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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 2nd August, 2022

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CS (COMM) 492/2022

AKASH AGGARWAL Plaintiff

Through: Mr. Anshuman Upadhyay and Mr.
Naseem Prashant, Advocates.
(M:9911373783)

versus

**FLIPKART INTERNET PRIVATE
LIMITED AND ORS.** Defendants

Through: Mr. Rajiv Nayyar, Sr. Advocate with
Ms. Manjra, Mr. Sidharth Chopra,
Ms. Shilpa Gupta, Ms. Surabhi Pande
and Mr. Kuber, Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

CS (COMM) 492/2022

1. Let the Complaint be registered as a suit.
2. Issue summons to the Defendants through all modes upon filing of Process Fee. Summons is accepted by Mr. Sidharth Chopra, on behalf of Defendant No.1 - Flipkart.
3. A written statement to the Plaintiff shall be positively filed within 30 days. Along with the written statement, the Defendant No.1 shall also file an affidavit of admission/denial of the documents of the Plaintiff, without which the written statement shall not be taken on record.
4. Liberty is given to the Plaintiff to file a replication within 15 days of



the receipt of the written statement(s). Along with the replication, if any, filed by the Plaintiff, an affidavit of admission/denial of documents of the Defendant No.1, be filed by the Plaintiff, without which the replication shall not be taken on record. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines.

5. List on 26th September, 2022, before the Joint Registrar for marking of exhibits. It is made clear that any party unjustifiably denying documents would be liable to be burdened with costs.

6. List on 11th November, 2022, before Court.

I.A.11270/2022 (u/O XXXIX Rules 1 & 2 CPC)

7. The present suit has been filed seeking permanent and mandatory injunction restraining trademark and copyright infringement, passing off, delivery up, rendition of accounts, damages and other reliefs. The Plaintiff - Mr. Akash Aggarwal is the sole proprietor of an entity operating under the mark/name '**V Tradition**', which is engaged in the business of sale of clothing for women on various retail e-commerce platforms, such as 'Amazon', 'Meesho', 'Myntra', as also, that of Defendant No.1 - Flipkart. The details of the marks of the Plaintiff are set out below:

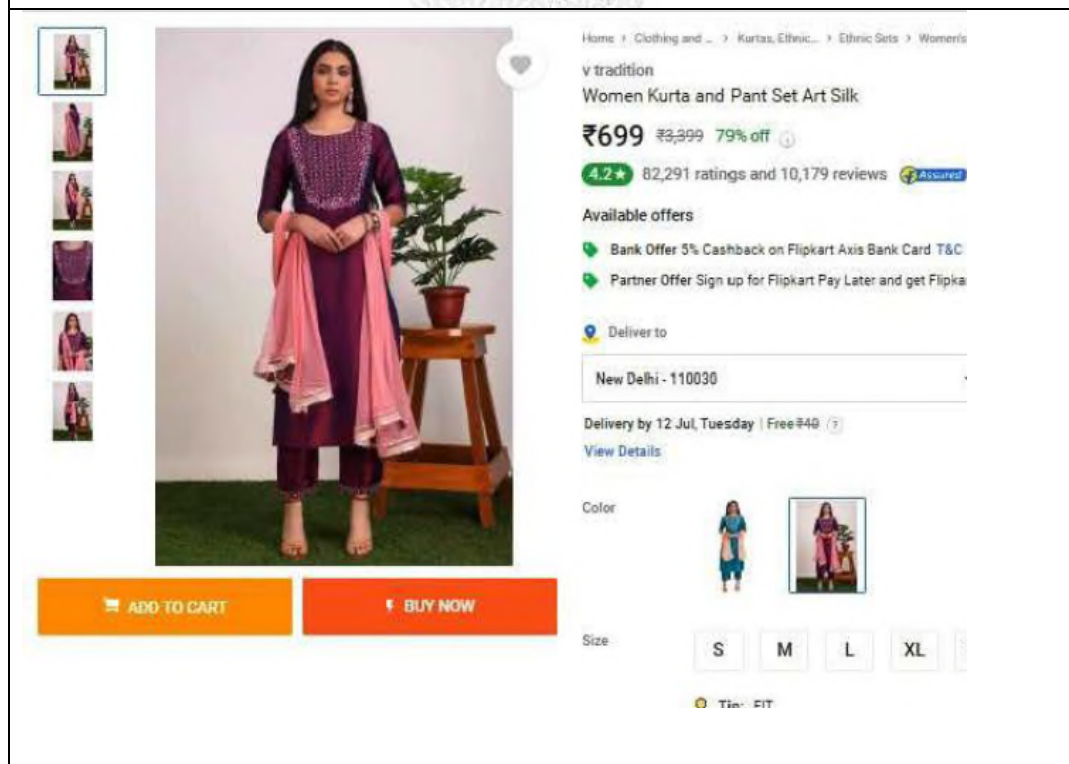
Trademark	App No.	App Date	STATUS
V TRADITION	4644238	07//09/2020	Pending
	5258052	23/12/2021	Pending (Class 25)
	5337646	21102/2022	Pending (Class 25)



