

(2020) 01 DEL CK 0423

In the Delhi High Court

Case No : First Appeal From Order (OS) No. 133, 134, 135, 141, 142, 157 Of 2019, Civil Miscellaneous Application No. 32954, 32956, 32958, 34228, 34230, 37244 Of 2019

Amazon Seller Services Pvt. Ltd

APPELLANT

Vs

Amway India Enterprises Pvt. Ltd. & Ors

RESPONDENT

Date of Decision : 31-01-2020

Acts Referred:

Constitution Of India, 1950 — Article 13, 19(1)(g), 19(2), 19(6), 73, 77, 162, 173, 226
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2
Information Technology Act, 2000 — Section 2(1)(w), 79, 79(1), 79(2), 79(2)(a), 79(2)(b), 79(2)(c), 79(3)
Trade Marks Act, 1999 — Section 2(2)(c), 29, 29(6), 29(8), 30, 30(2)(b), 30(3), 30(4)
Madhya Pradesh Public Security Act, 1959 — Section 3(1)(b)
Sale Of Goods Act, 1930 — Section 19, 419, 420
Indian Contract Act, 1872 — Section 23, 27

Citation : (2020) 267 DLT 228

Hon'ble Judges : Dr. S. Muralidhar, J; Talwant Singh, J

Bench : Division Bench

Advocate : Saikrishna Rajagopal, Sidharth Chopra, Sneha Jain, Sauni Dutt, Devvrat Joshi, Surabhi Pande, Nilofar Absar, Abhiti Vaccher, Vivek Ayyagari, Parag Tripathi, Priya Kumar, Shailabh Tiwari, C.D. Mulherkar, Chanakya Deviedi, Tejas Chhabra, Anand Chichra, Arjun Maheshwari, Kunal Dhawan, Lalitaksh Joshi

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J

Introduction

1. These are six appeals directed against the same impugned common judgment dated 8th July, 2019 passed by the learned Single Judge in interlocutory applications filed in the corresponding suits by the Respondents in these appeals. By the said judgment, the learned Single Judge has injuncted the Appellants from selling the goods of the Respondents, who claim to be Direct Selling Entities ("DSEs") in terms of the Model Framework for Guidelines on Direct Selling dated

26th October, 2016 i.e. Direct Selling Guidelines ("DSGs"), on the Appellants' e-commerce platforms.

2. Three of the present appeals i.e. FAO (OS) 133/2019, 134/2019 and 135/2019 are by Amazon Seller Services Private Limited ("Amazon") against Amway India Enterprises Private Limited ("Amway"), Oriflame India Private Limited ("Oriflame") and Modicare Limited ("Modicare"), respectively. Two of the appeals, FAO (OS) 141/2019 and 142/2019 are by Cloudtail India Private Limited ("Cloudtail") against Amway and Oriflame respectively. The sixth appeal i.e. FAO (OS) 157/2019 is by Snapdeal Private Limited ("Snapdeal") against Amway.

3. Since common questions of law arise from the impugned judgment of the learned Single Judge and the pleadings in the corresponding suits, they are being disposed of by this judgment.

4. At the outset, it is required to be noticed that the parties before the Court have categorically stated that the suits filed by the Respondents and the corresponding appeals before this Court are not to be considered as arising out of "commercial disputes", falling within the purview of the Commercial Courts Act, 2015 ("CCA"). They have accordingly been heard by this Bench, which is otherwise not authorised to hear appeals which are to be heard by the Commercial Appellate Division of this Court in terms of the CCA.

Facts in Amazon's appeals

5. Amway is engaged in the manufacture and distribution business of its healthcare, wellness, cosmetic, and home products through a business model called the Direct Selling Business Model ("DSBM"). The products offered for sale by Amway include moisturizers, creams, lipsticks, detergents, surface cleaners, shaving creams, deodorants etc. Amway claims that it has given an undertaking to the Government of India ("GoI") to abide by the DSGs in the conduct of its business. Amway also sells its products on its own online market place, www.amway.in.

6. Amway is a wholly-owned subsidiary of Amway Corporation, now known as Alticor Inc., headquartered at Ada, Michigan, USA. The parent company which was founded in 1959 applied to the Ministry of Industry, GoI in June, 1994 for setting up a wholly owned subsidiary to replicate the "Amway Model", proposing to "establish and develop a direct selling business of products which shall be sourced from local independent Indian manufacturers particularly small scale units by providing technology support to products of international standard".

7. After the GoI granted its approval to Amway Corporation by an order dated 26th August, 1994 to commence operations in India as a DSE in terms of its proposal, Amway came to be incorporated on 3rd August, 1995. On 4th August, 2004, GoI granted approval to Amway to set up its own manufacturing facilities for manufacture of personal care and cosmetic products and to also import fragrances, shampoos, lotions, body firming gels, scrubs etc. This was made

subject to the conditions which inter-alia were that Amway would not undertake domestic retail trading in any form and that the imports would be in accordance with the prevailing Export-Import ("EXIM") policy. Amway obtained a licence from the Food Safety and Standards Authority of India ("FSSAI") in terms of Food Safety and Standards Act, 2006 ("FSS Act") and the Food Safety and Standards Regulation, 2011 ("FSS Regulation").

8. Amway Corporation is stated to be a member of the World Federation of Direct Selling Associations ("WFDSA") and is stated to operate in more than 100 countries and territories worldwide. Explaining the DSBM, Amway states that such a model offers an "unparalleled opportunity" to Indian customers "to own and operate their own business by enrolling themselves as a Direct Seller" with Amway and sell its "high-quality consumer products on a principal-to-principal basis under a Direct Seller Contract". In terms of the said contract, the Direct Sellers undertake "the sale, distribution and marketing of "Amway Products" and services and to register as Preferred Customers". Amway claims to have provided opportunities to about 5,00,000 active independent Amway Direct Sellers. It provides training to such Direct Sellers and Distributors and also offers a digital learning portal for Amway Business Owners ("ABOs").

9. Amway claims that it has a "Code of Ethics" for Amway Direct Sellers. All products of Amway are stated to be marked with an express declaration that they are "sold only by Amway Business Owners".

10. According to Amway, its products bear a "unique code". This is stated to be located on the "upper surface of the cap of the product packaging" which allows Amway "to track the distributor channel, selling the said product to an end customer". The imprinting of these unique codes is stated to ensure prevention of the circulation and sale of any counterfeit Amway products through unauthorized trade channels. According to Amway, the trust of its Direct Sellers and their customers receives the highest attention and it has a "Customer Product Refund Policy", covering all Amway Products, which allows a customer who is not completely satisfied, to return the product within 30 days of the purchase of invoice/delivery. This refund policy is applicable to "products in saleable condition, and partially used products (30%) accompanied with an invoice". According to Amway, it has a nationwide presence with 130 sales offices, 4 regional warehouses, 3 regional hubs and 34 city warehouses catering to over 8900 pin codes across the country. It is the founder member of the Indian Direct Sellers Association ("IDSA") which is stated to be an "autonomous self-regulatory body for the direct selling industry in India".

11. According to Amway, the DSGs are stated to have been issued by the notification dated 26th October, 2016 of the Department of Consumer Affairs at the request of IDSA in order to prevent fraud and to protect the rights and interests of consumers.

12. The central issue highlighted in Amway's Suit CS (OS) 480/2018 filed in this

Court against Pioneering Products, and Black Olive Enterprises (Defendant Nos. 1 and 2 respectively) who are sellers on Amazon's online platform, Cloudtail (Defendant No. 3) another seller on Amazon's platform and stated to be an "affiliate/associate company of Amazon", and Amazon (Defendant No. 4), was that Amway cannot sell its products through channels of e-commerce/online portals or mobile apps. According to Amway, sale of its products through any e-commerce or online portal in the absence of a written contract with Amway, is unauthorised both in terms of its "Code of Ethics" as well as clause 7 (6) of the DSGs. Amway claims that it has not provided any written consent to any of its Direct Sellers to undertake or solicit sale, or offer its products through third party e-commerce websites/ mobile apps. Amway is unable to guarantee the authenticity and quality of such products which are purchased from unauthorised sources and its product refund policy does not apply to such unauthorised purchases.

13. Amway claims that it received complaints from its Direct Sellers that Amway products were being sold on various e-commerce/online portals or mobile apps and wholesale and retail shops illegally at unwarranted discounts resulting in a decline in the sales of the Amway's Direct Sellers. The further allegation was that such unauthorised sellers registered on the e-commerce platforms/shops were removing the unique code imprinted on Amway products to avoid the distributor channel from being identified or tracked.

14. According to Amway, it learnt sometime in September, 2017 that Amazon is offering for sale Amway products on its e-commerce portal/website, "www.amazon.in" and its mobile application "Amazon Online Shopping" without its permission or knowledge. A snapshot of the website of Amazon incorporated in the plaint revealed that Amway's "Nutrilite Daily- 120N tablets" were being offered for sale on the said website. It is stated that such a sale on Amazon's online platform was unauthorised, since it was without the leave, permission or licence of Amway, which has till date not authorised anyone to sell or advertise its products on Amazon's Online Platform. It was averred in the plaint that this was in direct violation of the Clause 7 (6) of the DSGs, which states :

"Any person who sells or offers for sale, including on an e-commerce platform/marketplace, any product or service of a Direct Selling Entity must have prior written consent from the respective Direct Selling Entity in order to undertake or solicit such sale or offer."

15. It was further averred in the plaint that Amway's products were being sold by the Defendants at much cheaper prices than the market price and that this cast "serious doubts" on the authenticity of Amway's products sold by the Defendants. It was claimed that Amway "has been facing huge financial losses on account of the illegal activities of the Defendants."

16. On 22nd September, 2017, Amway sent a cease and desist notice to Amazon, asking it "to remove reference to any statement/advertising/display of "Amway

products" from its website."

17. Amazon is stated to have replied to Amway by a letter dated 11th October, 2017, denying Amway's contentions and emphasizing that it merely provided an online platform for sale of various consumer goods and products by different registered sellers/vendors; that it did not monitor or control the transactions occurring on its website or mobile application, and that Amway could initiate action against its vendors/sellers, who were engaged in selling Amway products online without its authority or consent or selling spurious and counterfeit products under its name. According to Amway, Amazon's stand was contrary to Amazon's "exclusion policy" that did not allow on its online portal the sale of products by a person in the following situations:

"who is not (a) the "authorized reseller" (as designated by the manufacturer or distributor; or (b) where the manufacturer's standard warranty is not being provided to the consumer; or (c) where the product is placed on the market without the consent of the relevant brand or trademark owner."

18. Amway sent another notice dated 6th November, 2017 to Amazon refuting the averments made by Amazon in their reply dated 11th October, 2017. Amway contended that Amazon was "actively involved" in the sale of its products and was "providing services such as helping sellers manage their accounts, increase visibility, discoverability and sale of products, listing of products etc". According to Amway, Amazon was also publishing advertisements in the print media offering Amway products on its online portal.

