liking and same does not reflect the correct position of facts.

32. Another argument taken by the counsels for Google has been that the use of Trademarks as keywords does not amount to "*use*" under the TM Act. According to them, section 2(2) (b) requires a trademark to be used "*in a printed or other visual representation*" as a prerequisite before use under section 2 (2)(c) can even be examined. The key requirement here is that the use of a trademark is in some visible or tangible form which

is *"represented"* to an end user / consumer. Mere providing of a trademark term as a keyword as a back-end trigger by the advertiser to display its ads does not in any manner amount to such *"representation"* and does not qualify as *"trademark use"* particularly by Google.

33. It has been their case that as per the Federal Court of Australia in ***Veda Advantage (supra)*** wherein the Court had held that the use of a trademark as a keyword *"which is invisible to the consumer"* is not a use as trademark. The Court rejected the proposition that using the words which are invisible and inaudible, indeed imperceptible, to consumers, amounts to trademark use. Further, the UK Court of Appeal in the case of ***Reed Executive Plc & Anr. vs. Reed Business Information Ltd. and Ors., [2004] EWCA (Civ) 159*** had stated in relation to use of trademarks as keywords, that an invisible use of such sort, may not be use at all, for the purpose of the trademark legislation as there is no meaning being conveyed to anyone – *"no sign"*. In another decision given by the Moscow City Arbitrazh (Commercial) Court in the case of ***Nebo vs. Almazakh, Case No. A40-128465/17-91-1116 (2017)*** had held

that using a trademark as a keyword does not constitute use of a trademark and observed that keywords cannot be viewed as means of using a trademark as such words do not carry the *"branding"* capacity. The Court had observed that keywords do not form part of the advertisement proper, they are not included in its content and are not shown to the user. Keywords cannot even be used for identifying a particular ad as the same keywords may be used for multiple advertisements. Therefore, users do not know on the basis of which keyword a particular advertisement is shown nor can they determine which exact keywords correlates with the said advertisement.

34. It is their case that section 2(2)(c) further requires that the Plaintiff's trademarks be used *"as or as part of any statement about the availability, provision or performance"* of its services for it to qualify as trademark use. Mere providing of a trademark term as a keyword as a back-end trigger by the advertiser to display its ads does not in any manner amount to a *"statement"* to the end user / consumer and does not qualify as "trade mark use", especially by Google. The High Court of New Zealand in the case of ***NZ Fintech Limited T/A Moola vs.***

Credit Corp Financial Solutions Pty Ltd T/A Wallet Wizard [2019] NZHC 654 held that an advertiser is not using a keyword as a *"badge of origin"* for its goods or services, but rather it is being used in Google's paid service *"to place its comparative or competitive offering"* in the search results along with the trademark owner's offering which indicates that there is *"no use as a trademark"*; and also in the case of ***Veda Advantage (supra)*** it was observed that keywords being indiscernible to the consumers are not being used by the advertiser to *"distinguish the services of one trader from another"* and cannot denote a connection in trade between them. Such use by the advertiser is merely to "*identify internet users who may have interest in using its services*".

35. Counsels for Google, have argued that section 29(6) is to be read in addition and as a further elaboration of use under Sections 2 (2)(b) and 2(2)(c) that particularly identifies four specific forms of "use" of a trademark, which may qualify as infringement under section 29. Use of trademarks as keywords at the *"back end"* for triggering ads does not qualify as use, including under any of the subsections of section 29(6),

especially by Google. It is their case that it has been held across various international Courts that internal use of the trademark at the backend for triggering ads does not amount to use and hence cannot amount to trademark infringement.

36. It is their case that, if there is no use of trademark for five years as contemplated under section 47(1)(b), which provides that a trademark may be removed from the register, if a trademark owner is permitted to claim to be making "trade mark use" of a trademark solely by using the term as a keyword at the backend without it otherwise appearing anywhere in the trademark owner's advertising materials or business activities, *"non-use"* as contemplated under Section 47 and its purpose would stand defeated.

37. The Counsels for Google have argued that, even if use is established, there are no elements for infringement and/or passing off under the TM Act which have been established. According to them section 29(1) stated that the use of a trademark is infringing only if it is *"likely to be taken as being used as a trademark"*. The High Court of New Zealand in ***Intercity Group (NZ) Limited vs. Nakedbus NZ [2014] NZHC***

124 had held that use of a trademark as a keyword is an act which is not *"seen"* or *"known"* or understood by the consumer, it could thereby not be *"taken as"* anything, let alone amounting to use that this is *"likely to be taken as being used as a trademark"*. This view was also accepted by a Court of the United States of America in the case of ***Merck & Co. Inc. & Anr. vs. Mediplan Health Consulting, 425 F. Supp 2d 402*** and it was observed that internal use of a trademark as a keyword on Internet Search results does not constitute a trademark use. They state that, Courts have around the world held that in cases of no visible appearance of a third-party trademark in keyword advertising, it cannot amount to infringement. Reliance has been placed on ***Reed Executive (supra)*** and ***Veda Advantage (supra)***. They also submitted the judgement of the Chancery Division Court in the case of ***Cosmetic Warriors Ltd. & Anr. vs. Amazon.uk. Ltd & Anr., [2014] EWHC 181 (Ch),*** wherein it was held that the use of third party trademarks as keywords to trigger advertisements does not constitute trademark infringement.

38. Google has taken a stand that there is no *prima facie* evidence of confusion for infringement under sections 29(2) and 29(3) of the TM Act which state that use of a trademark is infringing if it is *"likely to cause confusion on part of the public"*. They have contended that it is settled law that confusion to the public or even likelihood of confusion cannot be automatically assumed in a vacuum where the actual advertisement and corresponding website does not mislead the consumer in any way. In absence of any actual or visible use of a trademarked term within the text of an advertisement, no question of likelihood of confusion or deception arises. Mere triggering of an advertisement of a third party cannot *per se* give rise to an assumption of confusion in public. Counsels for Google have also relied on *McCarthy on Trademarks and Unfair Competition* to state that a computer user who sees a search engine results page and clicks on a non-deceptive advertising link resulting from a trademark keyword purchased by a competitor is not confused as to the source of affiliation of any ultimate purchase that is made from that website and after trial, almost all Courts have found no likelihood of confusion

exists. They have placed reliance on the judgement of District Court of New York in ***Alzheimer's Disease & Related Disorders Association vs. Alzheimer's Foundation of America Inc. 307 F. Supp. 3d 260 (2018),*** to state that purchase of competitor's trademarks as keywords alone, without additional behaviour that confuses consumers is not actionable.

39. Moreover, the relevant class of consumers who access the internet and, more particularly, use the Google Search Engine to search for the Plaintiff's alleged marks are likely to be discerning class of users that is literate or at the very least semi-literate, having a basic understanding of how to search websites on the internet, having a basic knowledge of English language, understand how search results appear, and understand the difference between normal organic search results and Ads, and also are aware of the various industry players in the packing and moving business. Such users are also likely to be familiar with the websites like www.amazon.in, www.flipkart.com, www.bing.com, in.search and yahoo.com, all of which includes results for alternatives to the brand searched in a user's query. Such users accordingly anticipate that they will encounter ads

promoting alternatives to the term they searched, and they are very much in a position to make well-informed choices. The likelihood of confusion in respect of such a select class of consumers is even less likely and is in fact negligible, especially when Plaintiff is appearing prominently in the organic results and that the entire right-hand side of the page which displays the search results on the desktop, features information about the Plaintiff; as well as in sponsored links. They have stated that in any case consumers are unlikely to be confused by the appearance of the advertisement as the advertisement is clearly marked as 'Ad' and depicts the details of the advertiser and therefore there is no likelihood of initial interest of confusion.

40. Reliance has been placed on the judgement of District of Utah and North Carolina respectively of the United States of America in ***Jive Commerce LLC vs. Wine Racks Am., Inc Case No. 1:18-CV-49 TS-BCW*** and ***Passport Health LLC vs. Advance Health System, Inc., Case No. 5:17-CV-187-BO***. They have also placed reliance on the case of ***Nebo (supra)*** wherein it had been observed that the use of a trademark as keyword does not create the possibility of confusing any

products of the claimant with those of the advertiser and it is merely one of the technical criteria provided by the advertiser for displaying its ad in the online advertising spaces. The Supreme Court of South Africa (Court of Appeals) in the judgements in the cases of ***Cochrane Steel Products (Pty) Ltd. vs. M-Systems Group (Pty) Ltd & Anr. (227/2015) [2016] ZASCA 74*** and ***Esquire Electronics Ltd. vs. Roopanand Bros., [1991] R.P.C. 425***, had observed that it would be unnatural for a consumer to get misled by a clearly labelled ad, which clearly identifies the source. If neither the advertisement nor the advertiser's website contains any reference to the trademark owner then consumers ought to conclude that it is not related to the trademark owner's products or services, causing no confusion, and this was supported by absence of any evidence of actual confusion. Reliance is also placed on a judgment of a Coordinate Bench of this Court in ***Havells India Ltd. & Anr. vs. Amritanshu Khaitan & Ors., 2015 SCC OnLine Del 8115,*** to contend that advertising forms a part of commercial speech and it is an essential facet covered by Article 19(1) of the Constitution of India. Moreover, counsels for Google have

stated that comparative advertisement is permissible and in the interest of public enlightenment and competition. Such use is permissible under the umbrella of fair use. Any comparison which is unfavourable to a competitor does not mean that it is dishonest or detrimental to the mark of the owner.

41. The Counsels for Google have argued that there is no *prima facie* basis to establish ingredients of section 29(4) of the TM Act, as there is no basis to establish that the use of Plaintiff's alleged trademark as a backend trigger is without due cause or takes unfair advantage of the Plaintiff or is detrimental to the distinctive character or repute of the trademark. They have also argued that a case under section 29(5) of the TM Act is also not made out, as plaintiff's case is that the advertiser or Google has used the Plaintiff's alleged trademarks as its trade name or part of its trade name, business concern or part of the name, of its business concern dealing in goods and services in respect of which the plaintiff's alleged trademarks are registered.

42. It is the case of Google that comparative advertising is permitted under sections 29(7) and 29(8) assuming that the use

of trademark as a keyword is presumed to be *"use"* under section 29(6)(d). The trademark laws permit comparative advertising where a person can lawfully use his competitor's registered trademark within the advertisement itself to compare his goods/services to those of the competitors' and offer consumers with choices to make informed decisions. If the law permits honest usage of trademarks within the advertisement, it can be permitted as a back-end, invisible trigger for advertisements, even more so when the *"overall effect"* of the advertisement is neither misleading nor deceptive.

43. Another argument that has been advanced, is that the plaintiff has failed to make out any case of passing off, in the absence of establishing any confusion or misrepresentation to the end user or any harm to the plaintiff's reputation and goodwill by any advertiser's use of the Google Ads program. In relation to passing off, reliance has been placed on ***Vancouver Community College vs. Vancouver Career College (Burnaby) Inc. & Ors. 2017 BCCA 41*** to state that mere bidding on a keyword is not sufficient to amount to a component of passing off and factors like how the advertiser has presented himself

and his advertisement is what needs to be considered to test any misrepresentation. Reliance has also been placed upon ***Reed Executive (supra)*** to state that when the user clicks through the advertisement and then finds misleading material on the website of the advertiser and not on the advertisement of a search engine result page.

44. The Counsels for Google have argued that Google has not used the plaintiff's trademarks *"in course of its trade"* or *"in relation to the goods or services in respect of which the trademark is registered"* or *"within its advertising"* or *"in a manner to have taken unfair advantage of or in a manner detrimental to alleged distinctive character or repute of the plaintiff's trademarks"* or *"in a manner likely to be taken as being used as a trademark"*. According to them, a reliance on keywords at the backend for triggering Ads does not amount to either *"use"* of a trademark or *"infringing use"* or *"passing off"*, on the part of Google. This proposition, which has also been accepted by Courts of the European Union in ***Google France SARL vs. Louis Vuitton Malletier SA C-236/08 to C-238/08 (2010).*** In ***L'Oreal SA vs. eBay International AG C-***

324/09 (2010) it was held that the use of a trademark, if any in relation to the course of their commercial activities, such as offers for sale, signs corresponding to trademarks by the online service provider does not amount to use of those signs / trademarks by the service providers. Reliance has also been placed on ***Victor Andrew Wilson vs. Yahoo! UK Ltd. & Anr. [2008] EWHC 361 (Ch)*** and ***Fischerwerke GmbH & Co. vs. Beijing Baidu Netcom Science Technology Co. Ltd. & Others., [2013] Gao-Min-Zhong-Zi No.1620*** They have quoted *McCarthy on Trademarks and Unfair Competition* to note that there is no sale of trademarks by the service provider, only sale of advertising space.

45. The stand taken by Google is that even if it were to be assumed that the *"use"* and *"infringing use"* of trademark on Google's part, such use by Google is fair and in line with industry practice and is therefore exempt under section 30(1). It is their case that several other notable search engine providers such as Yahoo and Microsoft (Bing) also provide for a similar keyword advertising service, whereby they permitted use of registered trademarks not only as keywords but also within the

text of the advertisement itself. Many e-commerce providers, such as FlipKart and Amazon, use registered trademarks in their backend systems to trigger offers for alternative brands and products. They have drawn an analogy to Netflix to state that even it shows alternatives to a particular title searched by a user, presumably using that information in its backend systems as well. The TM Act itself permits descriptive use of a trademark under Section 30(2)(a) or under Section 35; nominative fair use of a trademark under section 30(1) of the TM Act.