8. The case of the Plaintiff is that he uses the mark/name '**V Tradition**' in respect of all garments manufactured and sold by him. The Plaintiff avers that he started manufacturing and selling his products under the mark/name '**V Tradition**' since August, 2020, on the e-commerce platform - Flipkart. He claims that he has received more than, approximately, 2.5 lakhs orders from Flipkart itself, with 1.41 crores clicks. The Plaintiff's products under the mark '**V Tradition**' have achieved a total sale of approximately Rs.18 crores on Flipkart itself, since December, 2020. It is submitted that the Plaintiff's products have more than 82,000 consumer reviews on Flipkart. On all the products sold by the Plaintiff, the mark '**V Tradition**' is prominently visible on his product listings on Flipkart. The Plaintiff claims to be spending a substantial amount of money on the creation of garments for women, as also, on engaging women models who wear the garments made by the Plaintiff, and whose photographs are used for showcasing and promoting the Plaintiff's products on the e-commerce platforms.

9. In the present suit, the grievance of the Plaintiff against Flipkart is

that the said platform is encouraging and allowing third-party sellers to 'latch on' and use the mark 'V Tradition', along with the photographs of the Plaintiff's products, on the said platform. By doing so, several third-party sellers which are not connected to the Plaintiff, are able to portray themselves as 'V Tradition' and ride on the popularity of the products and designs of the Plaintiff. Such third-party sellers also misuse the photographs created by the Plaintiff for his own products sold under the 'V Tradition' umbrella. An illustrative representation, of the actual and original product listing of the Plaintiff and product listings of third-sellers using photographs identical to that of the Plaintiff's product listings, is set out below:

Actual and original listing created by the Plaintiff on Flipkart under his mark 'V Tradition'



	Product Listings of Third-Party Sellers using photographs created by the Plaintiff
1.	 <p>Home > Clothing and... > Kurtas, Ethnic... > Ethnic Sets > Womens Eth...</p> <p>GODAJI EMPEX Women Kurta, Pant And Dupatta Set Silk Blend Special price ₹624 ₹2,299 81% off Or Pay ₹592 + ₹32</p> <p>4.1 726 ratings and 76 reviews</p> <p>Available offers</p> <ul style="list-style-type: none"> Special Price Get extra 10% off (price inclusive of discount) T1 Bank Offer 5% Cashback on Flipkart Axis Bank Card T&C Partner Offer Sign up for Flipkart Pay Later and get Flipkart Gi <p>Deliver to New Delhi - 110030</p> <p>Delivery by 2 Aug, Tuesday Free ₹40</p> <p>View Details</p> <p>ADD TO CART BUY NOW</p>
2.	 <p>Home > Clothing and... > Kurtas, Ethnic... > Ethnic Sets > Womens Eth...</p> <p>ASTRON CLOTHING Women Kurta and Pant Set Art Silk ₹629 ₹3,499 82% off 3.2 17 ratings and 0 reviews</p> <p>Available offers</p> <ul style="list-style-type: none"> Bank Offer 5% Cashback on Flipkart Axis Bank Card T&C Partner Offer Sign up for Flipkart Pay Later and get Flipkar <p>Deliver to New Delhi - 110030</p> <p>Delivery by 4 Aug, Thursday ₹62</p> <p>View Details</p> <p>Color</p> <p>ADD TO CART BUY NOW</p>

3.

