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

\+ CS(COMM) 63/2023 & I.A. 2225/2023, I.A. 2226/2023, I.A. 2941/2023

SAMRIDHI ENTERPRISES ..... Plaintiff

Through: Mr. Jeevesh Mehta and Mr. Nihit Dalmia, Advs.

versus

FLIPKART INTERNET PRIVATE LIMITED & ORS.

..... Defendants

Through: Ms. Shilpa Gupta and Mr. Naman Tandon, Advs. for D-1
Mr. Sachin Sharma, Mr. Anil Kumar Gulai and Ms. Nur Tandon, Advs. for R-2

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

O R D E R

% 01.03.2023

I.A. 2226/2023

1. Subject to the plaintiffs' filing legible copies of any dim or illegible documents on which they may seek to place reliance within four weeks from today, exemption is granted for the present.

2. The application is allowed accordingly

CS(COMM) 63/2023

3. The plaintiff manufactures and sells car covers under the marks "UK Blue" and "Autofact" since 2018, inter alia on the Flipkart platform of Defendant 1. The plaintiff is the proprietor, having registration, under the Trade Marks 1999 in respect of the device marks "Autofact/ 

, UK Blue/ 

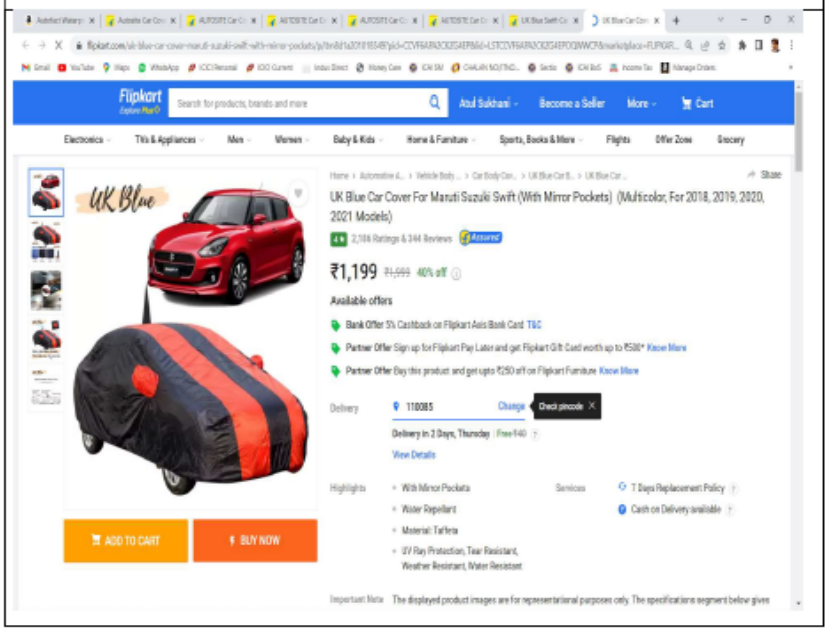
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4. Things were progressing fairly satisfactorily when, in June to July 2022, the plaintiff noted sudden dip in its sales. Enquiries were made, which revealed that Defendants 2 to 9 were selling car covers by copying not only the design look and feel of the car covers sold by the plaintiff, but were also marketing the car covers in an identical fashion, on the Flipkart portal.