19. Amway states that Amazon and its affiliates were not acting merely as "intermediaries", but were actively involved in the sale of Amway products. This averment is in the context of Amazon contending that it falls within the definition of an "intermediary" under Section 2 (1) (w) of the Information Technology Act, 2000 ("IT Act") and that subject to Section 79 (2) and (3) thereof, it would under Section 79 (1) be exempt from any liability arising out of content uploaded by third parties such as sellers on Amazon's online platform "www.amazon.in". Amazon also refers to the Information Technology (Intermediary Guidelines) Rules, 2011 ("Intermediary Guidelines") which requires due diligence to be undertaken by intermediaries, which Amazon claims to have complied with.

20. In the plaint it is averred that on 21st September, 2018 Amway's representative purchased the Amway products from Amazon's website.

21. Further, a reference was made to the fact that by an order dated 1st June, 2018 in CS (OS) 297/2018 filed by Amway against "some identified and unidentified medical shops/pharmacist in Bhagirath Palace, Delhi", this Court had granted an ad interim injunction and John Doe order against all the Defendants in the said suit. The Court also appointed four Local Commissioners ("LCs") and during raids it was found that Amway products worth lakhs of rupees with or without unique codes had been seized in the shops of such Defendants. Reference is also made to two other Civil Suits being CS (OS) 410/2018 and

453/2018 filed by Amway against two online aggregators/market places, in which an interim injunction restraining those online market places from selling Amway's products, without its prior authorisation, was passed. The LCs appointed in those suits were also asked to make an inventory of the Amway products being sold, to seal them and return them on superdari.

22. The prayers in CS (OS) 480/2018, inter-alia were for a decree of permanent injunction restraining the Defendants "from in any manner purchasing, possessing, selling, distributing, offering for sale, advertising/ displaying Plaintiff's 'Amway products' on the website of Defendant No. 4 i.e. www.amazon.in and mobile application "Amazon Online Shopping" or any other website/mobile application or any other portal without the prior written consent of the Plaintiff."

23. The prayer against Amazon apart from the above reliefs, was for a permanent injunction restraining Amazon, its "Directors, vendors, sellers, agents, affiliates, servants, licensees, franchisees, representatives and employees or any one claiming under them, directly or indirectly, from in any manner purchasing, possessing, selling, distributing, offering for sale, advertising/ displaying Plaintiffs 'Amway products' from its website www.amazon.in and mobile application "Amazon Online Shopping" or any other platform, without the prior written consent of the Plaintiff."

24. The further incidental prayer was for a direction to the Defendants to "disclose the details of the distributors/dealers/Direct-Sellers of the Plaintiff from whom they are procuring the "Amway products" or any other person or entity involved in such unauthorised transaction of "Amway products"". The final prayer in the plaint was for a decree of damages in the sum of Rs. 2,00,01,000/- together with interest at 18% per annum thereon from the date of filing of the suit till its realisation apart from unquantified punitive damages.

25. At the first hearing of the suit i.e. CS (OS) 480/2018 on 26th September, 2018, the learned Single Judge passed an order granting an interim injunction restraining the Defendant Nos. 1 to 3 not to offer for sale any of the products in the Amway range either through the website "www.amazon.in" or through their mobile application. Further if the same were genuine products, Defendant Nos. 1 to 3 were permitted to approach Amway to establish the same, and if they were able to obtain Amway's written approval then "they may be permitted to sell the products." As far as Amazon was concerned, it was noted in the order that its counsel had agreed to take down Amway listings from the online platform. It was accordingly directed that Amazon shall within three days, pull down all Amway listings on both the e-commerce platform and the mobile application and confirm the same to Amway through the counsel. It was stated that "the question as to whether the e-commerce platform is liable in such situations and whether the doctrine of exhaustion would apply, would be gone into on the next date of hearing".

26. By the same order, the learned Single Judge disposed of IA No. 13160/ 2018 by appointing four LCs to visit the premises of Defendant Nos. 1 to 3 and directing them to "make an inventory and take into custody all impugned products, including packaging, labels, stationery, hoardings and other materials bearing the mark "AMWAY". The LCs were authorised to seal the impugned products and return them on superdari after obtaining undertakings of the respective Defendants.

27. The four LCs so appointed, submitted their respective reports to the Court on 6th, 12th, 15th and 16th October, 2018 respectively. Amazon filed an additional affidavit dated 31st May, 2019. The applications were heard along with similar applications in the other connected suits.

28. The interim injunction applications in the suits were heard on 13 dates between 10th January, 2019 and 30th May, 2019 on which date judgment was reserved. The impugned judgment was thereafter pronounced on 8th July, 2019 granting the relief as noticed hereinbefore.

29. As far as the other two appeals of Amazon are concerned, FAO (OS) 134/ 2019 arises out of the suit CS (OS) 91/2019 filed by Oriflame against six Defendants of which Defendant Nos. 1 to 5 were registered sellers on Amazon. This included Cloudtail as Defendant No. 1 and Defendant No. 6 was Amazon itself.

30. This suit was first listed on 14th February, 2019 when an order on similar terms as the interim order dated 26th September, 2018 in the Amway Suit [CS (OS) No. 480/2018] was passed. The suit of Oriflame was based entirely on the DSGs, claiming that the said guidelines have the force of law.

31. At this stage of the case, Ms. Maninder Acharya, learned Additional Solicitor General of India ("ASG") appeared and submitted that the Direct Selling Guidelines "have to be followed though they are advisory in nature". According to the ASG, guidelines of such nature had been issued "by various Ministries and have binding effect under Article 77 of the Constitution." It was noted by the learned Single Judge in the order dated 14th February, 2019 that an affidavit would be filed in that regard. An interim injunction of similar nature was issued. It may be noted here that Oriflame too claims that it is a DSE which is bound by the DSGs and that the sale of its products on Amazon's online platform without its consent, would be in violation of Clause 7 (6) of the DSGs.

32. The third appeal by Amazon, i.e. FAO (OS) 135/2019, arises from CS (OS) 75/2019 filed by Modicare which also claims to be a DSE governed by the DSGs. This suit was filed against Amazon (Defendant No. 1) and two other sellers on Amazon's platform i.e. Laxmi Enterprises (Defendant No. 2) and Modicare DP Store (Defendant No. 3). On 5th February, 2019, an order was passed in the said suit by the learned Single Judge granting interim injunction on the same lines as the order dated 26th September, 2018 in CS (OS) 480/2018 filed by Amway.

Facts concerning appeals by Clouddtail and Snapdeal

33. The two Appeals by Clouddtail, FAO (OS) 141/2019 & 142/2019 arise from the aforementioned suits filed against Amazon and the sellers on its platform which included Clouddtail, by Amway and Oriflame respectively. It is Clouddtail's case that it too is an "intermediary" in terms of the IT Act and the Intermediary Guidelines. It too raises questions regarding the legal binding effect of the DSGs.

34. The 6th Appeal is by Snapdeal. It arises out of CS (OS) 453/2018 filed by Amway against nine Defendants with the ninth Defendant being Jasper Infotech Private Limited ("Jasper Infotech") which runs the e-commerce website "www.snapdeal.com". It may be noticed here that the name of Jasper Infotech has been changed to Snapdeal on 20th March, 2019. Defendant Nos. 1 to 8 in the suit were sellers on the online platform of Defendant No. 9. Snapdeal too claims that its operations on its online market place was limited to facilitating the buying and selling of various goods and services between independent sellers and independent buyers. In other words, it was acting merely as an intermediary and did not directly engage in the sale or purchase of the products.

35. As far as Snapdeal is concerned, the refrain in its appeal is that in the impugned judgment, the learned Single Judge has completely omitted to refer to the contentions of Snapdeal and has made observations vis-a-vis all the Defendants before it, without referring to the particular facts of the suit involving Snapdeal. As far as CS (OS) 453/2018 is concerned, it was first listed for hearing on 14th September, 2018 when an interim injunction was passed in I.A. No. 12419/2018. LCs were also appointed by the same order. Snapdeal contended inter alia that the LC found no goods at its premises which supports its contention that they were never involved in the handling of Amway products and that further, there was no evidence of any tampered goods of Amway being sold on Snapdeal's platform.

The Impugned Judgment

36. At this stage, it requires to be noticed that the impugned judgment of the learned Single Judge was passed in seven suits, five of which, i.e. CS (OS) 410/2018, 453/2018, 480/2018, 531/2018 and 550/2018, were filed by Amway and one each, CS (OS) 75/2019 and 91/2019, were filed by Modicare and Oriflame respectively.

37. It also requires to be noted here that Union of India was not made a party in any of the suits. However, when the Oriflame Suit CS (OS) 91/2019 was first listed on 13th February, 2019, the learned Single Judge issued notice to the learned ASG in order to elicit the stand of Union of India in respect of the legality and validity of the DSGs, and listed the matter for the following day i.e. 14th February, 2019 on which date an order was passed which has been referred to hereinbefore. The impugned judgment reflects that apart from all other counsel for the private parties, the learned ASG was also heard by the learned Single Judge.

38. In para 142 of the impugned judgment the learned Single Judge formulated the following four issues for determination:

"i) Whether the Direct Selling Guidelines, 2016 are valid and binding on the Defendants and if so, to what extent?

ii) Whether the sale of the Plaintiffs' products on e-commerce platforms violates the Plaintiffs' trademark rights or constitutes misrepresentation, passing off and results in dilution and tarnishes the goodwill and reputation of the Plaintiffs' brands?

iii) Whether e-commerce platforms are "intermediaries" and are entitled to protection under the safe harbour provided in Section 79 of the Information Technology Act and the Intermediary Guidelines of 2011?

iv) Whether e-commerce platforms such as Amazon, Snapdeal, Flipkart, 1MG, and Healthkart are guilty of tortious interference with the contractual relationship of the Plaintiffs with their distributors/direct sellers?

v) What is the relief to be granted?"

39. The conclusion of the learned Single Judge in the impugned judgment vis-a-vis the above issues can be summarised thus:

(i) the Direct Selling Guidelines have been framed in terms of the legal procedure, and are binding in law. They have been issued and notified in terms of the Article 77 of the Constitution of India and it is the only document that regulates the business of Direct Selling;

(ii) the present Appellant/Defendants were found guilty of infringing the trademarks of the present Respondents/Plaintiffs, of dilution/tarnishment, passing off, and misrepresentation;

(iii) the Defendants were not merely passive players but in fact, "massive facilitators" inasmuch as they were providing warehousing, logistical support, packaging and delivery services; the bare minimum that the Defendants are required to do to avail the exemption under Section 79 (2) (c) of the IT Act, would be to observe due diligence required under Section 79 (2) (c);

(iv) the continued sale of the products of the Plaintiffs on the e-commerce platforms without their consent, results in inducement of breach of contract, and tortious interference with contractual relationships of the Plaintiffs with their distributors;

(v) the balance of convenience lies in the favour of the Plaintiffs; the online platforms were unable to establish that the products of the Plaintiffs sold thereon were "genuine and not tampered with or impaired".

40. The learned Single Judge further concluded that the DSGs were binding in nature since "they do not impinge on any fundamental rights of either the sellers or the platforms." It was concluded that if the online platforms were permitted to

violate the DSGs, the DSEs would be left with no remedies to enforce a binding law. The DSGs having been authenticated by a Gazette notification were binding on e-commerce platforms and sellers on such platforms. It was held that the online platforms were aware that they were bound to enforce the said guidelines which reflected the current public policy and that the online platforms had "deliberately chosen to only set up the alleged illegality and non-binding nature of these guidelines only by way of defence."