Home > Clothing and ... > Kurtas, Ethnic... > Ethnic Sets > Women's Eth... >

Inwachi
Women Kurta and Palazzo Set Art Silk

Special price:
₹699 ₹3,499 **80% off**

4.3 174 ratings and 24 reviews **Assured**

Available offers:

- Special Price Get extra 20% off (price inclusive of discount) T&C
- Bank Offer 5% Cashback on Flipkart Axis Bank Card T&C
- Partner Offer Sign up for Flipkart Pay Later and get Flipkart Gift C

Deliver to
New Delhi - 110030

Delivery by 2 Aug, Tuesday | Free ₹40
if ordered before 3:55 PM

View Details

Size: S M L XL XXL

ADD TO CART BUY NOW

4.

Home > Clothing and ... > Kurtas, Ethnic... > Ethnic Sets > Women's

Geeta Fashion
Women Kurta and Palazzo Set Art Silk

₹699 ₹3,199 **78% off**

Be the first to Review this product

Available offers:

- Bank Offer 5% Cashback on Flipkart Axis Bank Card T&C
- Partner Offer Sign up for Flipkart Pay Later and get Flipka

Deliver to
New Delhi - 110030

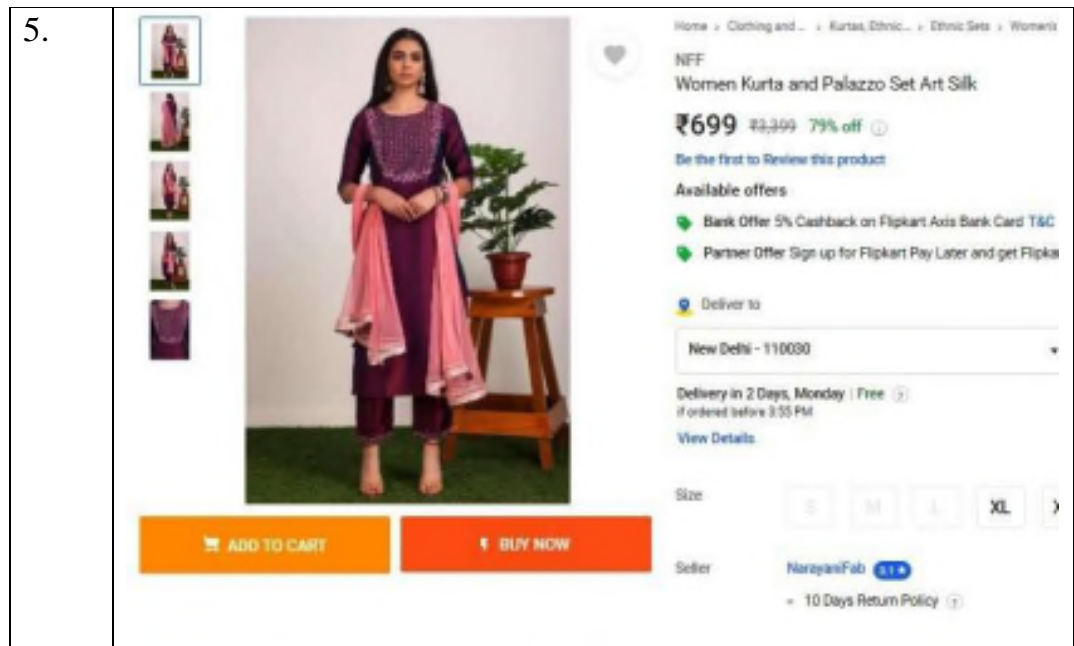
Delivery by 3 Aug, Wednesday | Free
if ordered before 1:55 PM

View Details

Size: S M L XL

Seller: **GEETATEXTILE** **4.3**
10 Days Return Policy

ADD TO CART BUY NOW



10. The Plaintiff has, thus, filed the present suit seeking reliefs against Flipkart from permitting third-party sellers to 'latch on' to his name and products. The prayers in the suit are for restraining Flipkart from allowing any person or party to portray itself and/or conduct its business on the website of Defendant No. 1 as 'more sellers' of goods offered for sale by the Plaintiff on his own product listings on the website of Defendant No. 1 under the Plaintiff's Trademarks and from enabling the unauthorised sellers from using the product images of the Plaintiff's product listings and name.