46. It is their case that the Competition Commission of India in the case of ***Matrimony.com Ltd. & Ors. vs. Google LLC & Ors., 2018 CompLR 101 (CCI)***, observed that the Google's keyword bidding policy promotes competition and provided similar consumer benefits and choice as compared to traditional advertising. They place reliance on the case of ***Private Career Training vs. Vancouver Career College (Burnaby) Inc. 2010 BCSC 765***, the Canadian Court held that the keyword advertising is no different than the accepted marketing practice of a company locating its advertisement close to that of a competitor's in a traditional media such as Yellow Book and the

said practice was not found to be false, deceptive or misleading. They have submitted that similar views have been taken by Courts of other jurisdictions such as Spain, South Africa and Canada, in the cases of ***Chocolat Lamontagne Inc. vs. Humeur Groupe-conseil Inc., [2010] Q.J. No. 7172***; ***Cochrane Steel Products (supra)***; ***Google Ireland Ltd., Google Inc. & Google Spain S.L. vs. Fotoprix, SA, Appeal 151/2016***.

47. Another submission made by the Counsels for Google is that the present suit is bad in law for non-joinder of necessary parties. It is their case that the issues in the present suit cannot be decided in the absence of the parties whose use of the Google Ads program the Plaintiff wants to restrain. It has been argued that the plaintiff is praying for an *in rem* decision that would affect all potential advertisers without making those advertisers as party to the proceedings. They state that entities such as Safe Packers Movers Pvt. Ltd., Gati Ltd., DTC Cargo Packers and Movers Pvt. Ltd., Leo Packers and Movers India Pvt. Ltd., etc. which have been impugned in the present proceedings without taking any steps to implead the owners of

such websites as parties to the suit and that in their absence the interim injunction cannot be effectively adjudicated.

48. Mr. Kshitij Parashar learned Counsel who appears for defendant No.2, Justdial Ltd. has argued that the main objective of defendant No. 2 is to provide people with immediate access to fast, reliable and comprehensive information on businesses, products and services across India and that the database of defendant No.2 comprises of approximately 6 million business listings across various cities and towns in India as of June 30, 2011. It has been submitted that defendant No.2 Company provide two types of listing i.e. Free/Non-Paid listing and Paid Listing to the business entities who want to register at the search engines of the defendant No.2. It was also submitted that many users or business entities register themselves as the Free/Non-paid Listers and that these Free/Non-paid Listing of the user or the business entity can be created by any person by just logging on the website of the of the defendant No.2 Company and thereafter by entering the details of their business entity or services which they intend to provide. In this regard he has placed reliance on the screenshots of the website of

defendant No.2 reproduced in their written statement. He stated that the information so entered needs to be validated through a mobile verification of the person making such an entry and once the validation is done the entry goes live. Once this is done, the users can visit and change the company details as per their requirement. He has stated that the defendant No.2 also provides an option of "REPORT ABUSE", through which if any wrong details have been updated for any company the user or the affected party can comment on it which gets rectified on a priority basis.

49. He then went onto to explain the Paid listing option which is available on the website of defendant No.2 where any prospective user who wishes to avail the services of the defendant No.2 has to pay a certain amount to defendant No.2. The process of paid listing has been explained as under:

i. A telemarketing executive of the defendant No.2 would schedule an appointment with the prospective Advertiser.

ii. Thereafter the prospective Advertiser would be visited by the Marketing Executive of the

defendant No.2, who would then explain to him the various categories of listing e.g. platinum, diamond, gold, etc. along with the different payment options.

iii. Once the mode of payment and the contract amount is finalised, the prospective Advertiser would then sign a contract with defendant No.2 after agreeing to the terms and conditions therein.

iv. Only after the contract is finalised and the formalities completed the information of the said Advertiser would go live on the website of defendant No.2.

v. Any customer who calls the defendant No.2 for an inquiry regarding the services which are also provided by the said Advertiser, only once a confirmation is received from the said customer the defendant No.2 shares the customer's number with the advertiser.

50. He explained that the basic difference between the Free/Non-Paid listing and the Paid Listing is that the Paid

Listing Advertisers would get leads from the defendant No.2 Company on the instance when any customer calls the helpline number of the defendant No.2 for certain inquiries regarding any service/goods. That the information retrieval officer (IRO) after responding to the said inquiry of the customer also suggests similar services which are also being provided by other company(s) and once the customer is satisfied and confirms that his information can be shared, it is then forwarded with the paid listing advertisers of defendant No.2.

51. It is the case of the defendant No.2 Company, that it cannot keep a regular watch on the free listing or the paid listing. Defendant No. 2 Company believes the information provided by any prospective advertiser to be correct and genuine. That in case a person is listed as a free lister/paid lister he can change his information as and when he wants and it is practically impossible for the defendant No.2 to keep a regular watch on it. He reiterated the option of "REPORT ABUSE" wherein if a wrong detail is updated for any company, the user or the affected party can comment on it, after which it gets rectified on a priority basis. Mr. Parashar has referred to the

Warranty Disclaimer Policy on its website, which clearly states that the defendant No.2 would not examine the authenticity/reputation of the advertisers and the same would be the sole responsibility of the advertiser. He has referred to the terms and conditions of the contract which specifically states that defendant No.2 does not have any liability towards the information which is being provided by the listers and the same belongs to the listers alone.

52. It is the case of Defendant No.2 that, it has not put any advertisement on its website infringing the trademarks/copyright of the plaintiff. It has been argued that the listing which has been questioned, does not belong to the plaintiff as it is DRS LOGISTIC and not DRS LOGISTICS. Mr. Parashar has referred to the screenshots which have been reproduced in the written statement of defendant No.2. It is the case of defendant No.2 that it has not infringed upon the trademark or copyright of the plaintiffs and that it is also not gaining any monetary benefits from the free listing as the same have been provided by defendant No.2 for the sake of convenience to the general public.

53. Mr. Lall in his rejoinder arguments has stated that the plaintiff's grievance is against the defendants' services which enable third party infringers and counterfeiters to direct internet traffic towards themselves and receive inquiries and deliver on packing and moving services by deceiving consumers into believing that the services are being provided by the Plaintiffs. He has argued that many users have lost articles and household goods on account of such deception and the services of the defendants enable dubious operators to set up fraudulent accounts with the defendants temporarily, deceive consumers and then disappear. Had it not been for the services of the defendants, such parties would have no means of promoting or advertising their services and perpetrating such fraud. The services offered by defendant Nos. 1 and 3 include, Google Adwords, Google Maps and Just Dial, i.e., defendant No.2 enables third parties to provide users fraudulent websites, fraudulent telephone numbers and fraudulent addresses, due to which ultimately people have lost their household items and valuables. In this regard Mr. Lall has referred to affidavits of Ramesh Agarwal and Gaurav Bakshi, the latter who got

confused and suffered huge damages due to such confusion created by the Defendants. Additionally, he has also referred to newspaper articles in order to establish this point.

54. Mr. Lall argued that the algorithm developed by Google permits the mischief that has been complained of by the plaintiff. According to him, Google developed algorithms that look for relevance, i.e., it connects the Keywords to the relevant service provided which in this case "APM" is linked to moving services. They have argued that these keywords are sold to third parties by Google on bidding and Google then charges a fee for such bids and for successful clicks. It is his argument, that it is correct that keywords are never sold, by them; they are kept under ownership of Google and leased to the highest bidder. This he states is the case of Google trading in Trademarks of third parties.

55. Mr. Lall has argued that there is an admission on behalf of Google that its Keyword Suggestion Tool provides the necessary historic information to induce third parties to select keywords consisting of well-known trademarks. Google admits that it collects information on the plaintiff and its use of the

keyword such as *'Agarwal Packers and Movers'* and this data is then used to induce third parties to select this trade mark as their keyword and attaches it to their website. In the case when someone looks for *'Agarwal Packers and Movers'*, Google is able to direct that traffic meant for the plaintiff, to the site of infringing third parties. Mr. Lall, has argued that this is a classic case of direct infringement and inducement to infringe.

56. He has referred to the statement by defendant No.3 in its written submission, "*Trademark Policy permits use of the trademarked term in the Ad-Text by resellers, informational sites and authorized advertisers, if they meet the necessary requirements, consistent with the applicable law in India"*, which does not form part of the Court order dated January 22, 2020 and cannot be an exception now sought to be carved out by Google. The same is liable to be disregarded. He argued that, such permission can only be granted by Google which, according to their own statement, makes a determination whether the user of the trademark term is a reseller or authorised agent or not. This he stated was proof that Google plays an active role in granting keywords to third parties.

57. Mr. Lall has countered the submissions made by the Counsels for Google with respect to Google's review of an advertisement by stating that such submissions are beyond pleading and therefore liable to be disregarded. He stated that this too would go to show that Google plays an active role in selection of keywords and that Google possesses the capability to assess and reject mischievous ads and keywords selected by advertisers, but chooses to ignore them with an incentive for profiteering.

58. Mr. Lall argued that in the pleadings Google has admitted that keywords are meta-tags. In the plaint these terms have been used synonymously by the plaintiff, which according to him, are admitted in the pleadings. He stated that, the reliance placed on ***Veda Advantage (supra)*** is misplaced as in paragraph 130 it was stated that keywords are *"words embedded in metatags"*; and that meta-tags are used in indexing and ranking of websites, which is exactly what keywords are used for, i.e., they are one and the same thing. He argued that it was the Defendants who failed to distinguish the two binding precedents of law in ***People Interactive (supra)*** and ***Mattel Inc. (supra)*.**

59. Mr. Lall has countered the argument advanced by the Counsels for Google that use of trademarks as Keywords does not amount to "use" under the TM Act by stating that when an entity participates in the Google AdWords Program it licenses the use of its registered trademark to Google for use as a keyword. He referred to paragraph 60 of ***Veda Advantage (supra)*** to state that it had been recorded in the said judgment that, sponsored links were advertisements, which Google's AdWords program allows advertisers to create, change, and monitor. They are triggered by keywords privately supplied by the advertiser to Google. Courts while discussing the law in the context of the United Kingdom ('UK' for short) and European Union ('EU' hereinafter) stated that in the European context it was stated that the keywords used in course of trade in respect of goods or services would amount to use as a trademark. However, it was held that the laws in Australia were different from the laws in the UK and similarly the laws in India are different and recognise that the use of keywords / meta-tags constitute use and infringement of a trademark.

60. Mr. Lall has argued that the interpretation of the decision by Google in ***Reed Executive (supra)*** is incorrect as the Court in that case had categorically expressed itself when it in paragraph 140 stated that, whether the use as a reserved word can fairly be regarded as use in course of trade or not, on which the Court expresses no opinion. In paragraph 142 the Court again restrained itself from expressing opinion and hence there is no finding at all on the question that the use of keywords does not equal to use in trade.

61. He argued that reliance placed on ***Nebo (supra)*** is misplaced as the Article 1484 of the Civil Code of the Russian Federation is very different from the Indian Law. Similarly, the laws of New Zealand are completely different from Indian Laws and therefore the decision in the cases of ***Intercity Group (NZ) (supra)*** and ***NZ Fintech (supra)*** would not be applicable in the present case.

62. He stated that section 29(6) is to be read with section 29(7) and indeed is in addition to the definition of "use" under section 2(2). Admittedly use of a trademark in the keyword by Google amounts to use "*in advertising*" as per sections 29(6),

29(7) and 29(8) and it is also admitted that a Google advertisement cannot be triggered without keywords. This indicates that it is an integral part of "*use*" in advertising and in background of the instant case where the question of "*use in advertising*" amounting to "*use*" is concerned, foreign cases cannot be relied on as the laws in India are very specific when it comes to *"use in advertising"* constituting *"use"* of a trademark. If a registered trademark is used in a keyword, it would constitute use of trademark and can be used to ward off an action for cancellation.

63. The argument, that even if the use is established, elements of infringement/passing off under the TM Act have not been established, has been opposed by Mr. Lall by arguing that there is no requirement of visibility of a trademark to constitute infringement. Such limitations to infringement are only figments of imagination of Google and are not supported by law. A trademark, need not be visible which is apparent from section 29(9) wherein it is stated that infringement may occur even by spoken use. So is the case of a keyword. He argued that the use in any case is not invisible as Google

actually makes the plaintiff's trademark visible to its customers/ prospective advertisers by offering it to be selected by third party advertisers.

64. He submitted that in the case of ***Mattel Inc.(supra)*** and ***People Interactive (supra)*** it was held that use of trademark in meta-tags constituted use and therefore the visibility of a trademark is not a prerequisite to constitute infringement. Since it is his case that meta-tags are keywords, the use of keywords would constitute infringement and in the direct applicability of aforementioned judgments on the issue, foreign laws should not be relied upon. He argued that Google has misread section 29(3) of the TM Act which categorically states that where marks are identical, confusion on part of the public is presumed; in this case Google admittedly sells and pawns an identical trademark of the plaintiff and in fact correlates the use of an identical mark to identical services, by its specially made algorithms, which amounts to *"taking unfair advantage"* and is detrimental to the distinctive character and repute of a mark.

