

(2022) 04 DEL CK 0146

Delhi High Court

Case No: Civil Suit (COMM) No. 1 Of 2017

M/S DRS Logistics (P) Ltd & Anr

APPELLANT

Vs

Google India Pvt Ltd & Ors

RESPONDENT

Date of Decision: April 21, 2022**Acts Referred:**

- Code Of Civil Procedure, 1908 - Section 151, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A
- Contempt Of Courts Act, 1971 - Section 12
- Trade Marks Act, 1999 - Section 28

Hon'ble Judges: Asha Menon, J**Bench:** Single Bench

Advocate: Chander M. Lall, Nancy Roy, Payal Kalhan, Ananya Chug, Prakriti Varshney, Jeevesh Nagrath, Arun Kathpalia, Saransh Jain, Shloka N., Shaurya R. Rai, Bani Brar, Kshitij Parashar, Swati Mitta, Sandeep Sethi, Neel Mason, Vihan Dang, Vennela Reddy, Aditi Umapathy, R. Ramya, Akshay Bharadwaj, Parva Khare

Judgement

Asha Menon, J

I.A. 2173/2022 (of plaintiffs u/O XXXIX R-2A CPC and under Section 12 of the Contempt of Court Act, 1971 against the

defendants/contemnors for violation of order dated 30.10.2021)

1. This order has been necessitated on account of the vehement opposition on behalf of the defendants No.1 & 3/respondents No.1 to 17 against the issuance of notice on the application.

2. For a brief background, it may be noted that the applicants are the plaintiffs in the suit seeking permanent injunction against the defendants, in which

I.As. No.21153/2011 and 4474/2014 were filed for interim relief. Vide order dated 30th October, 2021, I.As. No.21153/2011 and 4474/2014 were

allowed on the following terms and para 127 of the judgment is reproduced for ready reference:

“127. I must state here that the plaintiff can seek protection of its trademarks which are registered in view of Section 28 of the TM Act,

but cannot have any right on surnames / generic words like Packers or Movers individually. Having said that in view of my above

discussion, the applications are liable to be allowed, subject to final determination of the suit in the following manner:

(I) The defendant Nos.1 and 3 shall investigate any complaint to be made by the plaintiff to them alleging use of its trademark and its

variations as keywords resulting in the diversion of traffic from the website of the plaintiff to that of the advertiser.

(II) The defendant Nos.1 and 3 shall also investigate and review the overall effect of an Ad to ascertain that the same is not infringing /

passing off the trademark of the plaintiff.

(III) If it is found that the usage of trademark(s) and its variations as keywords and / or overall effect of the Ad has the effect of infringing /

passing off the trademark of the plaintiff then the defendant Nos.1 and 3 shall restrain the advertiser from using the same and remove /

block such advertisements.”

3. The instant application has been moved under Order XXXIX Rule 2A read with Section 151 of the Code of Civil Procedure, 1908 (“CPC” for

short) and Section 12 of the Contempt of Courts Act, 1971 alleging that the respondents/alleged contemnors had violated the order dated 30th

October, 2021.

4. According to the applicants/plaintiffs, when they sought to conduct a Google search with the keywords “AGARWAL PACKERS & MOVERS

and AGGARWAL PACKERS & MOVERS”, they were shocked to see that the Search Engine still reflected the third parties sponsored links

with the use of the said keywords. What troubled them more was that nowhere on their websites, the marks

â€~AGARWAL/AGGARWAL/AGARWAL PACKERS & MOVERS/AGGARWAL PACKERS & MOVERSâ€™™ in conjunction with each other

were listed and despite this, such third parties websites appear on the top results of Google. This according to them was a violation of the interim

injunction and a notice was addressed to the respondents/alleged contemnors on 29th November, 2021. The respondent/alleged contemnor No.6 sent a

response on 3rd December, 2021, which, according to the applicants/plaintiffs, contained a misinterpretation of the judgment dated 30th October, 2021.