11. On the last date, i.e., 22nd July 2022, Id. Counsel for the Defendant had sought time to seek instructions from his client and the following order was passed:

“

CS(COMM) 492/2022 & I.A. 11270/2022 (for stay)

4. The present suit has been filed by the Plaintiff seeking various reliefs including permanent and mandatory injunction restraining trademark infringement and passing off, etc against Defendant No.1- Flipkart Internet Private Limited and various John Doe sellers. The suit has been filed by the Plaintiff for the protection of its rights in the mark ‘V Tradition’ used in relation to clothing for women. It is the case of the Plaintiff that various sellers have unlawfully latched on to the product listings created by the Plaintiff on Flipkart platform as ‘**more sellers**’ of Plaintiff’s products.

5. It has been brought to the notice of this Court by Mr. Chopra, ld Counsel for Defendant No.1 that there is a suit which is pending before the Commercial Court in Saket District Court on the same cause of action against Flipkart and seven other sellers.

6. Mr. Chopra, ld. Counsel, submits that while the said suit continues, the present suit would not be maintainable. Ld. counsel for the Plaintiff on the other hand submits that he would restrict the cause of action in the said suit only to the listings made by Defendant Nos. 2 to 8 on the Flipkart platform. If so, let a statement be made before the Commercial Court in this effect. On a query put to Mr. Chopra, ld. Counsel, as to how the process of ‘latching on’ and reflecting other unauthorised sellers as ‘more sellers’ works technologically on the platform, he wishes to seek instructions.

7. List on 2nd August, 2022.”

12. Submissions at the *ad-interim* stage have been made by both parties. Mr. Anshuman Upadhyay, ld. Counsel for the Plaintiff has placed certain documents on record to show how the process referred to as ‘**latching on**’

and reflecting other unauthorised sellers as '*more sellers*', is enabled on Flipkart. He explains that when a third-party seller wishes to place a listing on Flipkart, the Flipkart software itself suggests '**V Tradition**' products as one of the most popular listings and 'Best-Sellers' and allows such third-party sellers to add various products under the Plaintiff's mark '**V Tradition**' into their own listings along with the Plaintiff's product photographs, by way of the 'Opportunities' option under the 'Listings' tab on the 'Flipkart' website.

13. Ld. Counsel submits that there are various persons, who have been adversely affected by the said '*latching on*' feature provided by Flipkart, which has resulted in loss of business to such small and medium entrepreneurs. Reliance is placed upon the affidavits filed by third-party sellers, who have also filed suits against Flipkart. The relevant portions of the said Affidavits have been extracted below:

Affidavit dated 25th July, 2022 filed by Mr. Uvais Ansari

I say that I suffered stress and huge loss due to 'latch on/more sellers' on my listings which were created under trademark Being left with no option, I filed a suit bearing CS(COMM) No.81 of 2022 titled as Tibra Collection Vs Flipkart Internet Private Limited and Ors before district court of Delhi and vide order dated 27.01.2022, ex-parte, ad-interim injunction was granted in my favour and against the Defendants whereby the Defendants were restrained from mapping/listing their products under my trademarks and copyrights on the website of Flipkart Relevant operative part of the aforesaid order is reproduced below:...."

Affidavit dated 27th July, 2022 filed by Mr. Mahboob Alam

I say that I suffered huge loss due to sudden 'latch on/more sellers' selling my products under my trademarks on my listings www.flipkart.com. Being left with no option, I filed a suit CS (COMM) No. 181 of 2022 titled as Mr. Mahboob Alam Vs. Flipkart Internet Private Limited and Ors before district court of Delhi and vide order dated 07.03.2022, ex-parte, ad-interim injunction was granted in my favour and against the Defendants whereby the Defendants were restrained from mapping/listing their products under my trademarks and copyrights on the website of Flipkart Relevant operative part of the aforesaid order is reproduced below:...