65. Google relied on *McCarthy on Trademarks and Unfair Competition* and asserted that a computer user who seeks a

search engine results page and clicks on a non-deceptive advertising link resulting from a trademark keyword purchased by a competitor is not confused as to the source or affiliation of any ultimate purchase that is made from that website. Mr. Lall stated that even if this is taken to be true, would Google ensure that the advertising is non-deceptive. He contends that Google has stated that it does not control the content in the advertising. He argued that this submission of Google is not relevant to the case as advertisers use a host of techniques to confuse its consumers and Google intentionally pawns well-known trademarks to such parties. According to him, as per section 29(7) there is no requirement of confusion, mere use in advertising amounts to infringement and similarly for the use in advertising, confusion is not a pre-requisite under section 29(8). The use of plaintiff's trademark as a keyword is not authorised by the plaintiff which is a pre-requisite under section 29(7). Moreover section 29(8) has been violated since the plaintiff's trademark is being sold as a keyword. Use by Google cannot be said to be honest use under any circumstances, especially when Google does not ensure that the overall effect is neither

misleading nor deceptive. He also stated that on the basis of the material placed on record which shows instances of actual confusion and passing off, the submissions made by Google that there is no case of passing off, is unacceptable. In contradiction Google's argument that no case of use of a trademark or infringement is made out under any part of section 29 of the TM Act. Mr. Lall stated that the terminology used in Section 29(7) of TM Act is *"material intended to be used....for advertising goods or services"* and keywords are used by Google to trigger advertisements. It is therefore admittedly a "*material*" intended to be used for advertising. The term *"within its advertising"* used in the note by Google does not exist in TM Act. It is the case of the plaintiff that there is no exception to section 29(7) for fair use; there is no fair use as evidence has been filed by the plaintiff showing actual confusion on account of mischievous advertising and that none of the assertions with regard to statutory exemption under sections 30 and 35 of the TM Act have been pleaded and there is no evidence that other e-commerce providers also use keywords in their back-end programming.

66. Google also asserts that discerning class of users have basic understanding of how to search for websites on the internet and have basic knowledge of English language and understand the difference between organic search results and Ads. Mr. Lall argued that Google is available in a number of different languages and English is not the primary language of Google. Even otherwise, majority of the people in India are not well versed in English and are likely to be confused between organic results and Ads which are not clearly demarcated. He stated that Google has not placed any evidence to prove these submissions and this argument is covered by the judgment of ***Baker Hughes Ltd. & Ors. vs. Hiroo Khushlani & Ors. 2004 (29) PTC 153*** wherein it was held that the argument of well informed consumers is not a ground available in defence for an action of infringement and passing off.

67. Mr. Lall cited the case of ***Merck & Co. (supra)*** wherein the Court held that there is nothing improper with defendant's purchase of sponsored links to their websites from searches of keyword "ZOCOR", because the defendants therein actually sold "ZOCOR" manufactured by plaintiff on their website.

According to him, the Court relied upon the Geico case to hold that Google's sale to advertisers of right to use specific trademark as keywords to trigger their ads would constitute use in commerce.

68. Google relies on foreign decisions of ***Jive Commerce LLC (supra), Passport Health (supra), Nebo (supra)*** and ***Cochrane Steel Products (supra)*** to assert that consumers cannot be misled by a labelled ad. Mr. Lall rebutted this submission by stating that Google gives no assurances, those advertisements which use the plaintiff's trademarks as keywords would have all these features. He pointed out that the plaint shows many instances where it is impossible to discern to whom a website belongs to. He stated that in many instances the keyword triggers the advertisement, which shows a phone number and the consumer, under the impression that he is calling the plaintiff, calls on the phone number and gets duped by the advertiser, i.e., a fraudulent party.

69. He argued that in the ***Cochrane Steel Products (supra)*** the Court found that Google earns revenue through keywords, that advertisers purchase keywords and that the highest bidder

gets the keyword. The Court in that case questioned, whether the Google advertisement which appears in response to the search using the keyword does not enable normally informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to in Google advertisement originates from the proprietor of the trademark or an undertaking economically connected to it or, which originate from third parties. He stated that in that case too, the Court cautioned against use of foreign law and that the ads should be clearly marked different from organic results and held that use of trademarks as keywords could only be permitted if there is no confusion. In the case of ***Vancouver Community College (supra)*** the Court held that keywords can cause confusion.

70. Mr. Lall argued that the case of ***Google France SARL (supra)***, supports the case of the plaintiff, the conclusion arrived by the Grand Chamber was use of a trademark as keyword does constitute use in relation to goods or services. Such "use" has been further held to have the capability of adversely affecting the function of indicating the origin of the mark. There was also

a finding that that even the Internet Service Provider is liable if the role played by the Internet Service Provider is not neutral and the moment it acquires knowledge of the unlawful nature of those data or of that advertiser's activities, it fails to act expeditiously to remove or to disable access to the data concerned.

71. He stated that in the case of ***L'Oreal SA (supra)*** there were several findings in favour of the plaintiff, he stated the said judgment was based on article 14 of the EU Directive 200/31 which stipulates a requirement wherein the intermediary does not have actual knowledge of the illegal activities and upon obtaining such knowledge acts expeditiously to remove or disable access to the information. The Court ultimately found that the proprietor of a trademark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to his trademark and which has been selected in an internet referencing service by that operator. The Court also stated that the use of a keyword is also objectionable. This is especially so where the intermediary plays an active role as to give it knowledge of, or control over, the data. The Court

had held that when an operator played an active role in promoting the product, the safe harbour provisions would not apply to such an operator.

72. In case of ***Victor Andrew Wilson (supra)*** it was held that the plaintiff therein was the owner of the "Mr. Spicy" trademark and attempted to sue third parties and Yahoo for choice of descriptive words such as "Spicy", "spicy soup", etc. as keywords. It was on this basis that the Court concluded that there was no infringement and there could be no objections to Yahoo soliciting third party use of "Mr. Spicy" as a keyword in return for payment, if the keyword is going to attach goods and services that are different from those protected in that case. This case too Mr. Lall argued is favourable to the plaintiff but recognises the weakness of such a descriptive mark to be restricted to goods/services for which it is registered.

73. Mr. Lall went on to argue that Google's argument that the Google Ads program is pro user choice and permissible is completely flawed as the same is contrary to law. The DG report set out in ***Matrimony.com Ltd. (supra)*** tells how Google

runs its AdWord policy and how it is actively involved in the selection process of keywords by advertisers.

74. He stated that the case of ***Private Career Training (supra)*** relates to specific advertising by law. The case concerned the name of particular university leading to the students getting confused. In that case it was stated that the sponsored links were displayed along with organic search results separated by a vertical line and within either a yellow or blue shaded box. In both the cases the search results are clearly designated as such or as "sponsored results". Conversely, in the present case Google has refused to make such a demarcation. In that case the Court opined that selection of the university had a high financial cost and personal commitment, hence the students are expected to exercise a high degree of care, which is contrary to the present case and that these findings are contrary to the decision in ***Baker Hughes (supra).***

75. Mr. Lall has submitted that the decision in ***Chocolat Lamontagne (supra)*** is concerned it has been clearly recorded therein that Google sells keywords which is contrary to their claims that keywords are never sold or purchased. In this case

too Google used a yellow shaded box to identify the sponsored links. The plaintiff in that case had not been successful in showing customer confusion on account of defendant's activities of a fundraising drive and use the of the term "*Alternative to*" the plaintiff's brand.

76. He relied on the decision of the Competition Commission of India in the case of ***Google India Pvt. Ltd. vs. Addl. Commissioner of Income Tax, LNINDORD 2017 ITATND 3508,*** to state that Google reviews keywords. Google has certified partners who help manage advertisers' AdWords accounts and that Google monitors user behaviour and the keywords planner tool suggests the suitability of keywords that are useful in particular month of the year. He stated that it was recorded that Google's AdWords program changes advertisements daily and that Google does not merely sell advertising space but is actually rendering services.

FINDINGS

77. Having heard the learned counsel for the parties, and perused the record, the grievance of the plaintiff is when a user on internet searches for the plaintiff by typing *"Agarwal*

Packers and Movers" despite the plaintiff having a registered trademark in its favour with regard to the said mark. The website of the advertiser who may be a competitor of the plaintiff or having similar / deceptive mark pops up over and above the organic results pertaining to the plaintiff within the sponsored results by using Google's services. This is because of the AdWord program of the defendant Nos.1 & 3 under which an advertiser having AdWord account can create, select, keywords based on which their advertisement shows up as a sponsored link thereby diverting the traffic from the plaintiff's website to the advertiser.

78. It is clear from the above that google being a search engine does give information about the number of searches made, using any popular keyword, that too in the same filed of business. So, assuming that, the advertiser chooses the keyword, but that is with the help of the information provided by Google. In the case in hand, the keyword is *"Agarwal Packers and Movers"*, which keyword, has been selected by the advertiser on the basis of statistical information provided by Google and the keyword is the registered mark of the plaintiff. This factum

is not disputed by Mr.Sethi and Mr.Kathpalia. So, I proceed on the basis that the keyword being *"Agarwal Packers and Movers"* is also the registered trademark of the plaintiff. The question which needs to be determined is whether this use of the mark as a keyword shall amount to infringement of trade mark and or passing off.

79. The submission of Mr.Sethi was that the use of the keyword does not amount to *"use"* under the TM Act, inasmuch as section 2(2)(b) requires a trademark to be used in a printed or other visual representation; before *"use"* under Section 2(2)(c) can be examined. In other words, a trade mark used as a keyword which is invisible to the consumer, is not a use of the trademark. He also stated that Section 2(2)(c) of the TM Act requires the plaintiff's trademark to be used as a part of any statement availability, provision or performance of its services for it to qualify as a trademark *"use"*.

80. To understand the submission, it is necessary to reproduce the relevant provisions of Sections 2(2)(b) and 2(2)(c) along with Sections 29(6), 29(7), 29(8) and 29(9) of the TM Act on which reliance was placed by Mr. Lall:

"(2) In this Act, unless the context otherwise requires, any reference-

xxx xxx xxx

(b) to the use of a mark shall be construed as a reference to the use of printed or other visual representation of the mark;

(c) to the use of a mark,-

(i) in relation to goods, shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods;

(ii) in relation to services, shall be construed as a reference to the use of the mark as or as part of any statement about the availability, provision or performance of such services;

xxx xxx xxx

29. Infringement of registered trade marks.

xxx xxx xxx

(6) For the purposes of this section, a person uses a registered mark, if, in particular, he—

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered

trade mark, or offers or supplies services under the registered trade mark;

(c) imports or exports goods under the mark; or

(d) uses the registered trade mark on business papers or in advertising.

(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labeling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly."

81. On a reading of the aforesaid provisions it is clear, that Section 2(2) of TM Act states, that unless the context otherwise provides the use of the mark shall be construed as a reference to the use of printed or other visual representation of the mark in relation to the goods or services, but the reading of Sections 29(6), 29(7) and 29(8) of the TM Act, it is seen that the legislature has expressly departed from the ordinary construction of the expression *"use"* under this Act to include instances to construe *"use"* under Section 29 of the Act.

82. Mr.Lall is right in saying that Sections 2(2)(b) and 2(2)(c) have to be read in addition to Section 29(6), 29(7), 29(8) and 29(9). Having said that a perusal of Section 29(9) makes it clear that an infringement of a trademark can be by way of spoken use which is different from printed or visual

representations of the mark. That is invisible use of the mark can also infringe a trademark.

83. This I say in view of the Judgment of this Court in the case of ***Hamdard National Foundation & Ors. vs. Hussain Dalal & Ors., 202 (2013) DLT 291***, wherein the Court while considering the suit for infringement, passing off and disparagement held that on a reading of Section 29 (9) it is clear that the said section provides that it is an infringement of the trademark by way of spoken use of the words which are contained in the trademark and the visual representation thereof. So, it follows, what is infringement, is not merely visual representation of the product in bad light under the provision of Section 29(9) but it is infringement of the trademark if the same is caused by way of spoken use of the words and the visual representation of the said words. Furthermore, a Division Bench of this Court in the case of ***Kapil Wadhwa & Ors. vs. Samsung Electronics Co. Ltd. & Ors., 194 (2012) DLT 23*** has found usage of a trademark in the source code i.e., through meta-tagging even though invisible to the end-user / consumer to be illegal. Albeit the appellant therein sold imported goods

manufactured by the respondent therein although without the consent of the latter.