41. In coming to the above conclusion the learned Single Judge referred to the decisions in *Bijoe Emmanuel v. State of Kerala* (1986) 3 SCC 615 hereafter ("Bijoe Emmanuel"), *Union of India v. Naveen Jindal* (2004) 2 SCC 510, *Gulf Goans Hotels Company Limited v. Union of India* (2014) 10 SCC 673, *Delhi International Airport Limited v. International Lease Finance Corporation* (2015) 8 SCC 446, *New Delhi Municipal Council v. Tanvi Trading and Credit Private Limited* (2008) 8 SCC 765, *Union of India v. Moolchand Khairati Ram Trust* AIR 2018 SC 5426, *U. Unichoyi v. State of Kerala* AIR 1962 SC 12; *Indian Drugs & Pharmaceuticals Limited v. Punjab Drugs Manufacturers Association* (1999) 6 SCC 247 and *Dalmia Cement (Bharat) Limited v. Union of India* (1996) 10 SCC 104 and the decision of this Court in *Zalam Singh v. Union of India* ILR (1985) 2 Del 909.

42. The learned Single Judge also distinguished the decisions in *G.J. Fernandez v. State of Mysore* AIR 1967 SC 1753, *Syndicate Bank v. Ramachandran Pillai* (2011) 15 SCC 398 and the decision dated 23rd April, 2019 of the Bombay High Court in Commercial Suit IP No.114/2018 (*Tips Industries v. Wynk Music Limited*) in their applicability to the case at hand.

43. On the second question of whether the sale of the Plaintiffs' products by the Defendants violated the Plaintiffs' trademark rights, the learned Single Judge opened the discussion by observing in para 175 of the impugned judgment that the Plaintiffs in each of the suits i.e Amway, Modicare and Oriflame "are the owners of their respective trademarks." The Defendants were found guilty of infringing the above trademarks and diluting it and passing off as their own misrepresenting their association with Amway, Oriflame and Modicare. It was concluded that the principles of exhaustion in terms of Section 30 of the Trade Marks Act, 1999 ("TM Act") did not exempt the Defendants from liability thereunder and the manner of sale on the e-commerce platforms also constituted passing off, misrepresentation and dilution/tarnishment of the products and business of the Plaintiffs.

44. It was held by learned Single Judge that the condition imposed by the Plaintiffs on the buyers of their products restricting post-sale alienation on an online market place without their consent, was an enforceable condition and that the Defendants should be restrained in terms thereof from offering any of their products including genuine and untampered ones on their online market places. It was held that the services provided by the online platforms amounted to infringement under Sections 29 (6) and 29 (8) of the TM Act; that the manner of

information provided for each listing on the websites of Amazon and Snapdeal could cause confusion amongst the consumers thereby misrepresenting an association of the online market place with the brand of product. It was further held that the Plaintiffs had legitimate reasons to restrict resale of the products under Section 30 (4) of the TM Act.

45. On the basis of the reports of the LCs, the learned Single Judge concluded that there was large scale tampering of the products of the Plaintiffs; there was a change of warranty of such products and that such products were re-packaged and re-sealed by the online market places. Since the source of the goods sold on the online market places were not easily determinable, they were not lawfully acquired in terms of Section 30 (3) of the TM Act.

46. The learned Single Judge noted the contention of the Defendants that the suits were not based on violation of trade mark rights and observed that

"While it may be true that the complaints are not structured like a traditional trademark complaint would be, the same does not mean that the Plaintiffs do not complain of violations of trademark rights." It was further observed that:

"The allegations in the complaint are clearly based on provisions akin to misrepresentation in the context of passing off and dilution, as also violation of trademark rights as stipulated and protected under Section 29 of the Trade Marks Act, 1999. Moreover, the defence of Section 30 has been set up by the Defendants only because they are aware that if the said defence fails, the use of the Plaintiffs' marks results in infringement."

47. In arriving at the above conclusion the learned Single Judge discussed and distinguished the decision of the Division Bench of this Court in *Kapil Wadhwa v. Samsung Electronics Company Limited* MIPR 2012 (3) 0191.

48. The learned Single Judge distinguished the cases cited by the Defendants and discussed their inapplicability. These included the decision dated 23rd May, 2017 in Case No. 2016-1290 (*Milo & Gabby v. Amazon.com Inc.*), *Tre Milano, LLC v. Amazon.com*, the decision dated 24th July, 2018 in Civil Action No.17-2738 (FLW) (LHG) (*Allstate New Jersey Insurance Company v. Amazon.com*), *Matrix Essential v. Emporium Drug Mart* 756 F. Supp. 280 (W.D. La. 1991), *Matrix Essentials v. Emporium Drug Mart* 988 F.2d 587 (5th Cir., 1993), *Sebastian Intern v. Long Drug Stores* 53 F.3d 1073 (9th Cir., 1995) and the decision of the Canadian Supreme Court in *Consumers Distributing Company Limited v. Seiko Time Canada Limited* (1984) 1 S.C.R. 583.

49. The learned Single Judge also relied on the decision dated 3rd July, 2019 of the US Court of Appeals in Case No. 18-1041 (*Heather R. Oberdorf v. Amazon.com Inc*), the decision of the European Court of Justice decided on 23rd April, 2009 in C-59/08 (*Copad SA v. Christian Dior Couture SA*), the decision dated 18th December, 2018 of the Court in Milan in G.R. No. 44211/2018 (*Landoll S.R.L v. MECS S.R.L*) and the decision dated 19th November, 2018 in

G.R. No. 38739/2018 (L'Oreal Italia SPA v. IDS International Drugstore Italia SPA).

50. The learned Single Judge held that changes in warranty, refund/return policies, changes in packaging, removal of codes of the products, and any other conduct that causes damage to the reputation of the mark and is likely to undermine the quality of the mark, would constitute "impairment" inasmuch as the online platforms use the trademarks of the Plaintiffs' products in their advertising, promotion and sale offers and in the meta-tags, so that the product listings on the platforms are thrown up on search results. Further, since the Defendants also provided warehousing, transport and other logistical facilities in the absence of consent from the Plaintiffs, it would result in a "clear infringement of the Plaintiffs' trademarks and the doctrine of exhaustion does not come to the aid of the Defendants." It was held that the use of the Plaintiffs' marks clearly constituted "use" under Section 2 (2) (c) of the TM Act, 1999. It was concluded that:

"The use of the Plaintiffs' marks clearly constitutes 'use' under Section 2 (2)(c) of the TM Act, 1999 which is the reason why the platforms obtain licenses for the marks from the sellers and warranties that they are authorised and that the products are genuine. These licences are themselves FAKE because the so-called licensors are not the owners of the marks nor do they have any permission to licence the marks. What is not owned cannot be licensed. Sellers have no rights if owners have not given consent."

51. The learned Single Judge further held that:

"The platforms are also indulging in conduct falling under Section 29(6) of the Trade Marks Act as they are affixing the marks on the products, packaging the same and putting the same in the market for sale. Amazon is specifically using the Plaintiffs' mark Amway in advertising, without actual knowledge that the said products being sold on its platform are genuine or not and whether they are tampered with or not."

52. Reference was made by learned Single Judge to the decision of the Division Bench of this Court in *Baker Hughes Limited v. Hiroo Khushalani* (1998) 74 DLT 715, the decision of the European Court of Justice in *Case C-16/03 (Peak holding AB v. Axolin-Elinor AB)* and the Commentary, *Kerly's Law of Trademarks and Trade Names* by James Mellor QC, 15th Edition 2011. It was concluded by learned Single Judge that:

"On a totality of the facts, it is held that use of the mark by the sellers and by the platforms is violative of the Plaintiffs' trademark rights and the Defendants' are not entitled to the defence under Section 30. The manner of sale on the e-commerce platforms also constitutes passing off, misrepresentation and dilution/tarnishment of the Plaintiffs' marks, products and businesses."

53. Turning to Issue (iii), the learned Single Judge concluded that the e-

commerce platforms were not merely passive players but "in fact are massive facilitators" inasmuch as they were providing warehousing, logistical support, packaging, delivery services, payment services, collection gateways etc. Reference was made to the FDI Press Note No. 2 of 2018 issued by the GoI in respect of FDI in e-commerce, and its para 5.2.15.2.2 which defines e-commerce.

54. Reference was also made by learned Single Judge to the decisions in *Christian Louboutin SAS v. Nakul Bajaj* 2018 (76) PTC 508 (Del) and judgement of the Supreme Court of India in *Shreya Singhal v. Union of India* (2015) 5 SCC 1, while distinguishing the decision of the Division Bench in *My Space Inc. v. Super Cassettes India Limited* (2017) 236 DLT 478 (DB), the decision of the learned Single Judge of this Court in *Kent RO Systems Limited v. Amit Kotak* 2017 (69) PTC 551 (Del) and the decision dated 1st May, 2017 of the Division Bench in *FAO (OS) (COMM) 95/2017 (Kent RO Systems Private Limited v. eBay India Private Limited)*.

55. In conclusion, on issue (iii), the learned Single Judge held as under:

"304. The question as to how the platforms are providing the value-added services and whether they are performing an active role in the same, would have to be finally adjudicated at trial. However, the bare minimum that they would be required to do to avail the exemption under Section 79(2)(c), would be to observe due diligence required under Section 79(2)(c) of the IT Act.

305. Thus, in order for the platforms to continue to enjoy the status of intermediaries, subject to adjudication at trial, the due diligence requirements would have to be met and complied with, as per the Platforms' own policies, and as per the Intermediary Guidelines. 2011. Non-compliance with the Platforms' own policies would take them out of the ambit of the safe harbour."

56. On the last issue, i.e. issue (iv) regarding tortious interference with contractual relations, the learned Single Judge observed interalia that:

"The companies and entities, which run e-commerce platforms, have a greater obligation to maintain the sanctity of contracts, owing to the sheer magnitude and size of their operations. When an e-commerce platform is notified of existing contracts and violation of the same on its platform, the least that the platform would have to do would be to ensure that it is not a party, which encourages or induces a breach. The manner, in which e-commerce platforms operate, makes it extremely convenient and easy for ABOs/distributors/direct sellers to merely procure the products from the Plaintiffs and defeat the purpose of the contractual obligations by selling in the grey market to unidentified persons, who may, thereafter, put them in the e-commerce stream, without any quality controls. In this manner, such ABOs/ distributors/ sellers may sell outdated products, expired products, damaged products and hide behind the cloak of the platforms themselves. Since none of the platforms, except IMG, to an extent, are even disclosing the complete details of the sellers, they offer a comfortable refuge for parties breaching their contracts with the Plaintiffs. This refuge by itself

constitutes inducement."

57. It was concluded by learned Single Judge that "the continued sale of the Plaintiffs" products on the e-commerce platforms, without the consent of the Plaintiffs, results in inducement of breach of contract, and tortious interference with contractual relationships of the Plaintiffs with their distributors."

58. In arriving at the above conclusions, the learned Single Judge referred extensively to an Article by John Danforth titled "Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity" Columbia Law Rev. Vol. 81 No. 7, 1491 and the Commentary titled "Salmond & Heuston on the Law of Torts", R. F. V. Heuston and R. A. Buckley, 20th Edition Universal Book Traders at page 358, as well as the decisions in Aasia Industrial Technologies Limited v. Ambience Space Sellers Limited (1998) 18 PTC 316 (DB) and the judgment of the learned Single Judge of the Calcutta High Court in Balailal Mukherjee and Company Private Limited v. Sea Traders Private Limited (1990) SCC Online Cal 55.