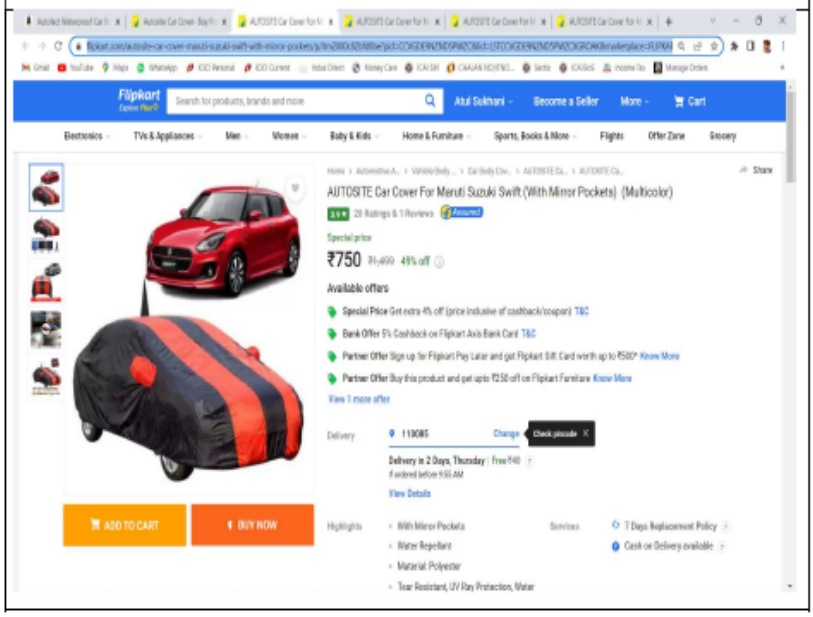
5. For the purpose of comparison, the plaint provides screenshots of the original listing of the "UK Blue" and "Autofact" car covers, as manufactured and sold by the plaintiff across platforms other than Flipkart, and the manner in which Defendants 2 to 9 were selling their car covers on Flipkart. It is contended that, apart from the fact that the car covers of the defendants were identical to those of the plaintiff, they were also selling the car covers in a similar fashion, so as to create confusion in the mind of the customer. By way of examples, the following screenshots, as provided in the plaint, may be reproduced:

ORIGINAL LISTING OF BRAND "UK BLUE" CAR BODY COVER FOR SWIFT - FLIPKART



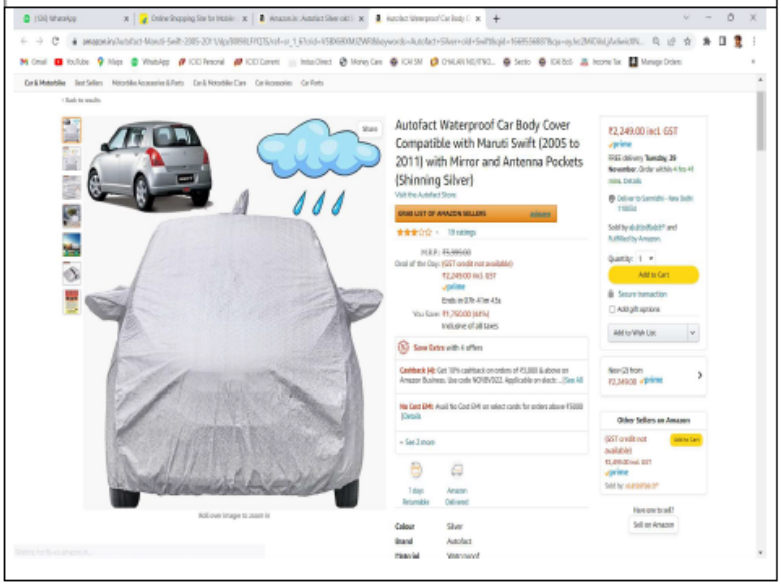
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PRODUCT LISTING OF SELLER "AUTOSITE" CAR BODY COVER FOR SWIFT - FLIPKART



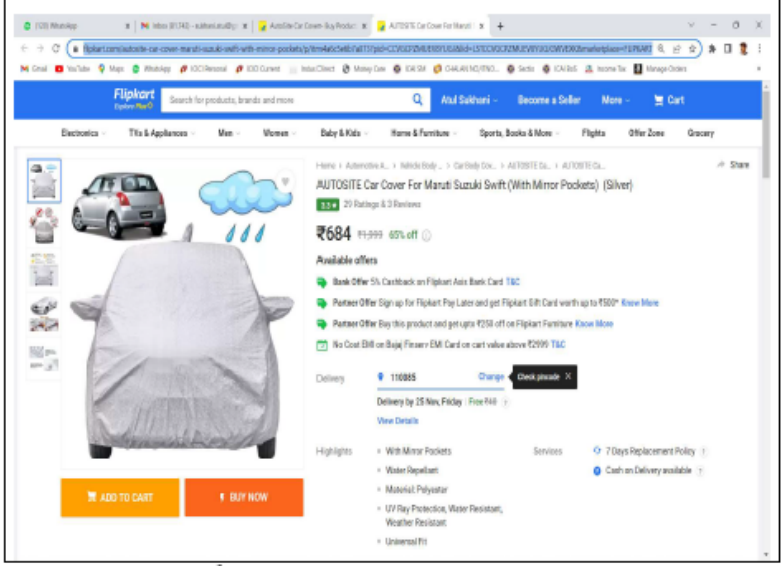
6. For the brand "Autofact", the defendant was also showing, alongside its product, a rain cloud, to increase the visual appeal of the product. This image, too, was copied by Defendants 2 to 9, while marketing their products on the website of Defendant 1. The following screenshots makes this apparent:

ORIGINAL LISTING OF BRAND "AUTOFACT" CAR BODY COVER FOR OLD SWIFT- AMAZON



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PRODUCT LISTING OF SELLER "AUTOSITE" CAR BODY COVER FOR OLD SWIFT- FLIPKART



7. The plaintiff has placed on record the screenshots evincing similar copying tactics adopted by each of Defendants 2 to 9. The plaint alleges that, by their acts, the defendants have infringed the copyright of the plaintiff regarding the manner in which it was adopting and marketing its car covers on the e-commerce platform, which constituted an original artistic work within the meaning of Section 2(c) of the Copyright Act and entitled the plaintiff to copyright therein.

8. It is in these circumstances that the plaintiff has approached this Court by means of the present suit praying as under:

9. On the last date of hearing, Ms. Shilpa Gupta, who appeared for Defendant 1, had submitted that Defendant 1 had taken down the listings with which the plaintiff was aggrieved, on being informed thereof by the plaintiff. She, therefore, sought to submit that her client is not a necessary party in this case.

10. In this context, it is relevant to note that, in paras 9, 13 and 15

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of the plaint, the plaintiff has averred thus:

> "9. That Defendant no 1 is encouraging such product listings and sellers and failed to observe certain basic due diligence as an intermediary. Not only this, Defendant no 1 through its Alpha preferred Seller i.e., Defendant no 2 is selling the same products by infringing the copyrighted work and Trademark of the Plaintiff to the benefit of themselves and to the loss of the Plaintiff.
>
> 13. That on observing the conduct of the Defendants no 2 to 9, the Plaintiff reported the infringement of Plaintiff's product images and listing descriptions to defendant no 1 vide email dated 13.07.2022, But the Defendant no 1 denied to take any action against the infringing sellers, rather advised the Plaintiff to approach the court of law for redressal of such IPR disputes. The Plaintiff again approached the Defendant no 1 while providing all the details of ownership of product images and said infringements. But Defendant no I again neglected to take any action against the infringing sellers and failed to adhere to their obligations as an intermediary and to observe important due diligence mandated by the provisions of law under Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Copy of the Emails dated 13.07.2022 and 17.1 1.2022 are annexed as **Document P7** and **Document P8**.
>
> 15. That the Defendant no 1 cannot said to be acting as an intermedia1y wherein it's the duty of such ecommerce portal to conduct sufficient scrutiny of the sellers being registered and their product listings. It is the duty casted upon such e commerce platforms under the IT rules that they need to caution and take appropriate actions upon such infringing sellers. But the Defendant no 1 has been negligent to follow such rules and thus they are actually acting abatters of the illegal acts of the infringing sellers. Not only this the Defendant no 1 is fully aware about the illegal acts of such sellers from the fact that defendant no 2 is selling the infringing products directly on to the ecommerce platform "Flipkart".
>
> (Emphasis supplied)

11. As paras 9, 13 and 15 of the plaint allege that, by failing to remove the allegedly infringing lists from their e-commerce site despite the plaintiff having intimated the Defendant 1 in that regard, Defendant 1 infringed certain statutory provisions and guidelines, I queried of Mr. Jeevesh Mehta regarding the exact statutory or administrative guidelines which had been violated by Defendant 1.