84. Having said that, the question is whether the *"invisible use"* of a mark, as contended by Mr. Sethi shall not amount to *"use"* within meaning of Sections 2(2)(b) and 2(2)(c) of the TM Act as it is not a case which falls within the meaning of Section 29. This issue is no more *res integra*, at least in view of the Judgment in the case of ***Amway India Enterprises Pvt. Ltd. and Ors. vs. 1MG Technologies Pvt. Ltd. and Ors., 260 (2019) DLT 690***, wherein a Coordinate Bench of this court while considering the use of the Mark *"Amway"* by third party e-commerce platforms, for promoting their own sales, has held the use of a mark in meta-tags or in advertising without the consent of the proprietor as a violation of trademark rights of the owner. In fact, the Court also held that Section 29 (8) also makes it clear that if any advertising of a mark takes unfair advantage of the mark or is detrimental to its distinctive character even without sale taking place there is an infringement.

85. On similar lines, is the Judgment of the Bombay High Court in ***People Interactive (I) Pvt. Ltd. (supra)*** wherein the Court observed that the defendant No.1 was using the plaintiff's proprietary mark shaadi.com and its domain name www.shaadi.com as part of meta-tags in the first defendant's website, which was held by the Court to be an attempt to misappropriate the plaintiff's mark and hijack the internet traffic from the plaintiff's site by a thoroughly dishonest and *malafide* use of plaintiff's mark and name in the meta-tags of his own rival website. Paragraph 14 of the Judgment is reproduced as under:

> *"14. I believe the Plaintiffs have made out not just a strong, but an overwhelming prima facie case. Dishonesty is writ large on the actions of the 1st Defendant. He has used the Plaintiffs' mark shaadi.com as a suffix to another expression. He has attempted to misappropriate the Plaintiffs' mark. He has made false claims regarding the extent and size of his service. He has, plainly, hijacked Internet traffic from the Plaintiffs' site by a thoroughly dishonest and mala fide use of the Plaintiffs' mark and name in the meta tags of his own rival website. The distinctive character of the Plaintiffs' mark is thus diluted and compromised by the actions of the Defendant. The 1st Defendant's action is nothing but online piracy. It cannot be permitted to continue."*

86. Having noted the above Judgments, it is clear that the use of the mark as meta-tags was held to be infringement of trademark. It follows, that invisible use of trademark to divert the traffic from proprietors' website to the advertisers' / infringers' website shall amount to use of mark for the purpose of Section 29, which includes Section 29 (6) and 29(8), related to advertising.

87. It is the submission of Mr. Sethi that there is a difference between the meta-tags and keywords, inasmuch as meta-tags, which are words inserted in the HTML code of the website; unlike keywords which are only a component of the AdWord Program of Google. This submission of Mr.Sethi is denied by Mr.Lall by contending keywords are commercial meta-tags used in the AdWord Program of Google on payment of charges on a pay-per-click basis. The concept of meta-tags and keywords can be understood in the following manner which I have culled out from the judgments given by various High Courts of this country and also pleadings of the defendant Nos.1 and 3 which I reproduce below:

Meta-tags	Keywords
i. Meta-tags are words inserted in the HTML codes of the website. [HTML coding is used to construct a website]	i. Keywords are used in the Google AdWords Program.
ii. The words used as meta-tags provide data about the website which is known as meta-data.	ii. Only advertisers who have enlisted themselves for the AdWords Program can access the keyword selection tool which is optional. Google provides a menu of the most searched queries in the form of keywords.
iii. These meta-tags are neither visible to the general public nor does it affect the display page of the website.	iii. Keywords are invisible and are provided by the advertisers themselves.
iv. Used as indices in organic searches.	iv. Keywords are used as a back-end trigger not in a TM sense.
v. Meta-tags form a part of the website.	v. Keywords are neither owned by any of the users of the AdWords Program, nor sold by Google.
vi. Effect: According to relevancy, websites are ranked and most relevant is displayed on top of the organic results.	vi. Effect: According to various parameters such as bid amount, choice of keyword, relevancy the Ad which is most relevant is displayed on the top of the sponsored results.

It must be stated here that the working of the meta-tags and also the keywords, as contended by Mr. Sethi is governed

through the use of algorithms. The use of meta-tags within codes and keywords with respect to the sponsored search produces a desired result which is on the basis of Google's algorithm. According to the Oxford Reference website, algorithm has been defined as, a "*documented series of steps which leads to the transformation of some data. For example, in order to calculate the sum of a series of numbers a possible algorithm would involve repeatedly adding the numbers to be summed to a running total. Computer programs are a manifestation of algorithms which allow them to be executed very quickly"*. Whereas the Collins online dictionary defines algorithm as, "*a series of mathematical steps, especially in a computer program, which will give you the answer to a particular kind of problem or question"*.

88. It is contended by Mr.Sethi, Google's use of its advertising / sponsored result algorithm is different from that of the algorithm involved in producing organic search result through use of meta-tags. It is the case of Mr. Sethi that it is the use of Google's algorithm in the AdWord program which triggers a sponsored result i.e., the advertisements, which is

different from the use of meta-tags, which produces Google's organic result. He stated that the sponsored result is triggered, based on many parameters, wherein each ad is given a quality score which is an aggregate of many factors such as relevancy of ad to search query, landing page quality, number of ad extensions, past history of the advertiser, geographical relevance of Ads to the webpage user; which goes to show that the AdWords Program is not driven by monetary consideration alone. No doubt, that meta-tags and keywords may be conceptually different however, both are used to show relevancy and appear on the top of the search engine result page, whether in organic or sponsored result. The question now is whether the use of mark as a keyword, results in diversion of traffic from the website of the original proprietor to that of the advertiser, this aspect has not been disputed / contested by Google, nor it has been argued that the end result from use of meta-tags and keywords is different; inasmuch as both are instrumental for a search result (whether organic or sponsored) to appear on the top of the search engine result page, except that sponsored links to the advertiser's web page is marked with the

symbol denoting Ad which is followed by the URL, displayed in the following manner: Ad · https://www.

89. I must also state that it is Google's policy that it will only investigate the Ad content and not the keywords, the former includes the ad text and ad title but not the keywords. In order to assess the quality score, Google also sees the quality of the landing page which is primarily the website of the advertiser which may or may not have / display the infringed trademark. In other words, it is not the case of Google that as keywords are not visible to a consumer the use of same shall not amount to an infringement of trademark. However, under the AdWords Program they also see the landing page i.e., website of the advertiser, which in a given case shall have the infringing trademark, which is also used as a keyword, in such a scenario, Google cannot absolve themselves from the liability of ensuring that the keyword is not an infringement of trademark.

90. It is important to note, that had the AdWords Program of Google not existed, the only option available to the infringer / prospective advertiser in order to achieve the same result would have been to change their meta-tags (source coding) which has

already been held to be *"use"* of trademark and as such infringement. This aspect also highlights the fact that the same result is sought to be achieved through different means.

91. It may also be necessary for me to refer to the AdWords Policy of Google. Before I refer to the same, it is also necessary to mention that Google in their affidavits dated March 16, 2015, August 13, 2015 and August 03, 2017 has referred to two documents, viz. privacy policy and agreement of Google with the advertiser i.e., the AdWords Program Agreement. This Court may not require to go into the privacy policy and the agreement Google has with the advertiser as the same may not have any bearing on the issue which has arisen for consideration.

92. Mr.Sethi and Mr.Kathpalia have now relied upon AdWords Trademark Policy which reads as under:

> *"AdWords Trademark Policy*
>
> *xxxx xxxx xxxx*
>
> *If a trademark owner files a complaint with Google about the use of their trademark in AdWords ads, Google will investigate and may enforce certain restrictions on the use of that trademark in AdWords text ads.* ***More help for trademark owners***
>
> *There are multiple factors that determine when trademarks can be used in AdWords text ads. Along with*

the factors described below, these policies apply only to trademarked terms where the owner submitted a valid complaint to Google and requested that the terms be restricted in Google ad campaigns.

Trademark terms used in ad text

Google will investigate and may restrict the use of a trademark within ad text. Ads using restricted trademarks in their ad text may not be allowed to run. This policy applies worldwide.

***Exceptions**: Here are some cases when the policy for ad text doesn't apply in the way described above;*

• Ad campaigns targeting Australia, New Zealand, the United States, Canada, the United Kingdom, or Ireland may use a trademark in ad text if the ad is in compliance with our policy on resellers and informational sites.

xxx xxx xxx

• Advertisers can use a trademarked term within ad text if they are authorized, meaning that the trademark owner sent Google the necessary form allowing an advertiser's particular account to use a certain term.

- Authorization policy

A trademark owner (or contact person listed on the trademark complaint) can provide Google with authorization to let specific AdWords accounts use the trademark in ad campaigns. Here are some important things to know about authorizations:

xxx xxx xxx

o We can either prohibit all use or allow all use of a particular term by an advertiser. Therefore, we cannot accept conditional authorization requests that include a time expiration or limitations on use of the term in specific contexts.

o The trademark owner may change or rescind authorization at any time by sending an email to ads-trademarks@google.com.

• An ad can use a trademarked term in its text if either of these conditions is true:

o the ad text uses the term descriptively in its ordinary meaning rather than in reference to the trademark

o the ad is not in reference to the goods or services corresponding to the trademarked term

EU and EFTA policy

For ad campaigns targeting the European Union and EFTA regions, the ad text policy above applies. Therefore, we do not prevent the selection of trademarks as keywords in the EU and EFTA. However, in response to a complaint, we will do a limited investigation as to whether a keyword (in combination with particular ad text) is confusing as to the origin of the advertised goods and services.

- Details of EU and EFTA policy

In response to a complaint, we will do a limited investigation to see whether the use of a trademarked term as a keyword in combination with particular ad text is confusing as to the origin of the advertised goods and services (such as a keyword and ad that falsely imply affiliation with the trademark owner). If the combination of a keyword and ad text is confusing, we will disapprove the specific ad mentioned in the complaint so that it can't run.

Under our EU and EFTA policy, the following types of ads may use a trademark as a keyword, provided that the combination of the keyword and ad is not confusing (as described above). The following are examples, and not an exhaustive list;

• Ads using a trademarked term when that term is being used in its ordinary meaning rather than in reference to the trademark

• Ads for competing products or services

• Ads for resale of the trademarked goods or service

• Ads for the sale of components, replacement parts, or compatible products corresponding to a trademark

• Ads for informational sites about a product or service corresponding to the trademark

- List of affected regions

- *Åland*
- *Austria*
- *Bassas da India*
- *Belgium*
- *Bouvet Island*
- *Bulgaria*
- *Clipperton Island*
- *Croatia*
- *Cyprus*
- *Czech Republic*
- *Denmark*
- *Estonia*
- *Europa Island*
- *Finland*
- *France*
- *French Guiana*
- *French Polynesia*
- *French Southern and Antarctic Lands*
- *Germany*
- *Gibraltar*
- *Glorioso Islands*
- *Greece*
- *Guadeloupe*
- *Guernsey*
- *Hungary*
- *Iceland*
- *Ireland*
- *Isle of Man*
- *Italy*
- *Jan Mayen*
- *Jersey*
- *Juan de Nova Island*
- *Latvia*
- *Liechtenstein*
- *Lithuania*
- *Luxembourg*
- *Malta*
- *Martinique*
- *Mayotte*
- *Monaco*
- *Netherlands*
- *New Caledonia*
- *Norway*
- *Poland*
- *Portugal*
- *Reunion*
- *Romania*
- *Saint Barthelemy*
- *Saint Martin*
- *Saint Pierre and Miquelon*
- *Slovakia*
- *Slovenia*
- *Spain*
- *Svalbard*
- *Sweden*
- *Switzerland*
- *Tromelin Island*
- *United Kingdom*
- *Wallis and Futuna*

Trademark terms used in keywords

Google will not investigate or restrict the use of trademark terms in keywords, even if a trademark complaint is received.

Other uses of trademark terms

The trademark policies described here apply only to the use of trademarks in Google AdWords text ads.

See information about our policy on the use of trademarks in these areas:

- Ad display URLs

As described in the section above, Google can investigate and may restrict the use of trademarks in ad text. This process does not apply to trademarks used in an ad's display URL (the website address shown in green within an ad).

Google will not investigate and restrict use of the trademark in display URLs because the presence of trademarked term within a URL may not necessarily constitute trademark use, such as in the case of post-domain paths or subdomains. Trademark owners can contact the advertiser directly regarding any concerns about display URLs. Please understand that Google is not in a position to be the arbiter of third-party disputes. Additionally, if the domain name contains or is similar to a trademark, but is actually owned by the advertiser, the trademark owner is the appropriate party to handle the matter, such as through the Uniform Domain Resolution Process (UDRP).

- Google search results

The trademark policies described here apply only to the use of trademarks in Google AdWords text ads. These ads are clearly marked as "Ads" on Google search results pages and as "Ads by Google" on our Display Network. Other types of trademark complaints, like trademarks used in sites that appear in Google search results, are not covered under our investigation process. For any such concerns, please see how to contact the site owner directly.