59. In the concluding portion of the impugned judgment under the title "Conclusions and Relief", it was concluded that the Plaintiffs had established a prima facie case, that the balance of convenience is in their favour and that irreparable injury would be caused to the Plaintiffs, their businesses and all those who depended on them and finally the consumers, if the interim relief as prayed for was not granted. It was observed that none of the online platforms were able to establish that the Plaintiffs' products sold thereon were "genuine and not tampered with or impaired." They had also not been able to show how the licences of the Plaintiffs' marks were granted to the e-commerce platforms.

60. Some broad observations were made by the learned Single Judge concerning all the products of the Plaintiffs, by relying on the report of the LCs, in the following manner:

"However, most of the Local Commissioners who have visited the various premises of the sellers and the platforms have seen that the products are being tampered with by removal of the codes, removal of the inner seal. Thinners and glues are being used to remove the codes and the products are being re-sealed, may be even under unhygienic conditions. In some cases, expired products are being given new manufacturing dates. Such tampering and impairment is, clearly, violative of the Plaintiffs' statutory and common law rights."

61. On the policies of the online platforms, it was observed by learned Single Judge as under:

"All the platforms have their own policies, which broadly state that they respect the Intellectual Property Rights of trademark owners and that upon any grievance being raised, they are willing to take down. The Policies of all the platforms clearly are simply "Paper policies" which are clearly not being adhered to as the facts of these cases go to show. They are a mere lip-service to the

Intermediary Guidelines of 2011. None of the platforms are insisting on any of the sellers obtaining consent of the Plaintiffs for sale of their products on the e-commerce platforms, where their own policies require them to do so. Unless and until, the sellers are authorized by the Plaintiff, they cannot be allowed to sell the Plaintiffs products on Defendant's e-commerce platforms."

62. It was further observed by learned Single Judge that:

"The argument of exhaustion completely fails as there is large-scale impairment of the goods as also misrepresentations being made on the platforms. Conditions of the goods being sold on the e-commerce platforms has been changed. The MRPs are shown to be higher in some cases. Wrong attribution of product names is also happening on some of the platforms. The source of the products listed on the platforms are suspect. The listings are also misleading as they use the Plaintiffs' product images, marks, logos, names, etc. giving an impression that the products are sold by the Plaintiffs themselves. The consumer is not being told that the seller is not authorised by the Plaintiffs, to sell the said products. A consumer would, literally, require investigative capabilities to trace the actual seller."

63. On whether the DSGs are considered binding law, and on how the Plaintiffs' right to carry on business was being affected by the actions of the Defendants, it was further reiterated by the learned Single Judge that:

"324. The Direct Selling Guidelines are law. While the Defendants' platforms and sellers insist on their Article 19(I)(g) rights being jeopardised, what is lost sight of is the fact that the Plaintiffs' right to carry on business is being affected. It is being jeopardized in view of the large-scale violations on the e-commerce platforms. Further, the rights of genuine consumers are being affected, as is evident from the various comments, which consumers have put up on these platforms, after purchasing the Plaintiffs' products from the said platforms. Insofar as the sellers themselves are concerned, many of them have given undertakings and have agreed for injunctions being passed. The other sellers who are themselves listed on the platforms have to assume responsibility for the products and establish that they are genuine. None of them have been able to establish that the products are genuine and not tampered with or impaired. They have also not been able to show as to how they granted licence of the Plaintiffs' marks to the e-commerce platforms."

The present appeals

64. It requires to be noticed that only some of the Defendants in the above suits have come forward to file appeals. Amazon, which was Defendant No. 4 in CS (OS) 480/2018, Defendant No. 1 in CS (OS) 75/2019 and Defendant No. 6 in CS (OS) 91/2019 has filed three appeals; Cloutail, which was Defendant No. 3 in CS (OS) 480/2018 and Defendant No. 2 in CS (OS) 91/ 2019 has filed its two appeals, and Snapdeal, which was Defendant No. 9 in CS (OS) 453/2018 has filed the 6th Appeal. The remaining Defendants in the above seven suits have not

challenged the impugned judgment of the learned Single Judge. They have also not appeared in the present appeals wherever they have been impleaded.

65. While admitting the appeals on 25th July, 2019 this Court permitted the parties to file their respective written submissions and listed the interim applications in the appeals for hearing on 17th February, 2020. Thereafter applications for advancing of the date of hearing were filed. These applications were allowed on 30th September, 2019 and the applications for interim relief were listed for hearing on 9th October, 2019. Thereafter these appeals were heard finally on 9th and 15th October, 2019, 5th November and 14th November, 2019, 14th December, 20th December and 21st December, 2019. 66. This Court has heard the submissions of Mr. Gurukrishna Kumar, learned Senior Counsel appearing for the Cloutail, Mr. Saikrishna Rajgopal, learned counsel appearing for Amazon; Mr. Rajshekar Rao learned counsel appearing for Snapdeal; Mr. Parag Tripathi, learned Senior Counsel and Ms. Priya Kumar, learned counsel appearing for Amway; Mr. Balbir Singh, learned Senior Counsel appearing for the Oriflame and Mr. Jayant Bhushan, learned Senior Counsel appearing for Modicare.

Prefatory observations

67.1 The Court would like to preface the discussion on the issues with brief observations on the nature of the suits themselves. From the complaints and the suits filed, four to be precise, it is plain that none of them was filed as a commercial suit, since none of them was framed as a suit either for passing off or for infringement in terms of the TM Act.

67.2 The second factor to be kept in mind is that in none of the suits was there any prayer for a declaration that the DSGs are law that bind the Defendants and that, as such, they are enforceable. Thirdly, there was again no prayer for a declaration that Amazon and Snapdeal were not "intermediaries" within the meaning of Section 79 of the IT Act. These factors attain significance in light of the fact that the learned Single Judge has returned specific findings, which clearly run contrary to the structure and frame of the suits themselves.

67.3. Another aspect that bears noting is that the impugned judgment runs into 225 pages and returns extensive findings, without expressing any caveat that such findings may be prima facie or tentative findings, limited for the purpose of granting interim relief. The said findings, even on a conservative basis, can be characterized as expressing a final opinion at an interlocutory stage. The many issues on which findings were returned are of a nature which necessitate evidence to be led by the parties and the matter having to go for trial to test the veracity of the cases of the respective parties. In fact, the issues that have been framed in the impugned judgement for the purposes of relief appear to travel far beyond the pleadings in the suits and, in fact, at a stage when the issues in the suits themselves are yet to be framed.

67.4 Given the nature of the complaints and the prayers made therein, it is highly unlikely that the issues that were framed by the learned Single Judge for the

purpose of considering the grant of interim reliefs would be the issues in the suits themselves. For instance, corresponding to the first issue whether the DSGs are in the nature of binding law there is no prayer in the suits themselves. It is doubtful, therefore, whether such an issue could have been framed in the suits. Likewise, in the absence of any prayer declaring that online platforms like Amazon, Snapdeal and Cloudfair are not "intermediaries" within the meaning of the IT Act, it is unlikely that such an issue could be framed in the suits.

67.5 There was also no question raised in relation to the constitutional validity of the DSGs either in the plaints or in the written statements and affidavits filed by the Appellants/Defendants in their suits and applications under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908 ("CPC"). It is, therefore, surprising that the learned Single Judge has extensively examined the question of the constitutional validity of the DSGs.

67.6 The learned Single Judge appears to have taken into account the submissions of the Union of India, when it was not even a party to any of the suits. These are suits governed by the CPC. The procedure adopted by the learned Single Judge in requiring the learned ASG to address arguments on behalf of the Union of India at an interlocutory stage, without it being party to the suits themselves, was, therefore, untenable.

67.7 It would be a different matter if the plaints themselves supported the case that the DSGs are indeed law and an officer of the Union of India was summoned as a witness in the trial. The Court on its own requiring the Union of India to address it on this aspect, in a civil suit, is indeed a deviation from the CPC itself, which would strictly govern the adjudication of civil suits filed on the original side of this Court. That this Court has original jurisdiction does not mean under that jurisdiction the Court will assume to itself the powers of a Writ Court. The flexibility of procedure that may be available to the Court while dealing with a writ petition under Article 226 of the Constitution, is not, and ought to not be adopted while dealing with civil suits filed on the original side, which would be strictly governed by the provisions of the CPC read with the corresponding provisions of the Delhi High Court Act and the Original Side Rules of the Delhi High Court.

67.8 In such circumstances, the question of what value the ASG's submission would have in determining the preliminary issue of the nature of the DSGs is a question that ought to have been addressed, but was not, by the learned Single Judge. The view expressed by the ASG before the learned Single Judge on the nature of the DSGs, can, at best, said to be "advisory" and not "evidence".

68. With these preliminary observations, the Court proceeds to examine each of the four issues, the conclusions pertaining to which, form the basis of the impugned judgment of the learned Single Judge.

Are the DSGs law?

69. The first issue formulated by the learned Single Judge was whether the DSGs "are valid and binding on the Defendants, and if so, to what extent"? It must be noted at the outset that this issue itself has been erroneously framed. Even going by the submissions made before the learned Single Judge, or for that matter before this Court, the question to be addressed was whether the DSGs were "law" and whether suits could have been filed by the Plaintiffs for enforcing the DSGs?

70. It is clear from the first line of para 146 of the impugned judgment, that the stand of the Appellants/Defendants, as noted by the learned Single Judge, is that "the DSGs are not law and they are merely advisory in nature". The learned Single Judge notes the further submission that according to the Defendants, the DSGs were "merely a model framework for State Governments and Union Territories to come out with an actual legal mechanism to enforce the same" and that "they are not binding in nature". It is in the next sentence that the learned Single Judge appears to have committed an error while noting that the Appellants/ Defendants had urged that the DSGs "are not law under Article 13 of the Constitution as they impinged upon the Fundamental Rights of the platforms and the sellers of the platforms guaranteed under Article 19 (1) (g) of the Constitution".

71. It has been repeatedly urged before this Court that this was not the contention of the Defendants. In particular, it is the case of the Amazon that they did not in fact challenge the constitutional validity of the DSGs. Their submission was that these were mere guidelines which could not be characterized as "law" and cannot, therefore, regulate the exercise of the fundamental rights guaranteed by Articles 19 (1) (g) of the Constitution.

72. The learned Single Judge appears to have committed an error in re-phrasing the "the first and foremost question", as "whether any right under Article 19 (1) (g) of the Constitution is impinged by the issuance of these guidelines". What was required to be addressed first was the issue whether the DSGs were indeed "law" and were the suits seeking enforcement of such law be maintainable?