Affidavit dated 25th July, 2022 filed by Ms. Rekha Nath

I say that I suffered huge loss due to unlawful activities of those 'latch on/more sellers'. Having left with no option, I filed a suit CS (COMM) No. 365 of 2022 titled Rekha Nath v. Flipkart Internet Private Limited and Ors before district court of Delhi and vide order dated 25.05.2022, ex-parte, ad-interim injunction was granted in my favour and against the Defendants whereby the Defendants were restrained from selling products under my trademarks and/or infringing my copyrights over my originally created paintings, on the website of Flipkart. Relevant operative part of the aforesaid Order is reproduced below:...

Affidavit dated 30th July, 2022 filed by Ms. Mamta

“2. I say that I am the Defendant No.6 in a suit titled as CS (Comm) No.365 of 2022 titled as *Rekha Nath vs. Flipkart Internet Private Limited and Ors.* Before district court of Delhi where vide order dated 25th May, 2022, an *ex-parte, ad-interim* injunction was granted against me for becoming ‘More Sellers’ under the brand ‘Rainbow Arts’ and Copyrights.

3. I say that I was a new seller on Flipkart. **The way of becoming latch on seller/more seller and earning money from other’s listings was shown to me by executives of Flipkart who guided and offered me to latch on to other sellers’ listings which are doing good on their platform.**

4. I say that I have realised my mistake and paid 50,000 to Plaintiff in the above case for settlement and an undertaking to not indulge in such act in future.”

14. Ld. Counsel for the Plaintiff has also effected purchases by such third-party sellers, so as to show how he is able to purchase five identical-looking products (*Kurtas*), which are sold by third-party sellers under the mark ‘**V Tradition**’. These products were purchased from third party sellers who were using identical photographs of the Plaintiff’s model and the name ‘**V Tradition**’, displayed on their product listings. The Plaintiff has produced the said ladies’ *Kurtas* purchased from such unauthorised sellers through the Flipkart platform. The invoices in respect of such purchases from third-party sellers have also been placed on record by the Plaintiff. One such invoice showing sale of products by a third-party seller trading as ‘Narayani Fab’, under the identical mark ‘**V Tradition**’, is set out below:



15. Mr. Nayar, Id. Senior Counsel appearing for Defendant No.1 - Flipkart, submits that the mark ‘**V Tradition**’ used by the Plaintiff is not registered, and hence, Flipkart has no method of checking as to whether the mark is entitled to protection, or not. However, without prejudice to the same, he submits under instructions, that insofar as the mark ‘**V Tradition**’ and the Plaintiff’s product listings are concerned, Flipkart would take down the said listings, within 48 hours, upon the URLs for the same being supplied to Flipkart.

16. Heard Id. Counsels for the parties. The advent of e-commerce has created various challenges to the protection of IPR rights. An action for passing off, which was traditionally restricted to products having similar logos, marks, names, and labels, in the real world, now has a new dimension in the context of e-commerce.

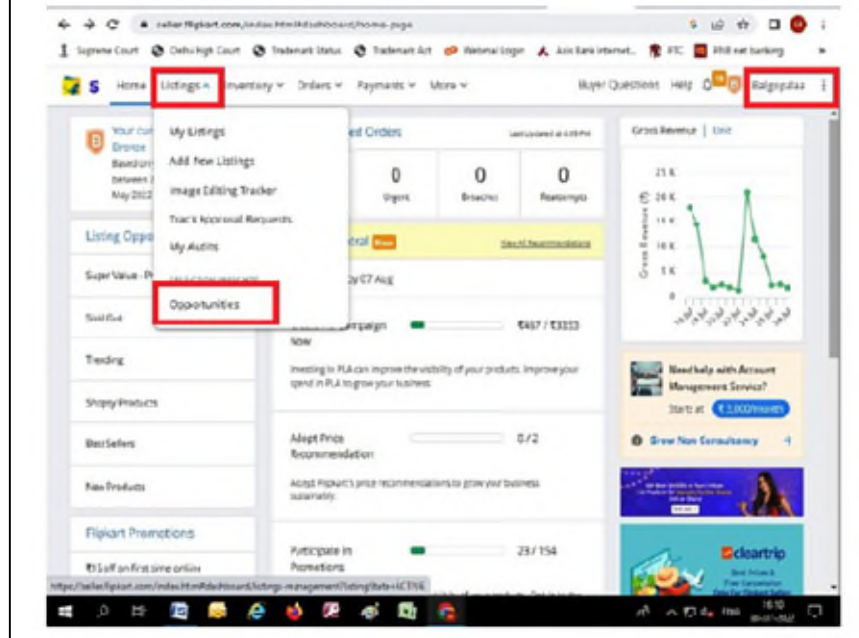
17. E-commerce platforms provide an alternate platform to small and medium entrepreneurs to showcase their products and conduct their businesses in a profitable manner. However, certain features on these platforms can also cause damage to such entities and entrepreneurs. One such feature, as is clear from the present case, is the feature described as '***latching on***' provided by the Defendant No.1 - Flipkart on its e-commerce platform. The said process of '***latching on***', as illustratively placed on record by the Plaintiff, is set out below. To demonstrate this process, the Plaintiff admits to have used the account of a relative, Balagopala, on the Flipkart platform.

