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

+ **FAO(OS) (COMM) 282/2022**

**FLIPKART INTERNET PRIVATE LIMITED** ..... Appellant

Through: Mr. Rajiv Nayar & Mr. Rajshekhar Rao, Sr. Advs. with Mr. Saurabh Seth, Ms. Sonal Sarada, Mr. Siddharth Chopra, Mr. Nitin Sharma, Ms. Shilpa Gupta, Ms. Swikrit Singhania, Ms. Surabhi Pande, Mr. Naman Tandon, Mr. Ranjit & Mr. Kuber Mahajan, Advs.

versus

**AKASH AGGARWAL & ANR.**

..... Respondents

Through: Mr. Anshuman Upadhyay, Mr. Naseem & Mr. Prashant, Advs. for R1 Mr. Aman Naqri, Adv. for Mr. Shadan Farasat, ASC, GNCTD

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**HON'BLE MR. JUSTICE AMIT MAHAJAN**

**ORDER**

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**27.09.2022**

**CM APPL. 42511/2022 (for exemption)**

1. Exemptions allowed, subject to all just exceptions.
2. The application stands disposed of.

**CM APPL. 42510/2022 (for stay)**

3. The appellant has filed the present appeal impugning an order dated 02.08.2022 (hereafter 'the impugned order'), passed by the learned Single Judge in an application filed under Order XXXIX, Rule 1 & 2 of the Code

of Civil Procedure, 1908, [being I.A. 11270/2022 in CS(COMM) 492/2022, captioned *Akash Aggarwal v. Flipkart Internet Private Limited And Ors.*].

4. The appellant (arrayed as defendant no. 1 in the suit) operates an online market place. The respondent (plaintiff in the suit), is engaged in the manufacturing and selling of apparel under the trade mark “**V Tradition**”.

5. The respondent (plaintiff) states that it has been successful in its business, and its aggregate sales on the appellant’s platform since December 2020 is to the extent of approximately ₹18 crores. Respondent no. 1 also claims that its products have more than 82,000 consumer reviews on the appellant’s platform – Flipkart.

6. The respondent’s (plaintiff) grievance relates to the appellant’s policy of “*latching on*”, whereby the appellant permits a link relating to other sellers under the tag “*more sellers*” being placed on the webpage reflecting the respondent’s product. According to the respondent (plaintiff), there are no other authorised sellers of its products, and therefore, placing a link of other sellers on the webpage amounts to committing or at the least encouraging commission of the tortious act of passing off.

