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KEYWORD ADVERTISING AND TRADEMARK USE: INSIGHTS FROM HINDWARE LTD. V. GROHE INDIA PVT. LTD.& ORS.

~Kriti Tyagi

INTRODUCTION

The Delhi High Court, in Hindware Ltd. V. Grohe India Pvt. Ltd. & Ors. [1]is the first Indian ruling that directly creates a symbiotic intersection of trademark law, online keyword advertising and intermediary liability under the Information Technology Act, 2000. The court has permanently restrained the Google LLC and Google India Private Limited and awarded nominal damages of Rs. 30 Lakh to the plaintiff, for allowing third-party advertisers to use the complainant's registered trademark "HINDWARE" as a keyword in its Google Ads (formerly AdWords) platform. While simultaneously narrowing the scope of intermediary safe harbour for platforms such as Google under Section 79 of the Information Technology Act, 2000, the court held that role of Google was beyond than passive intermediary.

FACTS

The mark Hindware has been recognized as a well-known trademark in relation to the sanitaryware products since 1991. The dispute traces its origin in the year 2013-14, when Hindware instituted two commercial suits in the Delhi High Court. It was discovered that the advertiser – defendants such as Grohe India, Cera and Omkara Infoweb, eventually reached the consensus and settled the matter. The proceedings contested against defendants – Google LLC and Google India, thereby significantly expanded the contours of trademark protection in the context of keyword advertising.

ISSUES

[1] *Hindware Ltd. V. Grohe India Pvt. Ltd. & Ors.,* CS (COMM) 591/2017 (Del.HC)

- Whether the use of a Hindware's registered trademark as a 'back-end' keyword constituted "use" of the mark within the meaning of Section 29 of the TradeMarks Act, 1999[2]?
- Whether Google was entitled to safe harbour protection as an "intermediary" under Section 79 of the Information Technology Act, 2000[3]?

STATUTORY INTERPRETATION: DOES KEYWORDS USE CONSTITUTE TRADEMARK "USE"?

Section 29(6)(d) of the Trade Marks Act, 1999 [4]lays down that a person uses a registered trademark if they use it "on business papers or in advertising" Google contended that the provision clearly laid down that it does not prohibit trademark appearing in an advertisement. It further argued that it was the advertisers and not Google who developed these ads based on keywords. Google only facilitated a neutral platform for advertising**.**

The court adopted a broader understanding of "use" in reference to the Section 2(2)(c)(i) [5]read along with Section 29(6) (d) of the Trade Marks Act, 1999. The court held that the phrase "in advertising" is not limited to the final advertisement but encapsulates the whole advertising process. Invisible, back-end and algorthmic deployment of a trademark as a trigger keyword amounts to commercialisation of trademark under the act. entails down that not only visible trademarks are protected but also invisible and algorithmic deployment of trademarks also may amount to commercial use under the Act**.** Moreover, the sale and active suggestion to the other advertisers of a competitor's registered mark without authorisation and prior consent constituted an unfair trade practices over the mark. Therefore, the Google position amounts an active involvement rather than a neutral facilitator of the commercial use of trademark.

THE INTERMEDIARY STANDARD: SAFE HARBOUR AND PLATFORM LIABILITY

Section 79 of the IT Act grants immunity to intermediaries in respect of third-party information, with the exception that the intermediary does not initiate or modify the content. However, Google's position was that it merely acted as neutral conduit. The Court declined to accept this

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[2] TradeMarks Act, 1999, § 29
[3] Information Technology Act, 2000, § 79
[4] TradeMarks Act, 1999, § 29 (6)(d)
[5] TradeMarks Act, 1999, § 2(2)(c)(i)

argument. The court held that Google is "not a passive intermediary but runs an advertisement business of over which it has pervasive control" The reasoning rested on the fact that Google's Keyword Planner is an active tool that recommends competitors' trademarked terms to potential advertisers. It has an auction system from where it retains all the revenue generated and thereby, earning profit. In that vein, ruling drew a distinction that a true intermediary facilitates infrastructure and remains neutral as to how it is used. Consequently, the safe harbour under Section 79 remains unacceptable in regard to the Google Ads programme.

OBSERVATIONS

The ruling underscores the notable significance and well-deduced observations in the development of trademark protection **-**

1. **PLATFORM LIABILITY**
   The judgement provided the judicial answer for the correct interpretation of Section 79 of IT Act, 2000 that the provision was not designed to protect those monetising the revenue model. Resultantly, the court did not extend safe harbour protection to the intermediaries.
2. **INTERPRETATION OF THE WORD "USE IN ADVERTISING"**
   The court's wider interpretation of "use in advertising" under Section 29 of the Trade Marks Act, clearly held that the provision does not extend to explicit visible advertisements only, but also involve backend keyword and invisible deployments as well as sponsored search activation.
3. **JUDGEMENT WITHIN GLOBAL JURISPRUDENCE**
   The ruling deviates from the application adopted by both the Court of Justice of the European Union in Google France v. Louis Vuitton, [6]where it was held that Google does not itself "use" a trademark by storing it as a keyword.
   Indian Jurisprudence clearly held that the commercial value attached to a trademark provided the platform the revenue because of the well-known trademark creates a responsibility towards the mark's owner.

DECISION

[6] *Google France v. Louis Vuitton*, (2011) All E.R. (EC) 411 (E.U Court)

The court ordered the defendants to pay the nominal damages of Rs. 30 Lakh jointly and severally, within the time span of eight weeks and restrained the Google LLC and Google India to use plaintiff's registered trademarks- HINDWARE and its variants, in its keyword on the Google Ads platform.

CONCLUSION

This significant ruling is not limited to IP, but goes beyond that. The most persistent flashpoint addresses the nexus between the platform's revenue model and the commercial value of registered trademarks. The court's interpretation of the word 'use" as well as not extending safe harbour protection is based on evaluating the Google's role. The Delhi High Court broadened the scope of trademark rights by furnishing the clarity that the active involvement of an advertising platform and generating profit from the keyword could render the safe harbour protection ineffective.