Slide 1

HOW TO BECOME A 'MORE SELLER' OF SOMEONE ELSE'S PRODUCTS ON FLIPKART

FLIPKART SUGGESTS OPPORTUNITIES TO ITS SELLERS

1. A screenshot of a Seller's Login profile from <https://www.seller.flipkart.com>
2. Name of the Seller- 'Balgopalaa' (as shown on top right corner of the screenshot)
3. 'OPPORTUNITIES' is one of the drop down options under the 'Listings' tab



Slide 2

BECOMING 'MORE SELLER' OF BEST SELLING PRODUCTS IS PROMOTED AS AN OPPORTUNITY TO PROSPECTIVE/EXISTING SELLERS

1. The Seller- 'Balgopalaa' is provided listing opportunities by Flipkart
2. Becoming 'More Seller' of Plaintiff's best selling product under 'Tradition' is an 'opportunity' provided to prospective/existing sellers by Flipkart

The screenshot shows the Flipkart Seller Dashboard. At the top, there is a navigation bar with various links like Home, Listing, Inventory, Orders, Payments, Growth, Reports, Advertising, Partner Services, Buyer Operations, and Help. A red box highlights the 'Listing Opportunities' link. Below this, a banner reads 'Grow your business by 3X' with a sub-headline: 'Last month, 4223 sellers have added 20101 new listings and earned ₹4.43 Crores in total! Quickly add products from the list below and improve your sales.' Below the banner, there is a section titled 'Best Sellers in Clothing' with a sub-headline: 'Our best selling and most popular products on Flipkart based on sales'. This section displays three product cards: '1 Tradition Women Kurta and Pant Set', 'Menon Top - Pyjama Set For Boys & Girls', and 'Choke Raja Collection (choke raja collection)'. Each card includes an image, a title, a price, and an 'Add Listing' button. A red arrow points from the 'Grow your business by 3X' banner to a larger version of the same banner below.

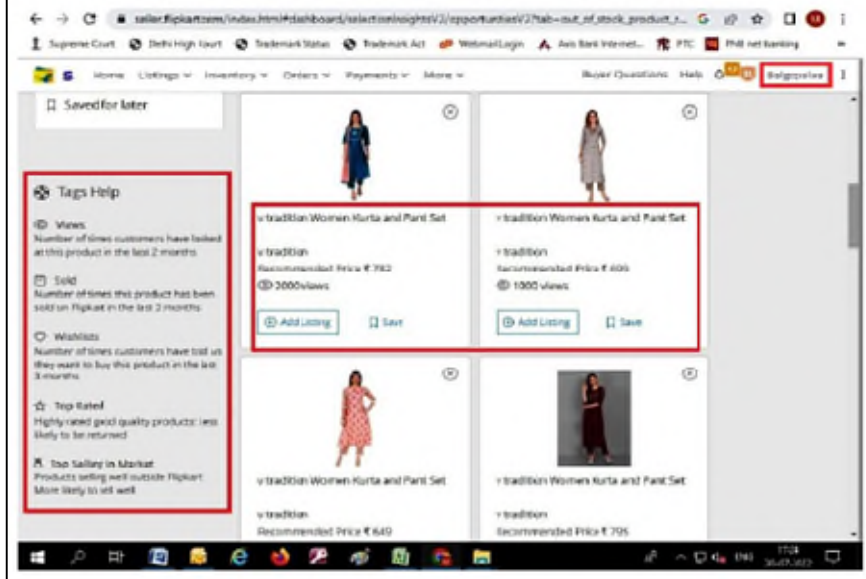
Grow your business by 3X

Last month, 4223 sellers have added 20101 new listings and earned ₹4.43 Crores in total! Quickly add products from the list below and improve your sales.