Once again on 14th December, 2021, the applicants/plaintiffs found that the respondents/alleged contemnors continued to permit third parties to use

â€~AGARWAL PACKERS & MOVERSâ€™™ and â€~AGGARWAL PACKERS & MOVERSâ€™™ as a keyword/meta tag/trade mark. The

sponsored links which were part of the notice sent by the applicantsâ€™™/plaintiffsâ€™™ counsel on 29th November, 2021 continue to appear in the Ads

section of the respondentsâ€™™/alleged contemnorsâ€™™ website. The screenshots have been reproduced in the application.

5. It is the grievance of the applicants/plaintiffs that the Search Engine www.google.com continue to list the applicantsâ€™™/plaintiffsâ€™™ trade mark

â€~AGARWAL PACKERS AND MOVERSâ€™™ as well as â€~DRS AGARWAL PACKERS AND MOVERSâ€™™ as one of the top options. The

Keyword Planner Tool accessed on 26th January, 2022 on the Search Engine www.google.com reflected that the applicantsâ€™™/plaintiffsâ€™™ trade

mark â€~AGARWAL PACKERS & MOVERSâ€™™ was suggested as competitive with a bidding rate as high as Rs.104/- for the search term

â€œagarwal packers and movers near meâ€. The Planner also suggested that the potential customers and users have searched for â€~AGARWAL

PACKES AND MOVERSâ€™™ on an average of 10,000 times in a month. Printouts of all these searches have been annexed to the application.

6. In the background of these facts, the applicants/plaintiffs have sought the following reliefs:

â€œ(a) Pass an order directing strict compliance of the order dated 30th October 2021 by the Contemnors forthwith;

(b) Pass an order holding the Contemnors guilty of Contempt of Court for wilfully violating the interim injunction order dated 30th October

2021 passed by this Hon'ble Court and initiate appropriate proceedings against the Contemnors and every such other person who are

in charge and responsible for the working, functioning and operations of the Contemnors business;

(c) Pass an order for the attachment of the property of the Contemnors and of every such other person, who at the time of such

disobedience was committed was/is in charge of the Contemnors' business;

(d) Pass an order for detaining the Contemnor Nos. 2-5 and 7-17 in civil prison for the maximum period of 3 months and/or impose a heavy

fine on the Contemnors who are found guilty of disobedience and violation of the interim injunction order dated 30th October 2021 passed

by this Hon'ble Court;

(e) Pass an order imposing exemplary costs on the Contemnors for their wilful violation of the interim injunction order dated 30th October

2021 and award such costs to the Plaintiffs towards compensation for costs incurred in the drafting, filing, and arguing of the present

application;

(f) Pass an order directing freezing of bank accounts of the Contemnors;

(g) Any such order as this Hon'ble Court may deem fit; and

(h) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

7. Mr. Chander M. Lall, learned senior counsel for the applicants/plaintiffs submitted that the judgment dated 30th October, 2021 was very clear that

the defendants/alleged contemnors could not use the trade mark of the applicants/plaintiffs or bond their name. The purport of the order was not

merely to avoid confusion if the origin of the Ads was clear. According to the learned senior counsel, the court considered the issue of the use of

keywords and since the defendants/alleged contemnors had claimed that as per their policy, neither texts nor Ad title would reflect the trade mark, the

only issue considered by the court was the use of keywords and the court had held in favour of the applicants/plaintiffs. As such, the continued use of

“AGARWAL PACKERS & MOVERS” and “AGGARWAL PACKERS & MOVERS” as a keyword, meta tag, trade mark was

evidently a violation of the orders. Hence, it was submitted that notice be issued and the matter be proceeded with.

8. Mr. Sandeep Sethi, learned senior counsel for the defendant No.3/alleged contemnor No.6, on the other hand submitted that the application was a

gross abuse of the process of the court as there was no violation of the order. The screenshots filed by the applicants/plaintiffs being Documents No.4

and 6 would show that the result was on an organic search, it included the applicants/plaintiffs advertisements and names. Any person who wanted to

advertise had to choose a word or a set of words as key and whenever anyone accessing the Google search uses the keyword/s, the advertisement

will be thrown up. According to the learned senior counsel, Google permitted use of keywords that may be somebody else's trade mark, like in the

case of "ADIDAS" and "NIKE".