73. At this stage, it is important to examine the DSGs. A perusal of the notification dated 26th October, 2016 issued by the Department of Consumer Affairs reveals that an Inter-Ministerial Committee ("IMC") was constituted by the Government of India with representatives of the Ministry of Finance, Department of Industrial Policy and Promotion, the Department of Legal Affairs, the Department of Information and Technology and the Ministry of Corporate Affairs. Besides these five ministries and departments, the representatives of the Government of NCT of Delhi, the States of Andhra Pradesh and Kerala were also part of the said IMC. They were to look into "the matters concerning the direct selling industries". This IMC is stated to have held consultations with "stakeholders" before formulating the "model guidelines for the States and the Union Territories" for protecting the "legitimate rights and interests of industry and consumers". What was envisaged was that "the State Governments will set

up a mechanism to monitor/supervise the activities of direct sellers, DSEs regarding compliance for guidelines for direct sellers". In other words, even in terms of this notification, what was being notified were only "model guidelines".

74. The model guidelines envisaged a DSE to submit an undertaking to the Department of Consumer Affairs ("DoCA") by 9th December, 2016, stating therein that it was in compliance thereof and was to also provide the details of its incorporation. The notification urged the State Governments and Union Territories to take "necessary action to implement the guidelines". Enclosed with the said notification were "model guidelines on direct selling English and Hindi" and "the Performa (sic) for declaration and undertaking".

75. The title of the enclosed document explains its nature: "Advisory to State Governments/Union Territories: Model Framework for Guidelines on Direct Selling". Consequently, it is clear that the DSGs were not meant to be treated as law themselves, much less binding law. It was only to be a model framework and "advisory" in nature. It was for the State Governments to adopt it into law. Therefore, Clause 7 (6) of these "model guidelines" is also purely advisory.

76. The learned Single Judge in the impugned judgment has noticed the background to the formulation of the guidelines, but crucially overlooked the fact that these were not in the form of "executive instructions" at all. A careful reading of the notification reveals that the guidelines have been issued by the DoCA. Its power to frame such guidelines can be traced back to the Consumer Protection Act, 1986 ("CPA"). The mere fact that the FSSAI may have written to e-commerce platforms to comply with the guidelines would not make them law.

77. Any doubt in this regard now stands dispelled by the communication dated 11th November, 2019 issued by the DoCA in the Ministry of Consumer Affairs under the subject "Rules to be notified under the Consumer Protection Act, 2019 - Comments from the stakeholders on draft rules - Reg". This has come as a result of the CPA, 2019, which was published in the official gazette on 9th August, 2019. The CPA, 2019, itself is yet to become operational, as it is awaiting the formulation of Rules thereunder.

78. This communication dated 11th November, 2019 notes that Rules under various topics are required to be notified under the new Act. Eight such topics have been notified and in Sl. No. 6 are the "Consumer Protection (Direct Selling) Rules, 2019". Stakeholders were invited to offer their views and suggestions on the draft Rules till 2nd December, 2019. A comparison of the text of draft Consumer Protection (Direct Selling) Rules, 2019 with the DSGs shows that the former almost entirely replicates the latter. Rule 8 (6) of the draft Rules, for instance, is a verbatim reproduction of Clause 7 (6) of the DSGs. Interestingly, even the definition of the "Act" under Rule 2 (1) (a) is identical to Clause 1 (1) of the Model Direct Selling Guidelines, 2016 and is defined to mean "CPA", with only the year being different; in the DSGs it is CPA, 1986, whereas in the draft Rules it is CPA, 2019.

79. Clearly, therefore, what was being invoked was the mechanism of formulating Rules under an existing statute that governs the subject, viz., the CPA. There was no occasion, therefore, to treat these draft DSGs, traceable as they were to the CPA, as "executive instructions". The learned Single Judge appears to have missed this significant aspect of the matter. A large portion of the impugned judgment has been devoted to discussing the case law around "executive instructions" which filled up the lacuna of the statutory law on the topic, when there was no occasion to adopt that route to find the DSGs to be binding.

80. The learned Single Judge started off by accepting the plea of the ASG that the DSGs were issued in exercise of the powers conferred under Articles 73 and 77 of the Constitution. Clearly, that is not what the notification stated. It clearly mentioned these as only "guidelines" which were "advisory". The distinction between rules, which are made under a statute, regulations, which also ought to be traced to a statute, and mere "guidelines", was lost sight of by the learned Single Judge.

81. The Plaintiffs appear to have jumped the gun in not waiting for the law to be formally made and enforced. It is possible that once the CPA Rules are notified, questions would further arise as to whether such rules, and in particular Rule 8 (6) thereof violated, as contended by the Appellants/ Defendants, Section 30 of the TM Act or Section 79 of the IT Act. At the stage at which it was before the learned Single Judge, these questions were moot and purely hypothetical.

82. Significantly, had the learned Single Judge addressed the issue whether the DSGs did in fact have the character of law, there would have been no need to go into the further issue of whether they violated any fundamental rights. The route adopted by the learned Single Judge was to first examine the second question, viz., whether the DSGs violated any fundamental right, and having answered that in the negative, to conclude that they are accordingly valid and binding "law".

83. The learned Single Judge relied on the decision in *Ram Jawaya Kapoor* (supra) to conclude that instances of exercise of executive power, where there was no violation of fundamental rights, "even if not traceable to a statute", cannot be questioned. The facts that the Supreme Court was confronted with in that case were that publishers of the text books raised a challenge to certain executive instructions issued by the State Government. The State Government took upon itself the task of publishing and printing text books published by different publishers by giving a mere 5% royalty to the publishers. The action of the State Government was not, however, traceable to any statute as such.

84. In the present case, it is not the government, but private entities like Amway, Oriflame and Modicare, which are trying to seek enforcement of the DSGs. In fact, they are seeking to enforce guidelines against third parties and not against those who might be bound by the DSGs, as and when it becomes

law. Merely because the DSGs are notified in the Gazette, they do not attain the status of "law" within the meaning of Article 13 of the Constitution. The source of the power to frame such guidelines is traceable only to the CPA. With the CPA, 2019 itself not having been notified, these draft guidelines could not have attained the character of "binding Rules" under the CPA, 2019, or for that matter, even under the CPA, 1986. When clearly even the draft guidelines mentioned the Act to be the CPA, there was no occasion for the learned Single Judge to accept the plea that they could be sourced to Articles 73 or 77 of the Constitution of India. Therefore, there was no occasion to apply the decision in *Ram Jawaya Kapoor* (supra).

85. The fact that the DSGs may not have been challenged in a Court of law is neither here nor there. If they were not law in the first place, there was no occasion for the Defendants/Appellants to challenge it. They would be right in proceeding on the basis that as they were not law in the first place and any challenge to such draft guidelines would have been premature.

86.1 In *State of Madhya Pradesh v. Thakur Bharat Singh* AIR 1967 SC 1170, a Constitution Bench of the Supreme Court explained that Articles 162 and 173 were concerned "primarily with the distinction of executive power between the Union on the one hand and the States on the other, and not with the validity of its exercise". The decision of the Supreme Court in *Ram Jawaya Kapoor* (supra) was explained by the Supreme Court in *Thakur Bharat Singh* (supra) as under-

"...The executive action which was upheld in that case was, it is true, not supported by legislation, but it did not operate to the prejudice of any citizen. In the State of Punjab prior to 1950 the text-books used in recognized schools were prepared by private publishers and they were submitted for approval of the - Government. In 1950 the State Government published text books in certain subjects, and in other subjects the State Government approved text-books submitted by publishers and authors. In 1952 a notification was issued by the Government inviting only "authors and others" to submit text-books for approval by the Government. Under agreements with the authors and others the copyright in the text-books vested -absolutely in the State and the authors and others received royalty on the sale of those text-books. The petitioners a firm carrying on the business of preparing, printing, publishing and selling text books then moved this Court under Art. 32 of the Constitution praying for writs of mandamus directing the Punjab Government to withdraw the notifications of 1950 and 1952 on the ground that they contravened the fundamental rights of the petitioners guarantee under the Constitution. It was held by this Court that the action of the Government did not amount to infraction of the guarantee under Art. 19(1)(g) of the Constitution, since no fundamental rights of the petitioners were violated by the notifications and the acts of the executive Government done in furtherance of their policy of nationalisation of text-books for students. It is true that the dispute arose before the Constitution (seventh Amendment) Act, 1956, amending, inter alia, Art. 298, was enacted, and there

was no legislation authorising the State Government to enter the field of business of printing, publishing and selling text-books. It was contended in support of the petition in Rai Sahib Ram Jawaya's case that without legislative authority the Government of the State could not enter the business of printing, publishing and selling text-books. The Court held that by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen: the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights. Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive order is issued."

86.2 Accordingly, in *State of Madhya Pradesh v. Thakur Bharat Singh* (supra), it was held that the order issued by the State Government of Madhya Pradesh under Section 3 (1) (b) of the Madhya Pradesh Public Security Act, 1959, not only restricted the movements of the Respondents, but actually required them to move to another place apart from the place of their ordinary residence, which was beyond the purview of the statute. This was held to be prejudicial to the Respondents and accordingly invalid. Therefore, even the extent of executive power could be curtailed by what the statute permitted expressly.

87. In *Poonam Verma v. Delhi Development Authority* (2007) 13 SCC 154, the question was whether the action of the Central Government to confine the scheme formulated by the Delhi Development Authority ("DDA") for out of turn allotment of flats only for widows of government servants who died in harness and those who were killed by terrorists could have been validly issued. The Supreme Court held that the Central Government could not have, in the absence of any statutory provision directed creation of any quota and that too after closure of the scheme. In that process, the Supreme Court held that "guidelines per se do not partake the character of a statute" and that "such guidelines in absence of statutory backdrop are advisory in nature". The Court referred to its earlier decision in *Narender Kumar Maheshwari v Union of India* (1979) 3 SCC 489, where it was held as under:

"107. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve."

88. In *G.J. Fernandez v. State of Mysore* AIR 1967 SC 1753 the Supreme Court held that the rules in the Mysore Public Works Department Code did not partake the character of "law" and that Article 162 could not be invoked to recognize the power of the State Government to frame rules. The provision only indicated "the scope of executive power of the State". It was further explained as under:

"Of course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. It is not in dispute that there is no statute which confers any authority on the State Government to issue rules in matters with which the Code is concerned; nor has any provision of the Constitution been pointed out to us under which these instructions can be issued as statutory rules except Art. 162. But as we have already indicated, Art. 162 does not confer any authority on the State Government to issue statutory rules. It only provides, for the extent and scope of the executive power of the State Government, and that coincides with the legislative power of the State legislature. Thus under Art. 162, the State Government can take executive action in all matters in which the legislature of the State can pass laws. But Art. 162 itself does not confer any rule making power on the State Government in that behalf. We are therefore of opinion that instructions contained in the Code are mere administrative instructions and are not statutory rules."

89. The learned Single Judge distinguished the above decision in *G.J. Fernandez* (supra) on the ground that the Code in question there was "in the nature of government regulations to regulate conduct of employees" and that the said Code was "not duly notified and gazetted" like the DSGs were. The Court is of the view that the mere fact that the DSGs were notified in the gazette would not set it apart from the Code that was being considered by the Supreme Court in *G.J. Fernandez*.

90. In *Syndicate Bank v. Ramchandran Pillai* (2011) 15 SCC 398, the question that arose was whether the Central Government's "guidelines to prevent arbitrary use of powers to evict genuine tenants from public premises under the control of the public sector undertakings/financial institutions" by a gazetted resolution dated 30th May, 2002, had the force of "statutory rules".