- Promoted YouTube videos

About the use of trademarks in promoted YouTube videos

xxx xxx xxx"

93. I find it necessary to reproduce the list of countries / territories where the use of the trademark as a keyword would be investigated by Google along with the countries / territories where such practice is not followed as per the copy of the AdWords Policy filed before the Madras High Court in ***Consim I*** and ***Consim II:***

> ***"What Is Google's AdWords and AdSense trademark policy?***
> *Google recognizes the importance of trademarks. Our AdWords Terms and Conditions with advertisers prohibits intellectual property infringement by advertisers. Advertisers are responsible for the keywords they choose to generate advertisements and the text that they choose to use in those advertisements. Google takes allegations of trademark infringement very seriously and as a courtesy we investigate matters raised by trademark owners. Trademarks are territorial and apply only to certain goods or services. Therefore, different parties can own the same mark in different countries or different industries. Accordingly, in processing complaints, Google will ask the trademark owner for information regarding where the mark is valid and for what goods or services. Please note the following about our complaint process:*
>
> - *The trademark owner doesn't need to be a Google AdWords advertiser in order to send a complaint.*
> - *Any such investigation will only affect ads served on or by Google.*
> - *Google's trademark policy does not apply to search results. Our investigations only apply to sponsored links. For trademark concerns about websites that appear in Google search results,*

the trademark owner should contact the site owner directly.

xxx xxx xxx

- *Because Google is not a third-party arbiter, we encourage trademark owners to resolve their disputes directly with the advertisers, particularly because the advertisers may have similar ads running via other advertising programs.*

AdWords Trademark Policies in Sponsored Links

Below, you can find information on our trademark complaint procedure across different regions as well as on our advertiser authorization procedure.

"I see an unauthorized ad using my trademark. What is Google's trademark policy?

Depending on the regions in which you have trademark rights, we may investigate the use of trademarks in ad text only or in ad text and keywords.

- *Please note the regions we will investigate ad text only. We will not disable keywords in response to a trademark complaint. Furthermore, our investigation will only affect ads served on or by Google.*

Regions in which we investigate use in ad text only

Afghanistan
Albania
Algeria
American Samoa
Andorra
Anguilla
Antarctica
Antigua and Barbuda
Argentina
Armenia
Aruba
Azerbaijan
The Bahamas
Bahrain
Baker Island
Bangladesh
Barbados
Belarus
Belize
Ghana
Greenland
Grenada
Guam
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Holy See (Vatican City)
Honduras
Howland Island
India
Indonesia
Iran
Iraq
Ireland
Israel
Palmyra Atoll
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Pitcairn Islands
Puerto Rico
Qatar
Russia
Rwanda
Saint Helena
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the

Benin
Bermuda
Bhutan
Bolivia
Bosnia and Herzegovina
Botswana
British Indian Ocean Territory
British Virgin Islands
Brunei
Burkina Faso
Burundi
Cambodia
Cameroon
Canada
Cape Verde
Cayman Islands
Central African Republic
Chad
Chile
Colombia
Comoros
Congo
Cook Islands
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Democratic Republic of the Congo
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Equatorial Guinea
Eritrea
Ethiopia
Falkland Islands (Islas Malvinas)
Faroe Islands
Fiji
Gabon
The Gambia
Jamaica
Japan
Jarvis Island
Johnston Atoll
Jordan
Kazakhstan
Kenya
Kingman Reef
Kiribati
Kuwait
Kyrgyzstan
Laos
Lebanon
Lesotho
Liberia
Libya
Macedonia (FYROM)
Madagascar
Malawi
Malaysia
Maldives
Mali
Marshall Islands
Mauritania
Mauritius
Mexico
Micronesia
Midway Islands
Moldova
Mongolia
Montenegro
Montserrat
Morocco
Mozambique
Myanmar (Burma)
Namibia
Nauru
Nepal
Netherlands Antilles
Nicaragua
Niger
Nigeria
Niue
Northern Mariana Islands
Oman
Pakistan
Grenadines
Samoa
San Marino
São Tomé and Príncipe
Saudi Arabia
Senegal
Serbia
Seychelles
Sierra Leone
Singapore
Solomon Islands
Somalia
South Africa
South Georgia and the South Sandwich Islands
Sri Lanka
Sudan
Suriname
Swaziland
Syria
Tajikistan
Tanzania
Thailand
Timor-Leste
Togo
Tokelau
Tonga
Trinidad and Tobago
Tunisia
Turkey
Turkmenistan
Turks and Caicos Islands
Tuvalu
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States
Uruguay
Uzbekistan
Vanuatu
Venezuela

Gaza Strip	*Palau*	*Vietnam*
Georgia		*Virgin Islands*
		Wake Islands
		West Bank
		Western Sahara
		Yemen
		Zambia
		Zimbabwe

o In the U.S., we allow some ads to show with a trademark in ad text if the ad is from a reseller or from an international site. However, if our investigation finds that the advertiser is using the trademark in the ad text in a manner which is competitive, critical or negative, we will require the advertiser to remove the trademark and prevent them from using it in similar ad test in the future. Learn more about our U.S. trademark policy.

o Outside the US. If our investigation finds that the advertiser is using the trademark in ad text, we will require the advertiser to remove the trademark and prevent the, from using it in ad text in the future.

o Google is dedicated to providing relevant advertising to our users, advertisers and publishers alike. Accordingly, our trademark policy not to investigate the use of trademarks as keywords in the regions listed above aims to provide users with choices relevant to their keywords. At the same time, we investigate trademark violations in ad text, both as a courtesy to the trademark owner and to ensure that the ads are clear to users.

• In certain regions, we may investigate use of trademarks in ad text, in keywords, or in both ad text and keywords.

Regions in which we investigate use in both ad text and keywords

Åland	*Guadeloupe*	*Saint Martin*
Ashmore and	*Guernsey*	*Saint Pierre*
Cartier Islands	*Heard Island and*	*and Miquelon*
Australia	*McDonald Islands*	*Slovakia*
Austria	*Hong Kong*	*Slovenia*
Bassas da-India	*Hungary*	*South Korea*
Belgium	*Iceland*	*Spain*
Bouvet Island	*Isle of Man*	*Svalbard*
Brazil	*Italy*	*Sweden*
Bulgaria	*Jan Mayen*	*Switzerland*
China	*Liechtenstein*	*Wallis*

Clipperton Island
Cocos (Keeling) Islands
Coral Sea Islands
Cyprus
Czech Republic
Denmark
Estonia
Europa Island
Finland
France
French Guiana
French Polynesia
Germany
Gibraltar
Greece
Lithuania
Luxembourg
Macau
Malta
Martinique
Mayotte
Monaco
Netherlands
New Caledonia
New Zealand
Norfolk Island
North Korea
Portugal
Reunion
Romania
and Futuna

o When we receive a complaint from a trademark owner, our review is limited to ensuring that the advertisements at issue are not using a term corresponding to the trademarked term in the ad text or as a keyword. If they are, we will require the advertiser to remove the trademarked term from the ad text or keyword list and will prevent the advertiser from using the trademarked term in the future. Any such investigation will only affect ads served on or by Google.

o We do not take any action in situations where an advertisement is being triggered by non-trademark terms even though the search query contains a trademarked terms. This occurrence stems from the fact that google allows advertisers to use a broad matching system to target their ads. For example, if an advertiser has selected the keyword "shoes" that advertiser's ad will appear when a user enters the word "shoes" as a search query, regardless of other search terms that may be used. So, the ad would show if the user entered any of the following search queries: "tennis shoes", "red shoes" or "Nike shoes." This system eliminates the need for the advertiser to specify each of the myriad different search query combinations that are relevant to the ad.

<u>How do I file a trademark complaint?</u>

Trademark owners may submit either a specific or general trademark complaint. A specific complaint means that we will investigate a trademark term(s) in specific advertisements only. The trademark owner is required to provide the exact URLs in

question and we will not investigate the trademark in any other advertisements. A general complaint means that we will investigate in all relevant advertisements. The trademark owner does not need to provide the specific URLs in question. However, if there are specific advertisers that are authorized to use the trademark(s), the trademark owner is required to provide the corresponding customer ID(s) or login email(s).

If you have concerns about the use of your trademark in AdWords ads or keywords showing in a region listed above, file a trademark complaint. If your complaint concerns use of your trademark in multiple regions, please send us one complaint with ownership information for your trademark in these regions. We'll follow the appropriate procedure for each regions submitted in your complaint.

I have previously filed a trademark complaint, but now I want to allow an advertiser use my trademark. What is Google's trademark authorization policy?

If we have processed a complaint for a trademark advertisers using the mark in the regions and industry of the trademark owner will have their keywords and / or ad text disapproved according to the process outline above.

xxx xxx xxx

……. We are only able to prohibit or allow all use of a particular term by an advertiser. Trademark owners may revoke the authorization at any time.

xxx xxx xxx

AdWords Counterfeit Goods Complaint in Sponsored Links'

A Google advertiser is selling counterfeit goods. What is Google's Counterfeit Goods policy?

Google AdWords prohibits the sale or promotion of counterfeit goods. Counterfeit goods contain a trademark or logo that is identical with or substantially indistinguishable from the trademark or another. Counterfeiters attempt to deceive consumers into believing the counterfeit is a genuine product of the brand owner or sell the goods as faux, replicas, imitations or clones of the original product. Counterfeit goods differ from

standard trademark infringement in that counterfeiters attempt to pass off their goods as the originals instead of merely using a similar mark in a confusing manner. Counterfeit goods differ from pirated products or copyright infringement because it is the trademark that is copied, rather than software, books, artwork, etc.
We will investigate all reasonable complaints: our actions may include disapproving or disabling ads and / or terminating advertisers. Any such investigation and action will only affect ads served on or by Google.
Please note, that upon request and approval, a complainant's contact details may be forwarded to the affected advertiser(s).
If you have concerns about the sale of counterfeit goods in AdWords ads, please file a complaint. Note: this information is only available in English.
Learn more about the Google AdWords Copyright policy.
xxx xxx xxx"

94. From the aforesaid, it is noted that in ***Consim I*** and ***Consim II***, Google relied upon their policy that they would investigate any infringement of trademark in the Ad-titles, Ad-text and also keywords. The investigation with regard to keywords was only confined to countries listed in paragraph 93 above. As per the Annexure-3 of the affidavit dated March 16, 2015 the change in the AdWords trademark policy was brought about in the year 2015, wherein Google has changed the policy to mean that they shall *"not investigate or restrict the use trademark terms in keyword"*. It appears, the same is for the reason already stated above under the submissions of Mr.Sethi

i.e., the use of trademark as keywords does not imply *"use"*. I may also state here that as per Google's policy they investigate use of the trademark as a keyword but i.e., only confined for the EU. This is in addition to the investigation undertaken for an infringement of trademark in Ad-title and Ad-text. From the above, it is clear that the fact that Google is investigating an Ad where use of trademark as a keyword is being used, there cannot be any reason why such a procedure is not followed in India. It appears this stipulation has been incorporated in their policy with regard to EU countries for the reason that there might be a chance of deception / confusion in a given Ad which pops-up on the basis of search query which has also been chosen as a keyword, which may trigger the advertisement consisting of the infringed trademark / references to it.

95. It can also be a case where the search query itself is a trademark which triggers the advertisement consisting of infringed trademark and / or material which may cause confusion. For example, a hypothetical advertiser may use the following hypothetical advertisement:

Ad · www.aggarwal.com
Best Packers | Top transporters in India

Fastest movers for your transportation, courier, moving and packing needs. Over 300 branches all over India. Providing services of domestic shifting, international moving, car transportation and corporate moving.

A case where use of trademark as a keyword triggering a sponsored result does not depict a product or services of that Ad in a pictorial form and the consumer does not have the aid of reference to the device marks/logo and colour combinations associated with the mark. The average consumer has to rely upon the words alone which form the Ad-content i.e., Ad-text, Ad-title and URL which may not directly represent a trademark, rather the words comprising of a trademark which may be strewn with generic words but, on a totality, reading the Ad-content the average consumer is deceived to form an opinion that the product or the services reflected in the Ad-content is the same which he is looking for. If a consumer were to search for a hypothetical company by the name of "Beetroute Transport" the search engine result page may return the following hypothetical sponsored links *in seriatim*:

A.1. Ad · www.beetroute.com
Transport services | Best in India
Awarded best transporters award for the year 2019. Providing quick and cheap

transport services through-out India. Hire vehicles for transport purposes. Special deals available. 011-852XXX

A.2. Ad · www.beetroot.com
Transport services | Best in India
Awarded best transporters award for the year 2019. Providing quick and cheap transport services through-out India. Hire vehicles for transport purposes. Special deals available. 011-852XXX

B. Ad · www.transportindia.com
Discounted Transport Services | Pan India
Moving made easy by transport India. Domestic transport, corporate transport, goods transport and much more. Contact us through our tollfree number now. 1800- XXXXX

C. Ad · www.quick.bt-transport.com
Transporters | India Goods Carrier
Providing services freight and luggage transport services. Best transport services. Beetroute Transport services. Visit our website for hiring transport services. Call us and get discount. +91-9418XXXXXX

It may be seen from the above, that according to Google's AdWords Policy only ad appearing at 'C' would be treated as infringing their AdWords Policy. No doubt, it would also cause confusion in the minds of the average consumer who is looking for Beetroute Transport. Whereas the average consumer may differentiate Ad appearing at 'B' to be not what

was searched for. However, the Ads appearing at 'A.1' and 'A.2' with its combined use of parts of a mark and its variants in URL along with Ad-title may cause confusion in the minds of the average consumer, ride on the original owner's goodwill and still not be investigated by Google as it would be deemed to be policy compliant according to them. This advertisement though not in violation of Google's AdWords Policy may still cause confusion in the minds of the average consumer. Needless to say, that it is ultimately the owner of the trademark whose goodwill is getting tarnished.