12. Mr. Mehta submits that by failing to act on the complaints by

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the plaintiff, Defendant 1 has violated Rule 3(2) of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereinafter referred to as, "2021 Intermediary Rules").

13. On a perusal of Rule 3(2)(a), I am unable to sustain the submission. Rule 3(2)(a) requires an intermediary to publish, on its website, the details of the Grievance Officer and the mechanism by which the user or victim could complaint against violation of the provisions of "this Rule", i.e., Rule 3 or any other matter pertaining to the computer resources made available by it. On such a complaint being made, Rule 3(2)(a) requires the Grievance Officer to acknowledge the complaint and dispose of it, and to receive and acknowledge an order, notice or direction issued by the appropriate government, competent authority or court of competent jurisdiction.

14. The submission of Mr. Mehta is that, by failing to dispose of the complaint made by his client, regarding Defendants 2 to 9 and their infringing activities, the Grievance Officer in the office of Defendant 1 had failed to act in accordance with Rule 3(2)(a) of the 2021 Intermediary Rules.

15. The submission is, unfortunately, not correct. Rule 3(2)(a) only envisages complaints regarding violation of the provision of Rule 3. There is no provision in Rule 3 which requires an intermediary, on receipt of a complaint regarding infringing activities on its port, to take any action against the alleged infringers. Mr. Mehta has also not been able to show me any provision to that effect.

16. Mr. Mehta relies on Rule 3(1)(b) (iv). The said provision, to my understanding, does not assist the case that he pleads. Rule 3(1)

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envisages observance, by an intermediary, of due diligence while discharging its duties. Clauses (a) and (b) of Rule 3(1) set out the manner in which such due diligence would be observed by the intermediary. Clause (1) requires the intermediary to publish, on its website, Mobile App or both, the rules and regulations, the privacy policy and user agreement for access of usage of its computer resource by any person. The plaintiff does not plead violation of this requirement by Defendant 1.

17. Clause (b) of Rule 3(1) requires the rules and regulations, the privacy policy and user agreement of the intermediary to inform the user not to host, display, upload, modify, publish, transmit, store, update or share any information which, inter alia, infringes any patent, trademark, copyright or other proprietary rights [in sub-clause (iv)].

18. All that is required of intermediary in this clause is, therefore, to inform the user not to display or host infringing content. The provision does not proceed further to require the intermediary to, on a complaint of infringement being made to it, take any action in that regard, much less any action against the intermediary.

19. The court cannot, by judicial fiat, read, into the IT Rules, something which the rule does not contain either expressly or by necessary implication.

20. I may note, in this context, that in the earlier, in Rule 3(4) of Information Technology (Intermediaries Guidelines) Rules, 2011, such a provision did actually exist. The said rule read thus:

> "3. Due diligence to he observed by intermediary — The intermediary shall observe following due diligence while discharging his duties, namely:

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(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes"

21. The omission of any such provision in the 2021 Rule is, clearly, a conscious departure from the pre-existing 2011 Information Technology (Intermediaries Guidelines) Rules. Where the rule makers deemed it appropriate not to incorporate a provision in the 2021 Rules parallel to Rule 3(4) of the 2011 Rules, it would be inappropriate for this Court, by judicial order, to incorporate such a provision or requirement in the 2021 Rules.

22. Mr. Mehta has also drawn my attention to the infringement policy of Flipkart which permits a person who alleges that its intellectual property rights are violated by content which is uploaded on the Flipkart platform, to register a complaint in that regard in the proper format. The policy also envisages removal, by Flipkart, of any such alleged infringing content, on the infringement being brought to its notice. That being said, the provision is couched in directory, rather than mandatory terms as it uses the word "may". The provision may be reproduced thus:

"**Flipkart Response to Infringement verification Notifications**

Upon receipt of a proper notice with requisite documents as stated above, Flipkart may expeditiously remove/cause to remove and cause to disable the alleged infringing content hosted by third parties. We shall also notify the relevant seller who submitted the alleged material and provide them with a copy of the copyright infringement notice. We retain the right to take appropriate actions according to the law of the land at the relevant point of time of notification. Any previous removal of disabling at an earlier

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occasion shall not preclude us from action contrary to such earlier removal of disabling."