Answering the question in negative, the Supreme Court held as under:

"6. If any executive instructions are to have the force of statutory rules, it must be shown that they were issued either under the authority conferred on the Central Government or a State Government or other authority by some Statute or the Constitution. Guidelines or executive instructions which are not statutory in character, are not 'laws', and compliance thereof cannot be enforced through

courts. Even if there has been any violation or breach of such non-statutory guidelines, it will not confer any right on any member of the public, to seek a direction in a court of law, for compliance with such guidelines. An order validly made in accordance with a statute (as in this case, the Public Premises Act), cannot be interfered with, even if there has been any transgression of any guidelines, except where it is arbitrary or malafide or in violation of any statutory provision. These are well settled principles (See: Union of India v. S.L. Abbas: 1993 (4) SCC 357, Chief Commercial Manager, South Central Railway, Secundrabad v. G. Ratnam: 2007 (8) SCC 212, and State of U.P. v. Gobardhan Lal)

7. As the guidelines relied upon in this case were not issued in exercise of any statutory power under the Public Premises Act or any other statute, even if there was violation or non-compliance with the aforesaid guidelines by the Appellant, relief to the Appellant could not be denied by relying upon the guidelines. To do so would amount to reading the guidelines into the statute, which is impermissible? The only 'remedy' of any person complaining of noncompliance with such guidelines, is to bring such violation, to the notice of a higher authority. We therefore hold that the enforcement of any right or exercise of any power by the Appellant, under the Public Premises Act cannot be set at naught by relying upon or referring to the guidelines issued by the Central Government."

91. Since this Court is of the view that the learned Single Judge was in error in overlooking the aforementioned legal position, and in holding the DSGs to be law, the Court does not consider it necessary to examine the further question whether the DSGs are violative of any fundamental right under Article 19 (1) (g) of the Constitution and whether the restriction placed on the said right by them are beyond the purview of Article 19 (6) of the Constitution.

92. The Court, therefore, leaves it open to the Appellants/Defendants to challenge the Direct Selling Rules under the CPA, once they are notified, as being violative of Section 30 of the TM Act and Sections 419 and 420 of the Sale of Goods Act, 1930 ("SOGA"), Sections 23 and 27 of the Indian Contract Act, 1872 ("ICA") and the Competition Act, 2002. There is no occasion for the Court in the present case to further examine these issues.

93. For all the aforementioned reasons, the Court sets aside the findings of the learned Single Judge on the first issue that the DSGs are "law" and that, as such, they are enforceable.

Trademark issues

94. The Court now turns to the second issue, and the findings thereon, that the sale of Amway, Oriflame and Modicare products on e-commerce platforms amounted to infringement of trademark, passing off and misrepresentation, etc.

95. The Court accepts the plea of the Appellants/ Defendants that a fundamental error has been committed by the learned Single Judge in noting in the opening

line of para 175 that "the Plaintiffs are owners of their respective trademarks and there is no dispute regarding the ownership". It must be observed at the outset, that in none of the complaints, have the Plaintiffs asserted or even mentioned anything about trademark registration. There was no occasion for the Plaintiffs to assert ownership of such trademarks. In fact, there is no such pleading to that effect at all. How the learned Single Judge could have come to such a conclusion and, that too, in a categorical manner, in the absence of any pleadings, is a mystery.

96. As the learned Single Judge rightly notes, the suits were not suits for infringement of trademarks, or even for that matter, passing off. Even as this has been acknowledged in the impugned judgment, the learned Single Judge proceeds to examine whether there has been an infringement of the trademarks. This is entirely outside the purview of the pleadings in the suits and such a venture in this regard ought not to have been undertaken by the learned Single Judge.

97. In any event, according to the Appellants/Defendants, the Plaintiffs were not the proprietors of the trademarks "Amway" and "Oriflame" respectively. Amway has been registered in the name of Amway Corporation and Alticore Inc., and Oriflame in the name of Oriflame Cosmetics AG, neither of which entities are parties to the suits. The case of the Appellants/Defendants is that once the goods have been lawfully acquired by a person by sale of the goods in the market, the further sale of such goods in the market by that person would not amount to infringement of the proprietor's trademark. The contention is that Section 30 of the TM Act limits the monopoly rights of the trademark owner and confers a benefit on traders to trade lawfully and acquire goods. Conscious of this position, according to the Appellants/Defendants, the Plaintiffs did not argue that the Appellants were infringing any registered trademark.

98. As already noticed, the action brought by the Respondents/Plaintiffs in the shape of the suits in question, was not one of trademark infringement or passing off.

99. Under Section 19 of the SOGA, upon a contract for sale for a specific property, the property and the goods are transferred to the buyer. The "Code of Ethics" framed by Amway itself states that once the sale takes place, the title in the products is transferred to the buyer i.e. the ABOs, on its first sale. Once the title passes to the ABO, no condition could be further imposed upon the buyer. Clause 7 (6) of the DSGs imposes one such condition on the buyer that the buyer cannot resell the product online. With such a condition not being an enforceable law vis-a-vis the third party, even if it were to be considered binding as such, by means of the contract between Amway and the ABO, Amway can at best seek to proceed against the ABO for breach of such condition. This is because there is no privity of contract between Amway, or for that matter between Oriflame and Modicare, with the online platforms.

Lifting the corporate veil

100. Arguments at some length were advanced by the Respondents herein regarding the relationship between the Amazon, on the one hand, and Cloutail, on the other. The assertion by Cloutail is that it is a wholly owned subsidiary of M/s Prione Business Services Pvt. Ltd. ("Prione"), which has no relation with Amazon and that Amazon and Cloutail are independent legal entities. Prione is a joint venture between M/s Catamaran Ventures and Amazon Asia Pacific and Amazon Eurasia. Cloutail states that it does not have any shareholding, interest or directors from Amazon or Amazon Asia Pacific or Amazon Eurasia, controlling and managing its affairs. The board of Cloutail is said to comprise of three directors, two of which are nominees of M/s Catamaran Ventures and one is the MD-CEO i.e. an employee of Cloutail.

101. In any event, these are matters of evidence. There could not have been a presumption that Cloutail and Amazon are one and the same entity and that the obligations of the Cloutail would bind Amazon and vice versa. There is merit in the contention of Amazon that by permitting private entities like Amway to restrict downstream distribution of genuine goods, by enforcing contractual stipulations against third parties, the judgment of the learned Single Judge recognizes a monopoly that can be exercised in perpetuity. There is also force in the contention that this runs contrary to the legal position explained in *Kapil Wadhwa v. Samsung Electronics* (supra). At this stage, the Court would like to discuss at some length the said decision, as it has a direct bearing on the case at hand.

The decision in *Kapil Wadhwa*

102.1 The facts in *Kapil Wadhwa* (supra) are that Samsung Electronics Company Limited ("SECL") and Samsung India Electronics Private Limited ("SIEPL") were companies incorporated in Korea and India respectively. SIEPL was the subsidiary of SECL. They were part of the Samsung group of companies, which had 14 listed companies and 285 worldwide operations. They were in the business of manufacturing and trading electronic goods, including colour televisions, home appliances, washing machines, air conditioners, computers, printers and cartridges, etc. The business was done under the brand/corporate name, using the trademark "Samsung".

102.2 In India, SECL had licensed the use of its trademark "Samsung" to SIEPL under a Trademark Agreement dated 8th July, 2003, which had been filed with the Trademark Registry for registration. The grievance of both SECL and SIEPL was that *Kapil Wadhwa* and others i.e. the Appellants in that case, were purchasing from the foreign market printers manufactured and sold by SECL under the trademark "Samsung", and after importing them into India and selling the products in the Indian market under the same trademark, thereby infringing the registered trademark of the Respondents in India. It was alleged that the Appellants were operating their website by meta-tagging the same to the website

of SECL and SIEPL.

102.3 The Respondents alleged that injury was being caused to the customers in India, who were paying less for the printers in question but were misled into believing that they were purchasing authorized Samsung products in India sold with the permission of the Respondents, when in fact the printers imported and sold were materially different from the ones sold in the Indian market. Appellants highlighted that their import and sale was beneficial to the Indian public since their aim was to sell the products at the prices less than 30 to 50% of the compatible products sold by SECL and SIEPL.

102.4 The Appellants further contended that the Respondents did not manufacture the products in India and that they also import the products. According to the Appellants, their act of importing the products was authorized and the sale in the Indian market was legal inasmuch as the Appellants sold the products "as it is".

102.5 The learned Single Judge held in favour of SECL and SIEPL by holding that the TM Act involved the national exhaustion principle. The action brought by SECL and SIEPL before the Court was one of infringement of trademark and not for passing off.

102.6 The Division Bench identified the issue as one of "parallel imports/grey market goods". It was held that Section 30 operated as an exception to Section 29. Under Section 30 (2) (b) of the TM Act, if a trademark was registered, subject to any conditions of limitations, the use of that trademark in relation to the goods to be sold or traded in any place and in relation to the goods to be exported to any market, would not constitute an infringement. It was held that once the goods have been lawfully acquired, if they are put into market and further sold, there would be no infringement of the trademark irrespective of the fact that whether such a market is an international market or a domestic market.

102.7 The Division Bench disagreed with the conclusion reached by the learned Single Judge, in the context of Section 29 (6) of the TM Act, that if a trademark is registered in one country, then the goods bearing the said registered trademark, can be lawfully acquired in that country alone. It, therefore, further disagreed with the conclusion in para 68 (d) of the judgment of the learned Single Judge that Section 30 of the TM Act implied that the goods lawfully acquired must originate from "the domestic market".

102.8 The Division Bench then concluded as under:

"42. There is a patent fallacy in paragraph 68(c). There is no law which stipulates that goods sold under a trade mark can be lawfully acquired only in the country where the trade mark is registered. In fact, the legal position is to the contrary. Lawful acquisition of goods would mean the lawful acquisition thereof as per the laws of that country pertaining to sale and purchase of goods. Trade Mark Law is not to regulate the sale and purchase of goods. It is to control the use of

registered trademarks. Say for example, there is food scarcity in a country and the sale of wheat is banned except through a canalizing agency. Lawful acquisition of wheat in that country can only be through the canalizing agency. The learned Single Judge has himself recognized that the law of trademarks recognizes the principle of international exhaustion of rights to control further trade of the goods put on the market under the trade mark. The task of the learned Single Judge thus was to resolve the impasse in the Indian Law, and thus the presumption/assumption in paragraph 68(c) could not be the point to resolve the textual context in which the learned Single Judge has discussed in paragraph 68(d)."

102.9 In other words, the Division Bench interpreted the word "market" in Section 30 (3) of the TM Act to include the international market.

102.10 The Division Bench then went on to interpret Section 30 (4) of the TM Act, which states that the further dealings in the goods placed in the market under a trademark, can be opposed where legitimate reasons exist to cause further dealings, and in particular whether condition of goods has been changed or impaired. The Division Bench then went on to explain as under:

"With respect to physical condition being changed or impaired, even in the absence of a statutory provision, the registered proprietor of a trade mark would have the right to oppose further dealing in those goods inasmuch as they would be the same goods improperly so called, or to put it differently, if a physical condition of goods is changed, it would no longer be the same goods. But, sub-section 4 of Section 30 is not restricted to only when the conditions of the goods has been changed or impaired after they have been put on the market. The section embraces all legitimate reasons to oppose further dealings in the goods. Thus, changing condition or impairment is only a specie of the genus legitimate reasons, which genus embraces other species as well.