96. It has to be noted that in such a scenario the advertisement in the sponsored result may not feature the trademark of the plaintiff as a whole which is why the overall effect of the Ad-content (Ad-title, Ad-text and URL) has to be taken into consideration, inasmuch as the idea that is sought to be conveyed, i.e., the advertiser is the plaintiff or somehow associated with the plaintiff. It is Google's case that it does not investigate use of a trademarked term in the URL, i.e., Google restricts its investigation to Ad-text and Ad-title. Whereas it is trite law that use of trademarks in URLs or deceptively similar

terms would amount to passing off [Ref: ***Satyam Infoway Ltd. vs. Sifynet Solutions Pvt. Ltd., (2004) 6 SCC 145***]. This I say so, because any Ad-content consisting of Ad-title, Ad-text and URL which is likely to deceive or cause confusion to an average person with imperfect recollection [Ref: ***Amritdhara Pharmacy vs. Satyadeo Gupta, AIR 1963 SC 449***], in the context of India shall constitute infringement of trademark or passing off. A defence may be taken that the trademark of the plaintiff does not feature in the said advertisement. This defence may sound appealing at a first blush however, it can be seen from such advertisement that using the written part / words of a trademark an attempt is sought to be made to take advantage of the trademark owner's goodwill. The judgment of the Supreme Court in the case of ***Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73***, held as under:

> *"19. With respect, we are unable to agree that the principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different and the conclusion so arrived at is clearly contrary to the binding precedent of this Court in Amritdhara case [AIR 1963 SC 449] where the phonetic similarity was applied by judging the*

two competing marks. Similarly, in Durga Dutt Sharma case [AIR 1965 SC 980] it was observed that:

> *"In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiffs and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated."*

20. Lastly, in Dyechem case [(2000) 5 SCC 573] it was observed in para 54 as under

> *"54. As to scope of a buyer being deceived, in a passing-off action, the following principles have to be borne in mind. Lord Romer, L.J. has said in Payton & Co. v. Snelling, Lampard & Co. [(1900) 17 RPC 48] that it is a misconception to refer to the confusion that can be created upon an ignorant customer. The kind of customer that the courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods in the*

market so far as relates to general characteristics. If he does not know that, he is not a customer whose views can properly be regarded by the Court. (See the cases quoted in National Sewing Thread & Co. Ltd. v. James Chadwick & Bros. Ltd. [AIR 1948 Mad 481] which was a passing-off action.) In Schweppes case [Schweppes Ltd. v. Gibbens, (1905) 22 RPC 601 (HL)] Lord Halsbury said, if a person is so careless that he does not look and does not treat the label fairly but takes the bottle without sufficient consideration and without reading what is written very plainly indeed up the face of the label, you cannot say he is deceived."

These observations appear to us to be contrary to the decision of this Court in Amritdhara case [AIR 1963 SC 449] where it was observed that the products will be purchased by both villagers and townsfolk, literate as well as illiterate and the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. A trade may relate to goods largely sold to illiterate or badly educated persons. The purchaser in India cannot be equated with a purchaser of goods in England. While we agree that in trade mark matters, it is necessary to go into the

question of comparable strength, the decision on merits in Dyechem case [(2000) 5 SCC 573] does not, in our opinion, lay down correct law and we hold accordingly."

(emphasis supplied)

Then in such a case allowing individuals who are not owners of a trademark to choose a keyword which is a trademarked term or use parts of the trademark interspersed with generic words in the Ad-title and / or Ad-text may constitute an infringement of a trademark and / or passing off. It is for this reason, reliance on foreign jurisprudence may be misplaced as the European Courts have held the average consumer to be normally informed and reasonably attentive [Ref: ***Google France SARL (supra)***]. It is unclear that on what basis has a distinction been drawn by Google between certain countries with regard to the trademark policies so formulated and followed. Be that as it may, it is clear from Google's EU and EFTA policy that Google provides a higher duty of care in a jurisdiction where large portions of the population are internet literate. This aspect further fortifies my finding as to why such a policy should be followed in India. Mr. Lall is right in relying on the judgment of ***Baker Hughes Ltd. & Ors. (supra)*** to state

that even sophisticated consumers can be confused and the affidavit filed by Mr. Gaurav Bakshi dated October 27, 2015 supports the proposition advanced by Mr. Lall.

97. Google has stated that it also factors in the quality of the landing page which is what the consumer would be directed to in case if he were to click on the sponsored results.

98. One of the pleas of Mr. Sethi was that the keyword planner tool is an optional software and keywords provided by the advertisers may have been provided by the keyword planner tool or may not be part of the keyword planner tool at all. This submission of Mr. Sethi has no bearing on the issue that is being decided by this Court in these applications, though on a *prima facie* view, in the eventuality a trademark is used as a keyword and what is the effect thereof in the context of TM Act. Suffice to state, if the keyword is not a trademark then there cannot be a question of infringement or passing off of the trademark. However, it is a conceded position that an advertiser can provide a keyword which is not part of the keyword planner tool only goes to show that in such a case registered trademarks including well known trademarks should be accorded a higher

degree of protection by Google through its policies so as to ensure that the goodwill of the marks is safeguarded. In a situation where these safeguards are not in place the trademark owner must enter the Google AdWords program in order to protect its own goodwill, which is the case of the plaintiff as well.

99. Although Mr. Sethi has stated that the keyword planner tool is an optional software, however, the same is contrary to the stand taken by Google wherein it has been stated that the quality score of the advertisement is based on an aggregate of factors such as relevancy of Ads, keywords, quality of landing page, etc., it is clear that the advertiser has much to gain from bidding on trademark as keywords. The advertiser would want his own Ad to appear on top of the sponsored results list in order to gain maximum publicity. Even though, the keyword planner tool may not be mandatory but if not used by an advertiser, may result in poorer quality score of the Ad thereby reducing the chances for the Ad to appear in the sponsored result list. Resultantly, it may be stated that the same though not mandatory has become essential for an advertiser. It was also

the plea of Mr. Sethi that trademarks are even permitted in ad-text by resellers, informational sites and authorized advertisers and as such may not constitute an infringement. This plea of Mr. Sethi is not vehemently opposed by Mr. Lall in his rejoinder submission while countering the reliance placed by Mr. Sethi on the Judgment of ***Merck & Co. (supra)*** by stating that the defendant (advertisers) therein being the resellers of the plaintiff's (Trademark owner's) product can be permitted to use the trademark being a fair use. In other words, where the use of trademark as a keyword as fair / *bonafide* use, is an exception to infringement and / or passing off.

100. Though Mr. Sethi did argue that Google algorithmically reviews the advertisements submitted in violation of Google ad policies such as ads supporting advertisements under the PCPNDT Act and the same are blocked, but the review does not remove the trademark infringing ads and the same are only investigated after complaint under the trademark / misrepresentation policy, but the same does not answer the issue raised by Mr. Lall that use of trademark as a keyword need to be reviewed and acted upon by Google. The

advertisement not featuring a trademark and using trademark as a keyword even if not infringing Google's policies creates confusion as to the origin of goods and services, the keyword along with the overall effect of the advertisement, (including Ad-title, Ad-text and URL) needs to be investigated in terms of paragraph 96 above.

101. The plea of Mr. Sethi that if the use of trademarks as keywords were to be considered as use under the TM Act, then Section 47 of the TM Act would be defeated as it states, non-use of trademark for five years would open the possibility of cancellation proceedings; this plea is unmerited. In the case in hand, the issue pertains to the use of a trademark as keyword by a third party and not non-use of the trademark by the original owner. This Court need not go into this issue as the instant suit pertains to use of trademarks by third parties and not non-use of the trademark.

102. I must at this stage state that it is a conceded position that up to 2009, Google in terms of its AdWords Policy as applicable to India did not allow the trademark as a keyword. It was only during the hearing of the ***Consim I*** before the Madras

High Court, did Google come up with a policy that they shall not investigate the use of trademark as a keyword. But this aspect demonstrates that it was the thought process of Google that a trademark cannot be used as a keyword. In fact, it is a policy which is being followed by Google to the extent that they shall investigate the use of trademark as a keyword in EU & EFTA countries and not in India.

103. One of the pleas of Mr. Sethi was that the suit is bad for non-joinder of necessary parties such as Safe Packers and Movers, Gati Ltd., DTC Packers and Movers which according to him are the competitors of the plaintiff in the business. The plea is unmerited for the simple reason inasmuch as it is not the case of the plaintiff that the names as suggested by the plaintiff have in fact used the trademark of the plaintiff as a keyword to score over the plaintiff and pop-up above the plaintiff in the Google search result page. In the absence of parties which have bid for the trademark of the plaintiff and any statement on record to that effect that the entities so named by Mr. Sethi have bid upon the trademark of the plaintiff as a keyword, they are not a necessary party. Hence to that extent, there is no cause of

action for the plaintiff against those entities to be made parties in this suit. Be that as it may, the submission of Mr. Sethi does suggest that the said entities being competitors of the plaintiff may bid for a trademark of the plaintiff as a keyword under the AdWords Program of Google. So, it is not disputed that a competitor may bid for a trademark of an entity to ensure its ads pop-up above the entity owning the trademark in the search results.

104. Regarding the reliance placed by the parties on the case of ***Consim I*** and ***Consim II***, the observations on the issue of functioning of meta-tags and keywords have been relied upon by this Court in the paragraphs above; however, it may be stated that the issue before the Madras High Court was that the Trademark of the plaintiff / appellant therein was appearing in the Adtext and Adtitle of the defendants / respondents therein. The Madras High Court also looked into the generic / descriptive nature of the words appearing in the Ad-text and Ad-title, which is not the case here. It is the stand taken by Google and so submitted by Mr. Sethi that the current Google policy states that *"Google does not allow any third party to put*

/ publish / refer to a Trademark of an owner in the Adtext / Adtitle as per its policy". Since this statement has already been taken on record that the Trademarks of the plaintiff shall not appear in the Adtext and Adtitle, the factual situation has departed from what was the issue before the Madras High Court. I may also state that the appearance of the sponsored links was different from what it is today, i.e., earlier (at the time of ***Consim I*** and ***Consim II***) the sponsored links appeared on the search engine results page with a yellow / blue background. The issue that whether these ads appeared on the top of the organic search results or on the right-hand side of the organic search results; Mr. Lall states that the former was the scenario, whereas the counsels for Google have pointed to the policy as existing then to state that the sponsored results could have also appeared on top of the search engine results page. Be that as it may, the position which exists today is that the sponsored links appear on top of the organic search results.

105. The Division Bench of Madras High Court in ***Consim II*** while stating that the appellant / plaintiff is entitled for injunction observed that Google has been adopting double

standards as the benefits given to the respondent Nos. 2 – 4 (advertisers) therein were not given to the appellant (Trademark owner). Even in the instant case, it is unclear as to how exactly a sponsored link is given the first rank and placed on top of the sponsored search results, over above the organic search results i.e., it is unclear whether some components as listed out by Mr. Sethi being; bid amount, quality of landing page, relevancy of ads etc. are given more weightage than others. It has also not been explained by the defendants the functioning of their current policy (as available online) which also incorporates a broad search and negative search option [Ref. Paragraph 50 expert witness testimony in judgment of ***Intercity Group (NZ) (supra)***]**.** Since, it is Google's proprietary algorithm, which controls not only the ranking, place of appearance and review of ads, this issue would have to be looked into at the time of trial. It is clear from the current Trademark policy of Google that it can *"either prohibit all use or allow all use of a particular term by an advertiser"* and despite such prohibition on use of a Trademark term in Adtext and Adtitle, there are possibilities of passing off. In ***Consim II*** it had been clearly stated by the

Madras High Court that it is clear that the search engine has control over selection of keywords by an advertiser but the search engine may not be aware of all the registered trademarks in various jurisdictions and in respect of various goods and services. I am in agreement with this observation and state that once the search engine has been made aware of a registered Trademark in a certain jurisdiction, it is incumbent upon the search engine to exercise a higher duty of care to ensure protection of the goodwill attached to such Trademark. Especially in light of the Judgment of a Coordinate Bench of this Court in the case of ***DRS Logistics (P) Ltd. vs. Rajesh Agarwal & Ors., 2013 SCC Online Del 1299*** wherein the mark of the plaintiff in paragraph 15 has been declared as a well-known trademark.

106. While considering the judgments relied upon by the counsels for Google, I may refer to the judgment of the Supreme Court in the case of ***Forasol vs. Oil and Natural Gas Commission, AIR 1984 SC 241***, wherein the Court while recognizing the high persuasive value of decision of the foreign Courts cautioned by stating that the rule laid down in those

particular cases must be judged in the Indian contextual background including the prevalent statutes and the legal procedure and the realities which exist in this country. This observation becomes relevant in the context of evaluating the aspect of confusion since in the cases of ***Google France SARL (Supra), L'Oreal SA (supra), Google Ireland Ltd. (supra), Cosmetic Warriors (supra), Intercity Group (NZ) (supra), NZ Fintech (supra), Private Career Training (supra), Chocolat Lamontagne (supra), Vancouver Community College (supra)*** and ***Cochrane Steel Products (supra),*** wherein the average consumer has been taken to be normally informed and reasonably attentive or liable to exercise a higher duty of care while searching on the internet, which as held by this Court above is not the definition of an average consumer in this country. Hence reliance on these judgments is misplaced.