9. According to the learned senior counsel, the reliefs as claimed by the applicants/plaintiffs were not granted, rather the defendants No.1&3, were

empowered to look into and investigate any complaint by the applicants/plaintiffs, if it was resulting in diversion of traffic from the applicants/plaintiffs

website to that of a competitor/advertiser. However, the applicants/plaintiffs have not made any complaint of diversion having occurred. It is only if

the defendants No.1&3, on receipt of a complaint from the applicants/plaintiffs and reviewing the same, found that the advertiser was infringing and

passing off their services as that of the applicants/plaintiffs, would the defendants No.1&3, be required to remove or block such advertisement. So, the

question of infringement was to be decided only by the defendants No.1&3. Thus, in keeping with the policy of Google, the use of keywords not being

injunctioned by the court, was available for use and no contempt had been caused. The learned senior counsel submitted that the hypothetical example

given by the court in the judgment at pages 93 to 94 supported these contentions. Thus, as neither in title nor URL nor texts, there was any confusion,

the use of the keywords was not barred.

10. It was further urged that no complaint in terms of the order had been submitted to the defendants/alleged contemnors since the letter/notice dated

29th November, 2021 only alleged that the Search Engine showed third parties advertisement. But as no such restraint had been issued by the court,

there was no reason to block these third party Ads which could appear on a page on an organic search. Even the applicants/plaintiffs have

acknowledged that the trade mark of the applicants/plaintiffs had not been used, in its letter (page 146 of documents filed with I.A. No.2173/2022 in e-

file). It is further submitted that the applicants/plaintiffs response to the reply of the defendants accepted that the investigation had to be made by

Google itself. Therefore, now no grievance could be raised.

11. Reliance has been placed on Ram Kishan Vs. Tarun Bajaj and Ors. (2014) 16 SCC 204, Sunder Lal and Ors. Vs. Ram Kumar and Ors. 2003

SCC OnLine P&H 128, U.C. Surendranath Vs. Mamballya's Bakery (2019) 20 SCC 666, Food Corporation of India Vs. Sukh Deo Prasad (2009)

5 SCC 665, Dr. U.N. Bora, Ex-Executive Officer & Ors. Vs. Assam Roller Flour Mills Association & Anr. (2022) 1 SCC 101, Sushila Raje Holkar

Vs. Anil Kak (2008) 14 SCC 382, Krishna Gupta Vs. Sh. Narendra Nath And Anr. 2017 SCC OnLine Del 10990, Bhupinder Singh & Anr. Vs.

Parmodh Singh & Anr. 2007 SCC OnLine HP 27 and order dated 2nd June, 2021 in Kent RO Systems Ltd. & Anr. Vs. Apex Service Centre & Ors.

in CS(COMM) 137/2019, in support of these contentions.

12. Both Mr. Sandeep Sethi, learned senior counsel for the defendant No.3/alleged contemnor and Mr. Arun Kathpalia, learned senior counsel for all

the respondents/alleged contemnor submitted that the application as framed disclosed mala fide intention of the applicants/plaintiffs. It was pointed out

by Mr. Kathpalia, learned senior counsel that there were only three defendants namely (i) Google India Pvt. Ltd., (ii) Just Dial Ltd. and (iii) Google

Inc. However, fourteen others have been impleaded as respondents/alleged contemnors. It was submitted that the contempt proceedings are serious

matters and in the nature of quasi criminal proceedings, but no allegation or categorical assertion of responsibility has been levelled against these

respondents/alleged contemnors. The respondents/alleged contemnors No.2 to 5 are the Directors of defendant/alleged contemnor No.1, the

respondents/alleged contemnors No.1&6 are defendants No.1&3, respondent/alleged contemnor No.7 is the Chief Executive Officer of defendant

No.3, who is located in USA, respondents/alleged contemnors No.8 to 17 are again Directors of defendant No.3, who are not parties to the suit, yet

they have been impleaded only for sensationalism. It was submitted that this effort should be nipped in the bud.