23. Where the applicable statutory rules do not envisage action being taken by a intermediary merely on a complaint being made by an aggrieved victim or user regarding infringement of intellectual property rights, by content posted on the platform of the intermediary, the court cannot, by placing reliance on an internal policy of a particular intermediary, read into Clause 3 any such requirement, especially where such a provision existed in Information Technology (Intermediaries Guidelines) Rules 2011 and has consciously been omitted in the 2021 Rules.

24. *Prima facie*, therefore, the allegation that Defendant 1 has, in not taking action on the basis of the complaint made by the plaintiff, acted contrary to the plaintiffs, does not appear to be sustainable.

25. Nonetheless, the court is not deleting Defendant 1 from the array of parties at this stage, as the presence of Defendant 1 may be useful in dealing with remaining prayers in the suit.

26. Insofar as Defendants 2 to 9 are concerned, the assertion in the suit, read with the submissions made by Mr. Mehta and the documents on record, clearly indicate that Defendants 2 to 9 have adopted marketing methods and a portrayal of their products on the platform of Defendant 1 which is consciously intended to lure buyer into believing the products of Defendants 2 to 9 to be the products of the plaintiff.

27. The allegation of copyright violation is, therefore, prima facie, made out. Any hesitance by the court in interfering at this juncture would result in continued violation, which cannot be tolerated in law.

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The principles of balance of convenience, irreparable loss would also, therefore, justify grant of interlocutory injunction even at this stage.

28. As such, issue summons in the suit by all modes.

29. Summons are accepted, on behalf of Defendant 1, by Ms. Shilpa Gupta and on behalf of Defendant 2 by Mr. Sachin Sharma.

30. Written statement, accompanied by affidavit of admission and denial of the documents filed by the plaintiffs be filed within 30 days with advance copy to learned Counsel for the plaintiffs who may file replication thereto, accompanied by affidavit of admission and denial of the documents filed by the defendants within 30 days thereof.

31. List before the learned Joint Registrar (Judicial) for completion of the pleadings, admission and denial of documents and marking of exhibits on 28th March 2023, whereafter the matter would be placed before the Court for case management hearing and further proceedings.

I.A. 2941/2023 (*under Order XXXIX Rules 1 and 2 of CPC*)

32. Issue notice, returnable on 2nd May, 2023 before the Court.

33. Notice is accepted, on behalf of Defendant 1, by Ms. Shilpa Gupta and on behalf of Defendant 2 by Mr. Sachin Sharma.

34. Reply be filed within four weeks with advance copy to learned Counsel for the plaintiffs, who may file rejoinder thereto, if any, within four weeks thereof.

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35. Till the next date of hearing, Defendants 2 to 9, their representatives, agents etc. are restrained from copying, reproducing, adapting, distributing, communicating, transmitting, disseminating, or displaying the product images of the plaintiff & Trademarks as well as product listing details of the Plaintiff in which the plaintiff owns the exclusive, valid and subsisting copyright(s) & Trademarks on to e-commerce platform "Flipkart" or on to any other online or offline platform.

36. Mr. Mehta points out that the details of Defendants 2 to 9 are not known to the plaintiff.

37. Ms. Gupta undertakes to provide the said details to Mr. Mehta so that he could implead the said defendants by name.

38. She is directed to provide the said details within three days from today. On the said details being provided, Mr. Mehta is directed to implead the said defendants in their individual capacities and file an amended memo of parties on record.

39. Summons in the suit and notice in the application would proceed to be issued against the defendants against the said details to be provided by the plaintiff.

40. Let the plaintiff comply with the requirement of Order XXXIX Rule 3 of the CPC qua the defendants who are not present today, within one week from the date of details of the said defendants being provided by Defendant 1.

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41. As the plaintiff has subsequently filed IA 2941/2023, by amending IA 2941/2023, this application is disposed of.

C. HARI SHANKAR, J.

MARCH 1, 2023
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