What are these species?

(i) Difference in services and warranties as held in the decisions reported as 423 F.3d 1037(2005) SKF USA v International Trade Commission & Ors.; 35 USPQ2d 1053 (1995) Fender Musical Instruments Corp. v. Unlimited Music Center Inc.; 589 F. Supp. 1163 (1984) Osawa & Co. v. B&H Photo.

(ii) Difference in advertising and promotional efforts as held in the decisions reported as 70 F.Supp 2d 1057 Pepsi Co Inc v Reyes; 589 F. Supp. 1163 (1984) Osawa & Co. v. B&H Photo.

(iii) Differences in packaging as held in the decision reported as 753 F. Supp. 1240 (1991) Ferrero USA v. Ozak Trading.

(iv) Differences in quality control, pricing and presentation as held in the decision reported as 982 F.2d 633 (1992) Societe Des Produits Nestle v. Casa Helvetia.

(v) Differences in language of the literature provided with the product as held in the decisions reported as 423 F.3d 1037(2005) SKF USA v International Trade

Commission &Ors.; 70F.Supp 2d 1057 PepsiCo Inc v Reyes;816 F.2d 68,76(2nd Cir. 1987) Original Appalachian Artworks Inc. v. Granada Electronics Inc.

69. Now, as we see it, this can only happen in case where goods have to be imported from a country of manufacture or a country where they are put on the market thereof, and then imported into India. Only then would there be a difference in the language of the literature provided with the product; difference in services and warranties in the country from where the goods are imported by the seller and the country of import i.e. the manufacturer's warranties not being available in the country of import; difference in quality control, pricing and presentation as also differences in advertising and promotional efforts.

70. This is also an indication of India adopting the Principle of International Exhaustion of Rights in the field of the Trade Mark Law.

71. We accordingly conclude that 'the market' contemplated by Section 30(3) of the Trade Marks Act 1999 is the international market i.e. that the legislation in India adopts the Principle of International Exhaustion of Rights."

102.11 Finally, the Division Bench examined whether SECL and SIEPL were entitled to oppose further dealings by the importer of the printers to India under Section 30 (4) of the TM Act. It was held as under:

"71...Now, the Principle of International Exhaustion of Rights itself takes away the right of the respondents to control the further sale and further distribution of the goods. With respect to after sales services, since the respondents do not warranty anything regarding their goods sold abroad, but imported into India and further sold, they not being responsible for the warranty of those goods, nothing turns thereon, as regards said plea. There may be some merit that the ordinary consumer, who is provided with warranties and after sales by the appellants, on not receiving satisfactory after sales service, may form a bad impression of the product of the respondents and thus to said extent one may recognize a possible damage to the reputation of the respondents pertaining to Samsung/SAMSUNG printers and Samsung/SAMSUNG products sold in India after importation. But, this can be taken care of by passing suitable directions requiring the appellants to prominently display in their shop that the Samsung/SAMSUNG printers sold by them are imported by the appellants and that after sales services and warranties are not guaranteed nor are they provided under the authority and control of the respondents and that the appellants do so at their own end and with their own efforts. This would obviate any consumer dissatisfaction adversely affecting the reputation of the respondents, and thus if this is done, the respondents can claim no legitimate reasons to oppose further dealing in Samsung/SAMSUNG products in India.

74. As regards the appellants meta-tagging their websites with those of the respondents, the learned Single Judge has correctly enjoined the appellants from so doing, which injunction we affirm. The argument by the appellants that how else would the appellants know about the working of the particular product

hardly impresses us for the reason the appellants can design their website in a manner where they are able, on their own strength, without any meta-tagging, to display the relevant information."

102.12 The above passages in *Kapil Wadhwa v Samsung Electronics* (supra) are a complete answer to many of the contentions raised by Amway, Modicare and Oriflame in the present case. In the considered view of this Court, the learned Single Judge was in error in distinguishing the decision in *Kapil Wadhwa v Samsung Electronics* (supra) by holding that the principle of exhaustion cannot be invoked by the Appellants/Defendants.

Reports of the LC

103. At this stage, it is necessary to notice that the learned Single Judge has based the conclusions about the tampering of goods of the Plaintiffs essentially on the four reports of the LCs. The first LC report dated 6th October, 2018 has been submitted by Mr. Aditya Vaibhav Singh, who visited the premises of Cloudtail. All that the report indicates is that the LC was informed that the Amway goods supplied to Cloudtail were bought from one Mr. Vinit, who operated from Bhaghirath Place. The representative on the site informed the LC that he did not have any bills for the said transaction and the purchases had been made in cash. He further stated that "he could not satisfy the complete purchase order (with respect to Amway) and only supplied the goods which he could purchase at that point of time." Thus, this report is entirely unhelpful to support the conclusions drawn by the learned Single Judge about large-scale tampering of goods.

104. The second report is dated 12th October, 2018 and has been submitted by Mr. Arun Wighmal. He visited the premises of Pioneering Products, the Defendant No. 1 in CS (OS) 480/2018, and found that it was under the control of and being operated by Amazon. He found various products bearing the mark "Amway" getting packed to be dispatched to their respective buyers. The LC states that despite the denial and resistance of Amazon's representatives, he inspected the premises, upon which he found a "good quantity" of products labelled "Amway" on the second floor. He found copies of stock transfer notes dated 8th and 27th September, 2018, showing that more than 2400 Amway products were transferred from the premises of Pioneering Products to the premises under inspection, which actually belonged to Amazon but was referred to as "the additional place of business" of Pioneering Products.

105. The crucial portion of the report is where the LC states that he opened two different sealed packages of the said Amway products and found that one of those did not contain the unique code. The package which did not contain the unique code was resealed. The learned Single Judge has, in the impugned judgment, set out in the body of the judgment the photographs taken by the LC with the caption "images showing removal of seals and repackaging at Amazon warehouse."

106. What the LC has not indicated is whether prior to the LC opening the sealed packages, he found the packages to have been otherwise tampered with. If it was the LC who opened the seal of the packages, then clearly till such time they remained sealed. It could not therefore be said that it was Amazon or Amazon's representatives which opened those sealed packages. Only two products are referred to by the LC, one of which did not have the bar code. Who removed these bar codes is still in question. If the seller who sold the product to Amazon had itself removed it, clearly then Amazon could not be blamed for tampering with the bar code.

107. From this one example, it is difficult to understand how the learned Single Judge could have concluded that Amazon was tampering with the products of Amway. This was too sweeping a conclusion to arrive at. It could not form the basis for the denial of the principle of exhaustion by invoking Section 30 (4) of the TM Act. As to whether the goods were in fact tampered with, since the report of the LC does not appear to indicate that he saw such tampering take place in his presence by Amazon, the question could only be settled by examining evidence.

108. In fact, in the written submissions on behalf of Amway, it is conceded that these constitute matters awaiting trial. If that is the position, then it was not open to the learned Single Judge to conclude, and that too at the interlocutory stage, that there was tampering of the products by Amazon. The second LC's report, therefore, does not come to the Plaintiffs' aid in order to assert that Amway products were being tampered with on Amazon's premises. Amazon states that it receives goods in a packed condition and then repacks them in Amazon's own packing, for further security and safety, to make the packages tamper proof. This again is a matter for evidence.

109. Turning now to the third LC's report dated 15th October, 2018, Ms. Richa Bhargava visited the premises of Black Olive (Defendant No. 2 in CS (OS) 480/2018). The LC concluded that the premises were under the control of Amazon on the basis that boards and hoardings of Amazon were found there. The LC found various products bearing the mark "Amway" getting packed to be dispatched to their respective buyers. This report, therefore, did not indicate any tampering of Amway products.

110. The LC found that "many of the products did not have the unique bar code." However, the LC's report is not helpful in determining whether it was Amazon which had removed the unique code. It is possible that there are products of Amway that do not have the unique code but some other marker. These, again, are matters for evidence. Therefore, this report is also unhelpful in determining if any tampering was done by Amazon.

111. The fourth report dated 16th October, 2018 is of Mr. B. Prashant Kumar. He also visited the premises of Cloutail. He noticed that it was used as a common office for Cloutail and its sister concern, Prione. The LC has placed on record

pictures taken at the premises where Prione refers to itself as "a Catamaran and Amazon venture." The premises were "almost empty, with the desks completely clean." There were no laptops, files, desktops or any other office related products to inspect. There was no particular warehouse that could be associated with Cloutail in and around the premises. How this report could then form the basis for inferring that there had been tampering of goods by Cloutail or Amazon is beyond imagination.

112. The broad conclusions reached by the learned Single Judge tend to obfuscate the factual distinctions between the cases involving the different online platforms. For instance, both in the first and the fourth reports of the LCs, no Amway products were found on Cloutail's premises. Similarly, the learned Single Judge has failed to appreciate Snapdeal's submissions that unlike Amazon, it does not even engage in large-scale "fulfilment" of orders, and consequently has very few storage and transportation facilities and barely comes into contact with the products sold on its platform. These submissions are at least prima facie supported by the LC's Report dated 27th September, 2019 in FAO (OS) 157/2019, to which the learned Single Judge has made no reference at all. No LC was appointed in Oriflame's suit. The facts revealed in the LCs reports were insufficient to make any specific conclusions regarding the impairment of the products vis-à-vis each of the present Appellants.

113. The learned Single Judge also appears to have accepted the plea of the Plaintiffs that the Defendants engage in the inflation of the maximum retail price ("MRP") of their products to offer "fake discounts" to consumers. Amazon's case is that it has a strict policy of removing listings without further questions if a complaint is received claiming that the MRP of a particular product has been "inflated". In any event, according to Amazon, the MRP displayed on the listings are "entirely user generated" and it "does not determine or influence the MRP whatsoever."

114. The learned Single Judge also did not inquire about the discounts passed on by Amway to its distributors, which are then passed on to the consumers, resulting in the sale of Amway products at high discounts in any case. In a similar vein, the conclusion that the consumers have to embark on a "Sherlockian venture" to trace the sellers of these products or that the sellers on Amazon's marketplace are not identifiable has not taken into account the sellers' details visible along with product listings on Amazon's marketplace, which were disclosed in Amazon's additional affidavits dated 24th April, 2019.

115. Not only Amazon, but also Cloutail and Snapdeal submit that details of the products, such as the brand and the seller are clearly provided on their online marketplaces. Where there are multiple sellers, the details of the offers of all such sellers are said to be available. Such information, it is submitted, is generated directly by the said sellers and not modified by the Defendants in any manner. Only the buyer's information is withheld from the seller until after the sale has concluded, a policy which is in the interest of the buyers insofar as it

prevents the misuse of the buyers' information by the sellers. These aspects do not appear to have been considered by the learned Single Judge. These too are matters in respect of which clearer answers would emerge hopefully at the conclusion of the trial.

116. The Court is, therefore, unable to concur with the view expressed by the learned Single Judge that the Defendants could not invoke the principle of exhaustion in terms of Section 30 (3) read with Section 30 (4) of the TM Act, or that the sale of the Plaintiffs' products on e-commerce platforms violates their trademark rights, constitutes misrepresentation and passing off, and results in the dilution and tarnishing of the goodwill and reputation of the Plaintiffs' brand. These findings are outside the purview and scope of pleadings in the suits and unsustainable in law.