107. In so far as the reliance placed by Mr. Sethi on the judgment of the Australian Court in the case of ***Veda Advantage (supra)*** is concerned, he contended that keyword meta-tags are trademarked words embedded in the source code of a website by the creator, unlike the keywords used by Google

in the AdWords Program, meta-tags are not entirely invisible. They can be located by someone who knows what to look for, whereas trademarked as keywords are invisible to the consumer; and they are not used as a trademark and their invisible use shall not amount to infringement, nor does a keyword denote connection in trade between the advertiser and the trademark owner. Keywords are also not being used to distinguish the service of one trader from another. Suffice to state, I have already in paragraph 88 above held that the effect of meta-tags and keywords is the same. I have also held above that even invisible use of a trademark would constitute *"use"* within the meaning of the provisions of the TM Act. That part, I have also held that the result of use of meta-tags and keywords is not different as both are instrumental for a search result to appear on the top of the search engine result page except that the sponsored links to the advertisers' web page is marked with the symbol denoting "Ad", which is followed by the URL. So, the keyword even assuming is invisible, the effect it has for advertising is that the traffic of the website of the trademark owner is diverted to that of the advertiser which shall have the

effect of passing off of the goods and services of the trademark owner as that of the advertiser.

108. Mr. Lall is right in stating that the keywords embedded in meta-tags are used in indexing of website, which is what keywords of Google AdWords Program are used for and in any case, Mr. Sethi has not been able to distinguish the precedents in the case of ***People Interactive (supra)*** and ***Mattel (supra).*** Even on the facts, this case can be differentiated since in that case the advertiser was providing services which were ancillary to the trademark owner. In other words, the trademark owner was providing financial services related to credit rating whereas the advertiser conducted a business assisting the consumers with poor credit rating and rectifying errors in the credit reports given by the proprietor of the trademark. Furthermore, it was stated that an ordinary and reasonable consumer in the context of Australia would not get confused between the organic search result and the sponsored search result, which appears within a yellow ad box. Even in that case the Court has stated in paragraphs 253 and 263 that certain words in the Adtext including the single word trademark of the owner which was

visible, suffixed with generic words was likely to cause confusion. The definition of an average consumer in India has been well settled. For the reasons above, this judgment has no applicability in the facts of this case.

109. In so far as the reliance placed by Mr. Sethi in the case of ***Reed Executive (supra)*** making similar submissions that invisible use may not be use at all as no meaning is being conveyed to anyone and it is only when the user clicks through the advertisement, he finds misleading material on web page of the advertiser and not on advertisement appearing on search engine results page and the same may not be attributable to Google, is concerned, I have already held, that even invisible use of trademark more specifically would constitute a use and in fact the precedents being available in the country in the form of ***People Interactive (supra), Mattel (supra), Amway India (supra)*** and ***Christian Louboutin SAS vs. Nakul Bajaj & Ors., (2018) 253 DLT 728*** the reliance place on the judgment of ***Reed Executive (supra)*** is misplaced. The issue is well settled. The question is not when the user clicks through the advertisement, he finds misleading material on web page of advertiser, but

whether by the use of invisible use of a trademark, the advertisement of the advertiser scores a march over the organic search result, where the website of the trademark owner appears. I may state here, Mr. Lall by drawing my attention to paragraph 140 of the judgement has stated that the Court has clearly stated that use as a reserved word can be regarded as use in course of trade, the Court has not expressed its opinion. In any case, the law in this regard even in that jurisdiction has changed since the judgments of the European Court of Justice in the cases of ***Google France SARL (supra), L'Oreal SA (supra)*** and the judgment in the case of ***Interflora Inc. vs. Marks & Spencer, [2015] F.S.R. 10.*** Needless to state that this case can be differentiated on the ground of the average consumer being normally informed and reasonably attentive. Be that as it may, the laws prevailing in the UK are different and the issue in the present case has to be judged in the context of Indian Laws and precedents [Ref: ***Forasol (supra)***]

110. While relying on the judgment of ***Merck & Co. (supra),*** Mr. Sethi stated that the internal use of trademark does not constitute as trademark use. The United States District Court

held that the advertiser bidding on the trademark as a keyword, was selling the trademarked drug *"ZOCOR"* for cholesterol medication which was manufactured by the Canadian affiliate of the trademark owner and the same does not amount to infringement in context of the laws prevalent in the United States. Based on the judgments delivered by the Courts in India, this reliance is totally misplaced. I must state here that Mr. Lall has fairly conceded, the fair use of trademark may not constitute infringement inasmuch as there is nothing wrong in the purchase of trademark as keyword where the advertisers sold medicines manufactured by the trademark owner.

111. In ***Victor Andrew Wilson (supra),*** on which reliance has been placed by Mr. Sethi to contend that the use of trademark as a back-end trigger does not amount to infringement and passing off which requires some commercial activity such as offers for sale, signs, corresponding to trademarks by the online service provider. This judgment may not be applicable to the facts of this case as in that case, the trademark was *"Mr. Spicy"* and the owner attempted to sue third-party and Yahoo for use of descriptive words such as *"spicy"*, *"spicy soup"*, etc., as

keywords. Firstly, respondent therein was Yahoo and not Google. Even the policy that is being followed by Yahoo has not been placed on record. That apart, it was held that there is no infringement if the keyword is going to be attached to goods and services which are different from those protected in that case. In any case, the weakness of such a descriptive mark was held to be restricted to goods and services for which it is registered.

112. Insofar as the reliance placed on the judgments by Mr. Sethi of the Canadian Courts do not aid the case of Google. ***Private Career Training (supra)*** has been relied on by Mr. Sethi to contend that keyword advertising is not different from accepted market practice of a company locating its advertisement close to a competitor's in a traditional advertising space such as yellow book and such practice is not misleading. Suffice to state the judgment is distinguishable on facts inasmuch as the Court held that the students who are concerned with the Ads had to exercise higher duty of care while distinguishing ads from the organic search result and secondly the sponsored result which was appearing in a yellow shaded

box was sufficient to distinguish the website of the parties and the parties before the Court were the advertiser / owner and not Google or YAHOO or any search engine. In ***Chocolat Lamontagne (supra),*** the submission of Mr. Sethi was, keyword advertising is not different from accepted market practice. In this case too the search results appearing which were in French in the sponsored results were clearly distinguishable as the hyperlinks listed under the heading sponsored links were preceded by the phrase *'Alternative to Lamontagne chocolate and other products'* Similar is the position in so far as the judgment relied upon by Mr. Sethi in the case of ***Vancouver Community College (supra).*** The Courts of Canada have also proceeded in terms of Canadian laws on the subject and also on a premise that the average consumer is internet literate and can differentiate sponsored results from organic results. The Court in this case however, made certain findings which may be noted such as in paragraph 55, the aspect of confusion is to be determined on the search engine result page and the Court came to a conclusion in that case, the components of the tort of passing off were met.

Therefore, one cannot overlook the fact that there is a possibility of confusion even in cases where the consumers are aware of the functioning of search engines. These judgments do not act as a bulwark for the case as presented by the counsels for Google.

113. Reliance placed by Mr. Sethi on the Judgement of ***Google France SARL (supra)*** to contend that the use of trademark as back-end trigger does not amount to infringement and passing off. According to him, Google has not used their mark in course of its trade or in relation to goods or services in respect of which the trademark is registered or within its advertising or in a manner to have taken unfair advantage or in a manner detrimental to distinctive character or repute of plaintiff's trademarks or in a manner likely to be taken as being used as a trademark. In other words, Mr. Sethi agrees that the use of trademark as a keyword held to be use, but only where the advertisement does not enable an average internet user or enables the user with great difficulty to ascertain the origin of goods or services referred therein.

114. I am unable to agree with the submission of Mr. Sethi as the judgment on which reliance has been placed by Mr. Sethi is from a European Court. The observation of the Court has to be read in the context of a purchaser in Europe unlike a purchaser in India. It is a settled law that an average consumer in India is of average intelligence and imperfect recollection [***Ref. Amritdhara Pharmacy (supra)***]

115. In so far as the judgment in the case of ***L'Oreal SA (supra)*** and ***Google Ireland Ltd. (supra)*** is concerned, similar would be my conclusion as concluded by me in the case of ***Google France SARL (supra),*** inasmuch as the issue before the European Court of Justice was to an extent similar to that in the present case, wherein the trademark owner had agitated that third parties had been using the trademark of the owner as the keyword in order to feature prominently on the search engine results page. However, the Court had examined this issue in the context of the average consumer in Europe and the European Laws / Directives wherein in the Court primarily examined the adverse impact of use of such mark on functions of a trademark. However, there was a caveat that even in such a scenario the

Court had remarked in paragraph 83 that whether the function of a trademark is adversely affected would depend on a particular manner in which the Ad is presented and such presentation does not enable the average consumer therein to ascertain the origin of goods and services. The Court further went on to note that in cases where the Ad does not suggest an economic link but remains vague to the origin of goods and services and the internet consumer is unable to determine on the basis of the advertising link and commercial message attached thereto whether the advertiser is a third party with regard to the proprietor of the trademark or not, or economically related to it, or is a third-party, the Court held that the conclusion must be that there is an adverse effect on the function of the trademark. This question, the European Court of Justice left open for the National Courts to assess on a case-by-case basis and even the role played by the service provider whether neutral or not is to be assessed by the National Courts. To this extent I am in agreement with the findings in ***Google France SARL (supra)***. The question of neutrality of the service provider in this case being Google would be subject matter of trial. A Coordinate

Bench of this Court in ***Christian Louboutin (supra)***, while answering the questions related to meta-tagging vis-à-vis intermediaries held as under:

> *"82. In the world of e-commerce, IP owners face challenging times. This is because sellers of counterfeit or infringing products seek shelter behind the platform's legitimacy, like in the case of Darveys com. Darveys com is involved in the promotion and sale of luxury products. The seller is located on a foreign shore. It is not even clear as to whether the seller is in fact selling a genuine product. As stated above, Darveys com promotes the products to its members who sign up on Darveys com. Without becoming a member, one cannot effect a purchase on Darveys com. In such cases giving exemptions of Section 79 would in fact amount to legalizing the infringing activity. The seller is not known, the person from whom the seller purchases the goods is not known. It is also not known if the product is genuine, though Darveys com represents to be same to be genuine. In view of these factors, Darveys com cannot be termed as an intermediary that is entitled to protection under Section 79 of the IT Act. The use of the mark, Christian Louboutin, the name, the photograph of the founder, without the permission of the Plaintiff, and without ensuring*

that the products which are sold are in fact genuine, would constitute violation of Plaintiff's rights. The Defendant has relied on a judgement of a Ld. Single Judge in Christian Louboutin v. Abubacker, 250 (2018) DLT 475 the court was considering protection for the red sole trademark. In the said judgement the court held that the red sole mark is not distinctive as there can be no monopoly on the colour red. The present suit does not relate to the red sole mark in isolation but the use of the plaintiffs marks, name of its name of its founder, use of the words constituting the mark in various ways including on the website, images, packaging material, invoice etc. by the Defendant which is an e-commerce platform. Thus the said judgement does not help the Defendant in the present case.

83. Meta-tagging: The plaintiff has relied upon a judgement in respect of meta-tags. A single judge of the Delhi High Court has held that use of meta-tags is illegal as it enables the Defendant to ride on the reputation of the Plaintiff. Meta tags are links which are provided using keywords. If a trade name is used as a keyword and a link is provided, the website comes up whenever a customer searches for the said trade mark. The trade mark used in the code as a keyword is invisible to the end-user or customer. Such use, though invisible to the

customer, has been held to be illegal in the case of Kapil Wadhwa v. Samsung Electronics Co. Ltd., 194 (2012) DLT 23. The Plaintiff claims that when a web user enters the Plaintiffs mark in a search engine such as Google, Darveys com website is amongst the search results and an analysis of the code shows that the marks of the Plaintiff are used as meta-keyword-tags, with a view to increasing the hits which the Defendant's website obtains from search engines like Google.

84. The trademark owner loses its huge customer base especially in the case of luxury products. If the products turn out to be counterfeit or not up to the mark, then it is the trademark owner's brand equity which is diluted. The seller himself does not suffer. Such immunity is beyond what is contemplated to intermediaries under Section 79 of the IT Act. While Section 79 of the IT Act is to protect genuine intermediaries, it cannot be abused by extending such protection to those persons who are not intermediaries and are active participants in the unlawful act. Moreover, if the sellers themselves are located on foreign shores and the trade mark owner cannot exercise any remedy against the said seller who is selling counterfeits on the e-commerce platform, then the trade mark owner cannot be left remediless."