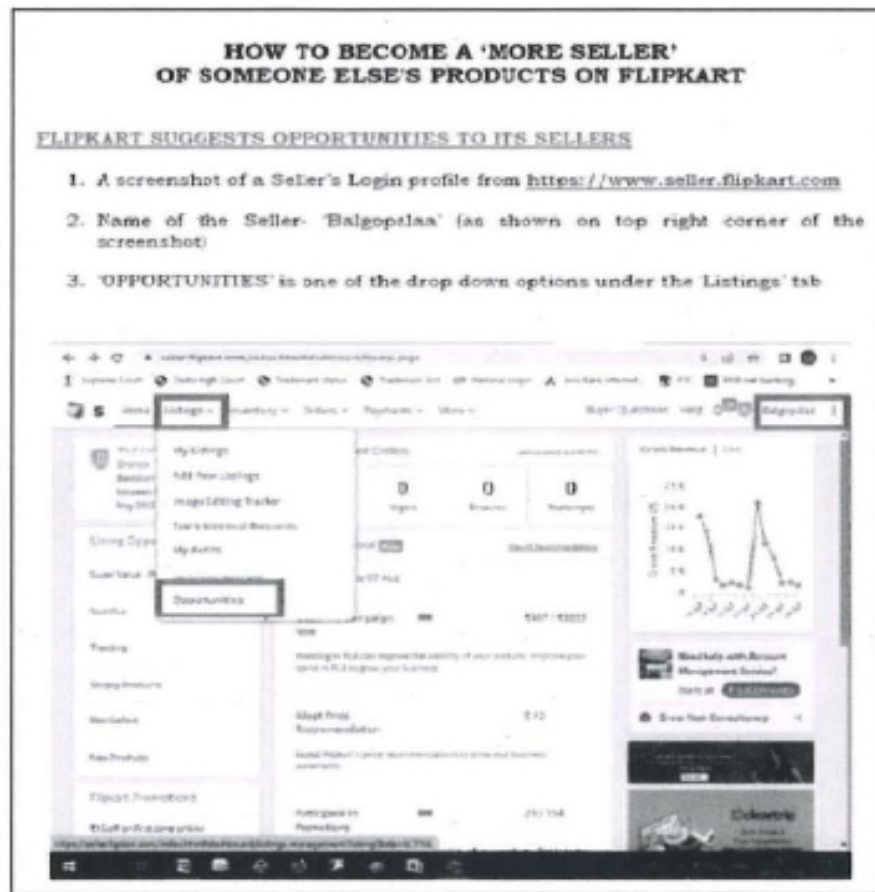
7. In so far as the respondent (plaintiff) is concerned, the appellant has undertaken, without prejudice to its rights and contentions, that it would take down the link of all resellers appearing on the webpage relating to the respondent’s products. However, it is submitted that the impugned judgment has wide ranging observations, which are not limited to the respondent’s (plaintiff) case alone. The impugned judgement effectively proscribes the appellant from using the feature of latching on or indicating “more sellers” in respect of seller of any goods.

8. Mr. Rajiv Nayyar, learned senior counsel appearing for the appellant

has drawn the attention of this Court to Paragraphs 17,18,19 and 20 of the impugned order. The same are reproduced below:

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

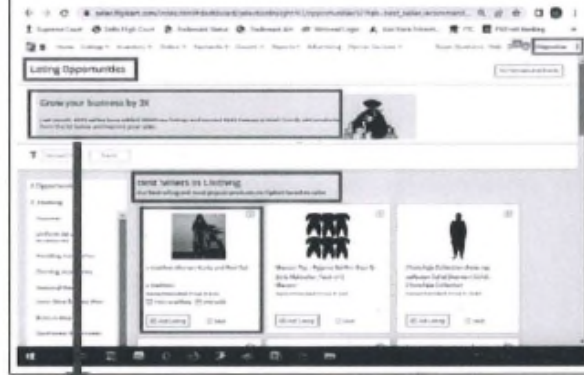
Slide 1



Slide 2

**BECOMING 'MORE SELLER' OF BEST SELLING PRODUCTS IS PROMOTED AS AN OPPORTUNITY TO PROSPER/ LIVE/ EARNING SELLERS**

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



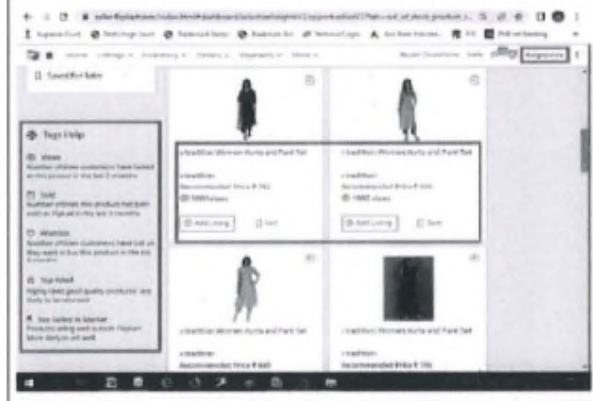
**Grow your business by 3X**

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

Slide 3

**FLIPKART PROMOTES THE UNLAWFUL ACTIVITY OF PASSING OFF**


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



Slide 4

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

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



The screenshot shows a web browser window with the URL 'seller.flipkart.com'. The page title is 'Ethink Set'. Below the title, there is a product image of a black dress. To the right of the image, there are fields for 'Price', 'Quantity', 'SKU', 'Brand', 'Color', and 'Size'. At the bottom of the product information section, there are two buttons: 'Add Listing' and 'Add Variant'. The 'Add Listing' button is highlighted with a red box.