Slide 3

FLIPKART PROMOTES THE UNLAWFUL ACTIVITY OF PASSING OFF

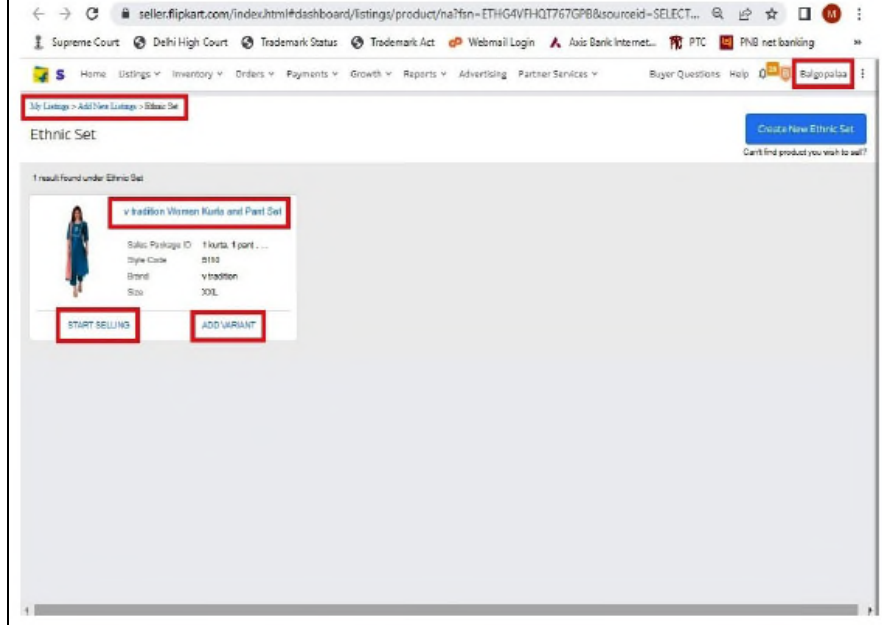
1. Plaintiff's products under 'V Tradition' is one of the top selling products in clothing
2. Flipkart invites sellers to become 'More Seller' of Plaintiff's goods by showing huge demand and popularity of products under plaintiff's trademark
3. Flipkart also suggests competitive prices to such sellers
4. By clicking on 'Add Listing' such seller could become 'More Seller' of plaintiff's goods under his trademark



Slide 4

FLIPKART PROMOTES, ENCOURAGES PASSING OFF AND HAS MADE IT AS EASY AS A COUPLE OF CLICKS OF THE MOUSE/TOUCHPAD

1. After clicking on 'Add Listing', a seller can start selling someone else's product as 'More Seller' of such product
2. Such 'More Seller' is authorized to add variants of the products of the original/true trademark proprietor



सत्यमेव जयते

Slide 5

SELLER NAMED 'BALGOPALAA' BECOMES 'MORE SELLER' OF 'V TRADITION'

1. In less than a minute of filling in details of the product's specifications, 'Balgopalaa' starts showing as a 'More Seller' of 'V Tradition' products



The screenshot shows a product listing on the Flipkart website. The product is a 'V Tradition Women Kurta and Pant Set'. The price is ₹699. The listing includes a 'More Seller' badge and a 'V Tradition' brand name. A red box highlights the 'More Seller' badge and another red box highlights the 'V Tradition' brand name in the seller information.

A perusal of the above slides shows that whenever a seller wishes to place some listings in a specific product category, a recommendation on the basis of the business conducted on its portal is given as to which are the 'Best Seller' products. The caption "*Grow your business by 3x*" along with specific data, is also projected in order to entice the new seller to 'latch on' to popular product listings. The said seller is then permitted to ADD the LISTING to his listing page. While giving this recommendation, the mark 'V Tradition', as also, the product photographs of the Plaintiff is permitted to be added by the third-party seller, without the permission or consent of the Plaintiff. It is, thus, clear that product listings of the Plaintiff are being

permitted to be used along with the Plaintiff's brand name and image/s of the product created by the Plaintiff. The said brand name and photograph then becomes a part of the product listings of the third-party unauthorised seller who can then make similar looking products and sell them as though they originate from '**V Tradition**'.