(emphasis supplied)

116. Having noted the aforesaid position of law and it is the case of Google as contended by Mr. Sethi that Google is an intermediary is unmerited, surely there is an obligation on part of Google to ascertain that the keyword chosen by the advertiser is not a trademark and even if it is a trademark the same has been licensed / assigned. Not ascertaining this factum by Google, it cannot take / seek the benefit of exemption under Section 79 of the IT Act as it has been held in the above judgment as amounting to legalising the infringing activity. That apart, the conclusion of the Coordinate Bench in paragraphs of 83 and 84 shall apply on all fours to the facts of this case. In view of this conclusion, the plea of Mr. Sethi that Google is not an arbiter of third party disputes and shall not investigate complaints of violation of trademark infringement is unmerited, hence rejected.

117. The reliance placed by Mr. Sethi in ***Cosmetic Warriors (supra)*** to contend that use of third-party trademarks as keyword does not constitute trademark violation is also not appealing. This judgment seems to be an after effect of the

decisions in ***Google France SARL (supra)*** and ***L'Oreal SA (supra)*** since I have dealt with the issue in the above paragraphs the reliance on European Law would not help the case of Google. In any case, the matter therein pertained to Amazon and its advertising policies which is not the case here. The Court had considered three scenarios for a possibility of confusion, out of which only the first and second scenarios are of interest. The first and second scenario pertained to sponsored links on intermediary websites wherein a consumer would be able to see the trademark in the advertisement and in the other where the consumer cannot see the trademark term in the advertisement. In the case of the former it was held to be detrimental to the function of a trademark and in the latter, it was stated that the consumers would be aware of appearances of sponsored links. Whether this awareness exists in this country is unclear and would be subject to Trial especially so when there are chances of the advertisements of the trademark owner often appearing in the sponsored results with blurred lines of distinction between sponsored results and organic results in a case where an average Indian consumer has specifically typed a

trademarked term. The third scenario concerned the layout of Amazon website and the appearances of the trademark therein that too when there was no overt statement that Amazon did not sell the products of the trademark owner, which is not a question for consideration before this Court.

118. In ***Intercity Group (NZ) (supra)*** and ***NZ Fintech (supra)***, the same were relied upon by Mr. Sethi to contend that trademark as keyword are not seen or known or understood by a consumer and the same is not be taken as anything let alone amounting to use of trademark. The said judgment is in the context of laws of New Zealand which are different from those in India and Mr. Lall is right in contending that Section 89 of the New Zealand Act does not include advertisement as infringement, which position is otherwise in this country as I have referred to the provisions of Section 29 (6) and Section 29 (8) of the TM Act. Even in ***Intercity Group (NZ) (supra)***, the average consumer has been taken to be well-informed and reasonably observant but even so the Court has observed that there may exist a possibility of confusion as the case before the New Zealand Court was that the advertiser had bid on the

trademark as keyword being InterCity, which appeared on the search engine results page along with the website of the advertiser. In ***NZ Fintech (supra),*** the plaintiff therein had alleged that the defendant therein was using its mark *"MOOLA"* as a keyword. Whether such use resulted in sufficient number of consumers perceiving such use by the defendant therein to be a use of the trademark, was to be a matter of trial. These judgments therefore are distinguishable on facts. However, the New Zealand Court too in both the aforementioned judgments had interpretated their own law to mean that the use of trademark as a keyword, amounts to use in the course of trade. The question which further needs to be tried through the trial is whether there is a difference in the search engine results page when searching with capital letters, spaces, symbols such as hyphens, etc. and the difference thereof.

119. In so far as the reliance placed in ***Cochrane Steel Products (supra)*** is concerned, Mr. Sethi contended that it is unnatural for a consumer to get mislead by a clearly labelled Ad which identifies the source. If neither the advertisement nor the

advertisers' website contains any reference to the trademark owners products or services, then no confusion exists nor there is any evidence that any actual confusion existed and as per common market practice, advertisements are placed close to the competitors' advertisements in a yellow book. The trademark of the appellant therein was *"CLEARVU"* which was itself an unregistered mark. Wherein it was also held by the Court that the organic search result were clearly distinguishable from that of the sponsored search result. The said judgment has no applicability as the judgment has held that the average consumer in South Africa to be a person who is normally informed and reasonably observant internet user, which may not be the position in the Indian context. The case of ***Esquire Electronics Ltd. (supra)*** is distinguishable from the case at hand as the issue to be decided by the South African Court pertained to trading in prerecorded video tapes upon which a registered trademark was recorded through magnetic signals. Needless to state, that the facts at hand are very different to the one sought to be relied upon by the counsels for Google even so

the judgment has to be read in the context of the South African Laws.

120. Reliance has been placed in ***Nebo (supra)*** by Mr. Sethi to contend that the keywords do not form part of advertisement cannot be used for identifying a particular ad as the same keyword may be used for multiple advertisements. Users do not know the basis of which keyword, a particular advertisement is shown or which keyword co-relates with the said advertisement. In other words, keywords do not create a possibility of confusion of any products of owner with that of the advertisement. I am not in agreement with the submission made by Mr. Sethi more so with regard to my conclusions above and in the context of law laid down by the Indian Courts of which a reference has been given above. Even on facts this case is distinguishable as the search engine involved in the said case was Yandex and the policies governing the advertisements through keywords is different from that of Google in the present case. Be that as it may, the statutory law governing trademark law is very different in Russia as compared to that of the Indian Laws. As I have already concluded above, that use of

trademarks as keywords amounts to use in the course of trade in terms of the TM Act and the judgments of the Indian Courts in this regard, this case provides no succour to the case of the counsels for Google.

121. By relying upon the judgment in the case of ***Alzheimer's Disease and Related Disorders Association (supra)*** the contention of Mr. Sethi primarily is that trademark as keywords alone without additional behavior that confuses consumers is not actionable. In ***Jive Commerce LLC (supra),*** consumers are unlikely to be confused as the sponsored links clearly marked as Ad and the owner's Ad being directly below the sponsored search result in the organic search result there cannot be any confusion. These judgements of the Courts of the United States of America do not avail the case of Google, since in the case of ***Alzheimer's Disease and Related Disorders Association (supra)*** the Court therein had opined that the mark in question was weak and since the consumers were searching for a generic term, therefore the likelihood of confusion was less. Similar position exits in the case of ***Jive Commerce LLC (supra)*** wherein the mark of the plaintiff / owner was not registered, it

remained unclear under which class the said mark therein was to be categorised even in which case the Court came to a conclusion that the mark was either descriptive or suggestive which is not the case here. Similar is the position in ***Passport Health (supra)*** where the mark of the trademark owner being *"PASSPORT HEALTH"* was considered to be weak and the Court had observed that the sponsored results could easily be differentiated from the organic results as they were appearing on the right-hand side titled with the words *"related searches"*, this position no longer exits as of now.

122. Mr. Sethi has also placed reliance on the judgment in the case of ***Matrimony.com Ltd. (supra)*** of Competition Commission of India to contend that Google keyword bidding process promotes competition and provides some benefits and choice as compared to traditional advertising. To this submission, Mr. Sethi has accepted the fact that the trademark can be used as a keyword to divert the traffic from the website of the owner to that of the advertiser to encourage competition this according to this Court may in a given case amount to infringement and / or passing off.

123. Mr. Sethi has relied upon ***Havells India Ltd. (supra)*** to contend that advertisement is a part of free speech and right to carry any business. Competitors use of trademark is protected within the ad-text of a competitor provided the competitive advertisement under Section 29 (6) and 29 (8) of TM Act are complied with. There cannot be any dispute, that the advertisement is part of free speech, but surely that free speech cannot be at the cost of the trademark of an owner which amounts to a misleading advertisement.

124. ***Fischerwerke GmbH & Co. (supra)*** is on similar proposition that use of third-party trademarks does not constitute trademark infringement. Reliance on this case is misplaced due to the reason that firstly, that the search engine involved in that case was Baidu and not Google and; secondly the advertising policy of the said search engine has not been produced before this Court and even the law related to trademarks in that case is different to the case at hand. As per the stand of Google that up to 2013, even they did not allow the trademarks to be used as keywords in China, whether this

position changed after the judgment in the relied upon case is unclear.

125. In so far as the submission of Mr. Sethi that Google investigates the Ads which under its counterfeit / misrepresentation policy is concerned, the same does not answer the use of trademark as keyword by an advertiser as infringement of trademark. Even if Google under the misrepresentation policy investigates an infringing Ad but only after a complaint, there is no doubt that the usage of trademark as keyword results in diversion of the traffic from the website of the trademark owner to the webpage of the advertiser which causes prejudice to the owner of the trademark in terms of goodwill and credibility with respect to the services and should be investigated by Google. In a way the advertiser through oblique motives is cashing upon the goodwill of the trademark owner for his own benefit and through which process Google is earning revenue and as such is equally liable for the omissions and commissions of the advertiser. It also follows that when the use of trademark as a keyword constitutes infringement / passing off which amounts to violation of rights accrued in

favour of the proprietor under the provisions of the TM Act then on the same analogy that Google investigates advertisements which are prohibited under law, Google should also investigate the advertisements in this case as well.

126. This Court also at this stage cannot overlook the affidavit dated October 27, 2015 filed by Gaurav Bakshi wherein he has stated as under:

> *"2. That I wished to avail the services of old and reputed Agarwal Packers and Movers and searched for the same in google search engine which displayed 03/04 Agarwal Packers and Movers companies and I picked up one and contacted them over the given number.*
>
> *3. That one Mr. Amit and Mr. Vinod was contacted who represented themselves as Agarwal Packers and Movers company that has an India-wide presence by the name Aggarwal Goods Movers and Packers which is one and the same i.e. Agarwal Packers and Movers Ltd. to which I was searching.*
>
> *4. That I am persuaded by them to believe that they are the same old and reputed Agarwal Packers and Movers Ltd. Believing their statement and their website display in google Search engine, entrusted the task of shifting my*

personal household belongings and a car from Noida to Panjim Goa against payment of freight charges of Rs. 74, 294/- vide Goods Consignment Note No. 1306 dated 03/08/2015.

5. That I received my household belongings at the destination on 16/08/2015 in deplorable condition as most of the furniture items were broken and a large number of other items were heavily damaged. The car was received on 18/08/2015 with dents and scratches all over the body.

6. That soon after conveying the receipt of goods and car in above conditionI encountered with a horrible experience of harassment, abusive behavior, criminal threats with dire consequences to me and to my family if insisted upon for repairs of damaged goods and if pursued the case further.

7. That I realised that I had not picked up genuine Agarwal Packers and Movers and was cheated by above fake mover company who falsely projected themselves as reputed Agarwal Packers and Movers Ltd and deliberately used similar and confusingly identical name by inserting a very small almost indecipherable word "goods" in between Agarwal Packers and Movers to cheat me and

the public at large and such fake companies are displayed in google plate form[sic] along with genuine Agarwal Packers and Movers Ltd by which innocent people are misguided and have to face tough time in finding real Agarwal Movers on google as many Agarwals appears on google map."

The aforesaid does *prima facie* reveal that with usage of trademark of plaintiff as a keyword the traffic from the webpage of the plaintiff is being diverted to the webpage of the competitor / advertiser which means that a normal consumer who on typing the trademark of plaintiff as a search query was led to a webpage which had caused confusion regarding the origin of the webpage, whether belonging to the plaintiff or not. In cases of intellectual property, the Courts must also be mindful of the fact that it is ultimately the public at large which gets cheated and feels the brunt of spurious goods and services in the market [Ref: ***Hindustan Pencils (P) Ltd. vs. India Stationery Products Co. & Ors., AIR 1990 Delhi 19***].

127. I must state here that the plaintiff can seek protection of its trademarks which are registered in view of Section 28 of the TM Act, but cannot have any right on surnames / generic words

like Packers or Movers individually. Having said that in view of my above discussion, the applications are liable to be allowed, subject to final determination of the suit in the following manner:

(I) The defendant Nos.1 and 3 shall investigate any complaint to be made by the plaintiff to them alleging use of its trademark and its variations as keywords resulting in the diversion of traffic from the website of the plaintiff to that of the advertiser.

(II) The defendant Nos.1 and 3 shall also investigate and review the overall effect of an Ad to ascertain that the same is not infringing / passing off the trademark of the plaintiff.

(III) If it is found that the usage of trademark(s) and its variations as keywords and / or overall effect of the Ad has the effect of infringing / passing off the trademark of the plaintiff then the defendant Nos.1 and 3 shall restrain the advertiser from using the same and remove / block such advertisements.

128. I must also state here that the case of defendant No.2, who has been made as a party, is as noted in paragraphs 48 to 52 above, it is clear that defendant No.2 is not using the mechanism of providing trademarks as keyword for triggering the ads. This stand has been taken on record and the defendant No.2 shall remain bound by their statement.

129. The above directions are subject to the final determination of the suit. The aforesaid conclusion of mine is only a *prima facie* conclusion and nothing stated above shall be construed as a final determination of the suit. The applications being I.As. 21153/2011 and 4474/2014 are disposed of. List this suit and pending applications subject to the orders of Hon'ble the Chief Justice before the Roster Bench on the date fixed. No costs.

V. KAMESWAR RAO, J

OCTOBER 30, 2021*/aky/jg*