Slide 5

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

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



The screenshot shows a web browser window with the URL 'seller.flipkart.com'. The page title is 'V Tradition'. Below the title, there is a product image of a black dress. To the right of the image, there are fields for 'Price', 'Quantity', 'SKU', 'Brand', 'Color', and 'Size'. At the bottom of the product information section, there are two buttons: 'Add Listing' and 'Add Variant'. The 'Add Listing' button is highlighted with a red box.

*A perusal of the above slides shows that whenever a seller wishes to place, some listings in a specific product category, a recommendation on the basis of the business conducted on its portal is given as to which are the 'Best Seller' products. The*

*caption “Grow your business by 3x” along with specific data, is also projected in order to entice the new seller to ‘latch on’ to popular product listings. The said seller is then permitted to ADD the LISTING to his listing page. While giving this recommendation, the mark ‘V Tradition’, as also, the product photographs of the Plaintiff is permitted to be added by the third-party seller, without the permission or consent of the Plaintiff. It is, thus, clear that product listings of the Plaintiff are being permitted to be used along with the Plaintiff’s brand name and image/s of the product created by the Plaintiff. The said brand name and photograph then becomes a part of the product listings of the third-party unauthorised seller who can then make similar looking products and sell them as though they originate from ‘V Tradition’.*

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

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

20. *This Court is satisfied that such a feature cannot be*

*allowed to be used or offered, to the detriment of the owner of the brand or the person who has created the original product. Consent and authorisation of the brand owner and the listing owner would be required before such conduct by any seller is permitted. In the present case, a perusal of the physical products handed over to the Court after purchases having been made from identical third party sellers, shows that while the products of the Plaintiff have the label ‘V Tradition’, none of the others have any product tag name. The product design, look and feel, as also, the documents which have been placed on record by the Plaintiff, clearly show that the Flipkart platform has allowed third-party sellers to ‘latch on’ to the Plaintiffs product listings which were featuring as ‘Best Sellers’, by way of the ‘Opportunities’ option. Accordingly, in order to protect the Plaintiff, his brand and the investment which the Plaintiff has made in his mark/name, this Court is of the opinion that any infringing third-party product listings would be liable to be taken down.”*

9. Mr. Nayyar submits that the observations, as set out above, effectively results in the appellant being restrained from using the feature of “*latching on*” on its site. He submits that the said feature per se does not infringe any law.

10. The assumption that the feature of “*latching on*” falls foul of the Trademarks Act, 1999 or amounts to passing off goods requires examination. Indisputably, it is permissible for the resellers of genuine products to also sell their products on the e-platform and the same would not infringe the Trademark Act.

11. *Prima facie* providing a link of another seller on the webpage of a particular seller, absent anything more, neither infringes that seller’s trade mark nor amounts to passing off.

12. The contentions advanced by Mr. Nayyar are *prima facie* substantial.

The question whether a link provided on a web page, which permits a customer to access the site or a web page of another seller *per se* amounts to passing off requires examination.

13. Issue notice.

14. In view of Mr. Nayyar's statement that in so far as respondent no. 1 is concerned, the feature of "*latching on*" has already been disabled; respondent no1's grievance stands addressed at interim stage.

15. Considering the wider ramifications of the observations made regarding the feature of latching on; the observations made in Paragraph 17 to 20 of the impugned order, as quoted above, are stayed till the next date of hearing

16. List on 23.11.2022.

**FAO(OS) (COMM) 282/2022 & CM APPL. 42512/2022 (for exemption)**

17. Issue notice.

18. List on 23.11.2022.

**VIBHU BAKHRU, J**

**AMIT MAHAJAN, J**

**SEPTEMBER 27, 2022**

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