18. The fact that such a feature is made available is not even disputed by Flipkart. In the opinion of this Court, permitting a third-party seller to 'latch on', in this manner, to the Plaintiff's name/mark and product listings is nothing but 'riding piggy back' as is known in the traditional passing-off sense. It amounts to taking unfair advantage of the goodwill that resides in the Plaintiff's mark and business. In the context of e-commerce, this Court has no doubt that 'latching on' by unauthorised sellers results in and constitutes 'passing off' as known in the brick and mortar world. It is a mode of encashing upon the reputation of the Plaintiff which he has painstakingly built. The affidavits filed by the Plaintiff also need to be further looked into as this seems to be a recurring difficulty that IP owners appear to be facing.

19. On the basis of the demonstration before this Court today, and the submissions made, *prima facie*, the Flipkart platform is permitting other third-party sellers to 'latch on' to the best sellers in one particular segment of products, resulting in various third-party sellers misusing the Plaintiff's brand/mark.

20. This Court is satisfied that such a feature cannot be allowed to be used or offered, to the detriment of the owner of the brand or the person who has created the original product. Consent and authorisation of the brand owner and the listing owner would be required before such conduct by any seller is

permitted. In the present case, a perusal of the physical products handed over to the Court after purchases having been made from identical third-party sellers, shows that while the products of the Plaintiff have the label '**V Tradition**', none of the others have any product tag name. The product design, look and feel, as also, the documents which have been placed on record by the Plaintiff, clearly show that the Flipkart platform has allowed third-party sellers to '*latch on*' to the Plaintiff's product listings which were featuring as 'Best Sellers', by way of the 'Opportunities' option. Accordingly, in order to protect the Plaintiff, his brand and the investment which the Plaintiff has made in his mark/name, this Court is of the opinion that any infringing third-party product listings would be liable to be taken down.

21. In the facts and circumstances of the present case, the Plaintiff has made out a *prima facie* case for the grant of an interim injunction against Flipkart. In the opinion of this Court, the balance of convenience lies in favour of the Plaintiff and irreparable injury would be caused to the Plaintiff if an interim injunction is not granted. Accordingly, till the next date of hearing, Flipkart, and all others acting for and on its behalf, shall stand restrained from allowing any third-party sellers from '*latching on*' to the mark '**V Tradition**' used by the Plaintiff or the Plaintiff's product listings under the mark/name '**V Tradition**', so as to ensure that third-party unauthorised sellers are unable to misuse the name and product listings of the Plaintiff. Thus, Flipkart shall ensure that the '*latching on*' feature is disabled *qua* the mark '**V Tradition**' used by the Plaintiff till the next date of hearing. All such third-party sellers shall also stand restrained from

'latching on' to the product listings of the Plaintiff and misusing the product listings and mark/name '**V Tradition**', for promoting their products which are not connected to the Plaintiff, in any manner.

22. According to the Plaintiff, there are 45 third-party sellers, who have already started using the Plaintiff's mark '**V Tradition**', product listings and pictures. Let the URLs and any other available details of all such infringing third-party product listings be supplied to Id. Counsel for Flipkart, within two days. Upon receipt of the same, all the said product listings shall be disabled or taken down, within 48 hours.

23. Id. Counsel for Flipkart shall also supply a list along with their contact details, of all the third-party sellers, who have availed of the *'latching on'* feature in respect of the Plaintiff's mark/name '**V Tradition**' and products sold under the said mark, to the Id. Counsel for the Plaintiff. The Plaintiff is at liberty to avail of his remedies, in respect of such parties, in accordance with law.

24. Reply to the present application be filed within two weeks. Let rejoinder thereto, if any, be filed within two weeks thereafter. The observations in this order are prima facie in nature and shall not bind the adjudication of the interim application, after pleadings are completed.

25. List before the Joint Registrar on 26th September, 2022.

26. List before the Court on 11th November, 2022.

PRATHIBA M. SINGH
JUDGE

AUGUST 2, 2022/dk/ad