Are the Appellants intermediaries?

117. Turning now to the third issue as to whether Amazon, Cloudfair and Snapdeal were in fact intermediaries within the meaning of Section 79 read with 2 (1) (w) of the IT Act, the learned Single Judge has extensively examined the incidental services provided by these platforms in the form of packaging and entering into fresh warranties. This aspect has already been discussed at length in the decision in Kapil Wadhwa v. Samsung Electronics Co. Ltd. (supra) wherein it was held that the mere fact that there could be a change in the condition of the warranty of a certain product would not attract Section 30 (4) of the TM Act, and equally would not deprive the intermediaries from the option of invoking Section 79 of the IT Act in their defence.

118. The learned Single Judge appears to have misinterpreted Section 79 of the IT Act in concluding that it is restricted to "passive" intermediaries. Section 79 of the IT Act reads as under:

"79. Exemption from liability of intermediary in certain cases:

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation-For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

119. In terms of Section 79 of the IT Act, there does not appear to be any distinction between passive and active intermediaries so far as the availability of the safe harbour provisions are concerned. In terms of Section 79, an intermediary shall not be liable for any third-party information, data or communication link made available or posted by it, as long as it complies with Sections 79 (2) or (3) of the IT Act.

120. The exemption under Section 79 (1) of the IT Act from liability applies when the intermediaries fulfil the criteria laid down in either Section 79 (2) (a) or Section 79 (2) (b), and Section 79 (2) (c) of the IT Act. Where the intermediary merely provides access, it has to comply with Section 79 (2) (a), whereas in instances where it provides services in addition to access, it has to comply with Section 79 (2) (b) of the IT Act.

121. In Amazon's case, as indeed in Cludtail's and Snapdeal's, since they provide services in addition to access, they have to show compliance with Section 79 (2) (b) of the IT Act. In other words, they have to show that they (i) do not initiate the transmission (ii) do not select the receiver of the transmission and (iii) do not select or modify the information contained in the transmission. The case of these Defendants is as follows. Where there is a potential customer who is accessing the site, so long as it is he who clicks the button, it is the customer who is initiating the transmission. Amazon, Snapdeal or Cludtail do not "select" the receiver of the transmission, which is the buyer. They do not modify the information contained in the transmission, such as the choice of the product, the number of units, and so forth. For example, if a potential buyer goes to Amazon's website and selects a book sold by a seller whose name is indicated on the site, as long as this entire transaction is not controlled by Amazon and the choices, of which the transaction consists, are made solely by the customer, such

as, say, the decision to purchase three copies of the book, and these choices are not altered by Amazon, the requirements of Section 79 (2) (b) of the IT Act would stand fulfilled.

122. Given the disputed questions of fact that emerge from the pleadings in the suit, it is obvious that the issue of whether an entity is an intermediary or not can be decided only after a trial. In this context, it should be noted that the reasoning of the learned Single Judge in *Christian Louboutin SAS v. Nakul Bajaj* (supra) was disapproved of by a Division Bench of this Court in its judgment dated 4th April, 2019 in RFA (OS) (COMM) 1/2019 (M/s. Clues Network Pvt. Ltd. v. M/s. L'Oréal), wherein the Court set aside an order of the learned Single Judge, which relied, inter alia, on *Christian Louboutin SAS v. Nakul Bajaj* (supra). Indeed, the learned Single Judge appears to have erred in distinguishing the decision in *Myspace Inc. v. Super Cassettes Industries Ltd.* (supra), where the Division Bench held that Section 79 of the IT Act is not an "enforceable provision", but merely provides "affirmative defence" to entities which fulfil the criteria set forth therein. It was observed by the DB in the said case as under:

"51... The true intent of Section 79 is to ensure that in terms of globally accepted standards of intermediary liabilities and to further digital trade and economy, an intermediary is granted certain protections. Section 79 is neither an enforcement provision nor does it list out any penal consequences for non-compliance. It sets up a scheme where intermediaries have to follow certain minimum standards to avoid liability; it provides for an affirmative defence and not a blanket immunity from liability."

123. Section 79 of the IT Act is a safe harbour for online market places, limiting their liability for third party information posted on their systems. It is to ensure that the liability for non-compliance and/or violation of law by a third party, i.e. the seller, is not fastened on the online market place. In holding that Amazon is in fact not an intermediary, the learned Single Judge has obviated the need for any evidence to be led in the matter.

124. During the course of arguments before this Court, the Respondents/Plaintiffs were not at all clear as to whether, according to them, Amazon was in fact an intermediary or not. In any event, the alternative arguments, claiming that Amazon is not an intermediary, appear to be riddled with inconsistencies. If, in fact, Amazon is not an intermediary, the question of Amazon having to comply with Section 79 (2) of the IT Act would not arise at all. Clearly, the Respondents seem to be unsure as to what their stand ought to be. As a result, the burden of proof has shifted unfairly onto the Defendants to show that they have complied with the requirements of Section 79 of the IT Act, when in fact the Plaintiffs have to first show that there had been a violation of any of their rights due to the Defendants' activities before the "affirmative defence" of Section 79 could be sought to be invoked. Therefore, Section 79 of the IT Act has been, contrary to the judgment in *Myspace Inc. v. Super Cassettes Industries Ltd.* (supra), sought to be enforced by the Plaintiffs positively, rather than be deployed as "affirmative

defence."

125. There is prima facie merit in the contention of the Appellants that the value-added services provided by them as online market places, as listed out by the learned Single Judge, do not dilute the safe harbour granted to them under Section 79 of the IT Act. Section 2 (1) (w) of the IT Act does envisage that such intermediaries could provide value-added services to third party sellers. This interpretation is sought to be buttressed by Press Note No. 2 issued by the Ministry of Commerce and Industry. In particular, reference is made to para 5.2.15.2.4 (vi), which reads as under:

"In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller, post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller."

126. There was no occasion for the learned Single Judge to have, at the stage of considering applications for interim injunction, returned a conclusive finding that Amazon is "a massive facilitator" and plays an "active role in the sales process." These are too sweeping and definitive a set of findings which have to be properly rendered at the conclusion of the trial. Here again there is prima facie merit in Amazon's contention that merely because it packs and ships the product does not mean that the sale is consummated by Amazon. Amazon contends that such an interpretation runs afoul of both Section 79 of the IT Act and the policy laid down by the Press Note No. 2, a portion of which have been extracted hereinabove. Amazon explains that when the sale of product is "fulfilled by Amazon", all it means is that Amazon guarantees the quality of the product by rendering logistical support services, which include storage, packaging and delivery. These are again matters that would have to be tested at the trial.

127. Under Section 79 (2) (c) of the IT Act, the obligation of the intermediary is that, in terms of the Intermediary Guidelines, it publishes its policies for the information and convenience of its users. The enforcement of such a policy is another matter. Clause 17 of Amazon's policy prohibits sale, on its platform, of "unauthorised" products. This Clause 17 was put forth with the object of enabling Amazon to refuse listing of a product where, for instance, it originates from a country that does not follow international exhaustion. Amazon seeks to point out that this does not apply to India where the principle of international exhaustion is in fact followed. It is contended that Clause 17 cannot be interpreted to empower Amway to seek restrictions on the sale of its products on Amazon's online platform.

128. The Supreme Court in *Shreya Singhal* (supra) held, inter alia, that the obligation of an intermediary to remove content under Section 79 (3) (b) of the IT Act arises only if there is a Court order or a notification from a government agency on the grounds mentioned under Article 19 (2) of the Constitution. Amazon points out that it did not receive any such Court order from Amway in

support of its allegations. The letter of the FSSAI dated 9th April, 2018 was not a notification by an appropriate government agency and did not conform to the grounds enumerated in Article 19 (2) of the Constitution.

129. Therefore, on the third issue also, this Court is unable to concur with the learned Single Judge that Amazon, Snapdeal and Cloudbtail would have to meet the diligence requirement, failing which the benefit of the safe harbour provision i.e. Section 79 of the IT Act would not be available to them.

Tortious interference

130. The Court turns now to the last issue, viz., whether the platforms are guilty of tortious interference with a contractual relationship. This incidentally is the central plank of Modicare"s case.

131. In the first place, the tort of inducement to breach of contract necessitates that there be a contract in the first place between the online platforms and the DSEs. The mere fact that the online platforms may have knowledge of the Code of Ethics of the DSEs, and the contractual stipulation imposed by such DSEs on their distributors, is insufficient to lay a claim of tortious interference. It was incumbent on the part of the Plaintiffs to demonstrate active efforts on the part of or contracts entered into by the Appellants/Defendants to make a viable case for tort of inducement to breach of contract.

132. The Appellants state that the placing of the products on the Appellant"s online platforms is entirely voluntary. It is not induced by these platforms. The services of warehousing, transportation, packing, and so on are provided by these online platforms, not just to the products of the DSEs, but to all products offered for sale on their platforms. They accordingly contend that the mere provision of platforms for sale would not amount to inducement to breach of contract. They contend that it is for the DSEs to proceed against their respective ABOs/sellers to deal with the breach of contractual obligations on their part. These are again contentions that can be decided upon finally only at trial. The learned Single Judge could not, at the interlocutory stage, have brushed these contentions aside.

133. The judgments relied upon in this regard by the learned Single Judge, the Appellants submit, are distinguishable on facts from the present case. The sale of products of the DSEs on the Appellants" online platforms was neither in violation of extant laws or opposed to public policy, as in *Aasia Industrial Technologies Limited vs Ambience Space Sellers Limited* (supra), nor were there, in the present instance, specific acts intended to induce breach, such as the persuasive telexes in *Balailal Mukherjee and Company Private Limited vs. Sea Traders Private Limited* (supra). In any event, on the facts of the present case, whether in fact any of the online platforms induced a breach of contract between the DSE and its ABOs/sellers is at best a matter of evidence, and not of inference.

No case for interim injunction

134. Of the three elements to be considered for the grant of interim injunction, the Plaintiffs, in the considered view of this Court, failed to establish that they have a prima facie case particularly since the DSGs could not be considered to be binding law. Interestingly, the ABOs/direct sellers alleged to have committed the breach of the DSGs were not impleaded as Defendants.

135. Even on the test of balance of convenience, the learned Single Judge has only returned such a conclusion, without actually examining whether the grant of injunction would have an adverse impact on online marketing. What was not considered is whether the requirement of online marketing entities to seek prior consent of the DSEs would not deprive the consumer of exercising the choice to buy such products on online platforms, while ensuring free flow of trade.

136. As regards irreparable loss and injury, there was no empirical data placed before the learned Single Judge by the Plaintiffs in support of their contention that they had suffered huge losses. This again was a matter of evidence and not inference.

137. Consequently, the Court is unable to concur with the learned Single Judge that the three elements for the purposes of grant of interim injunction have been fulfilled in the present case.

Conclusion

138. For all of the aforementioned reasons, the impugned judgment of the learned Single Judge is hereby set aside. The applications seeking interim injunction in the suits stand dismissed. The appeals are allowed and applications disposed of in the above terms with costs of Rs. 50,000/- in each of the appeals, which will be paid by the respective Plaintiffs/Respondents to the corresponding Appellants within four weeks from today.