13. It was further submitted by Mr. Arun Kathpalia, learned senior counsel that when a specific prayer in respect of use of keyword had not been granted, it had to be taken that the relief had been refused. As such, there can be no other conclusion, but that, the defendants have complied with the order in letter and spirit. On the contrary the applicants/plaintiffs are misinterpreting the order and on that basis the defendants/alleged contemnors could not be dragged over the coals. In fact, according to the learned senior counsel, this was an attempt to obtain those reliefs that had been denied when the applications under Order XXXIX Rules 1&2 CPC had been disposed of. It was also urged that in case the order was open to two interpretations then the defendants cannot be accused of non-compliance. Hence, it was prayed that the application be dismissed without issuance of notice.

14. In rebuttal, Mr. Chander M. Lall, learned senior counsel for the applicants/plaintiffs submitted that the order was not open to multiple interpretations. It was submitted that the defendants had filed an appeal against the judgment dated 30th October, 2021 and in the grounds of appeal had stated that they were aggrieved with the restraint of the use of the trademark, thus, clearly understanding that the interim protection given to the applicants/plaintiffs included the non-use of their trade mark. It was submitted that it was on account of the statements made by Google and their disclosed policy in court that orders in respect of trade mark was not pressed. However, in the present case, there were non-visible embedding of meta tags. It is on account of embedding that with the use of a keyword, competitor's names and websites showed up, as the use of the trade mark of the applicants/plaintiffs itself was constituting the keywords. Furthermore, a complete blanket ban would have affected the licensed user of the trademark of the applicants/plaintiffs, which was why the relief was moulded.

15. Thus, it was contended that the defendants/respondents/alleged contemnors were mischievously interpreting the orders and thus blatantly disobeying directions. It was further submitted that in the European Union such trade marks cannot be used as keywords and therefore was not no

question why a similar policy cannot be enforced in India. Reliance has been placed on the judgment of the Madras High Court in Consim Info Pvt.

Ltd. Vs. Google India (P) Ltd. 2010 SCC OnLine Mad 4967 and Consim Info (P) Ltd. Vs. Google India (P) Ltd. 2012 SCC OnLine Mad 3462 in this

regard. The possibility of confusion has been discussed in the judgment dated 30th October, 2021 in paras No.95, 96, 99 and 100. Reference has also

been made to the discussions in paras No.101 to 105 to submit that the court disapproved of the double standards of Google in trying to seek to use the

keywords formed of the trade mark of entities while not doing so in the European Union.

16. According to the learned senior counsel what was required to be done by the defendants was one to determine whether the keyword was a trade

mark and if it was then to ascertain whether it was used by the licensee or not, and then if it found that these were third parties, they had to block the

advertisements. Thus, the intent of the judgment dated 30th October, 2021 was to prevent diversion whereas the action of the defendants/respondents/

alleged contemnors were quite to the contrary. It is further pointed out that all judgments relied upon by the learned senior counsel on behalf of the

defendants/alleged contemnors were those that were decided after reply had been filed. Therefore, the contempt case may be proceeded with.

17. It was further submitted that it was only the conceit of the Directors of Google that they are refusing to subject themselves to the jurisdiction of

this court to even file a response.

18. I have heard the submissions of the learned senior counsel for the parties and have considered the cited judgments. It is the considered view of

this Court that as regards the defendant No.1/respondent/alleged contemnor No.1 and the defendant No.3/respondent/alleged contemnor No.6, they

had received the orders. Whether there has been willful disobedience or not cannot be considered at this juncture qua these two respondents/alleged

contemnors. Moreover, it would be for the defendants No.1&3/respondents/alleged contemnors No.1 & 6 to state and disclose to the court, as to who

received the orders on their behalf and who would have the obligation to implement these orders within the organization to enable the court to take a

considered decision, whether to proceed against them or not. Whatever be their defence to the application, namely, that they had complied with the orders or that they had caused no contempt, would have to be considered, but not in the present summary fashion, as sought. The application is under Order XXXIX Rule 2A CPC as also under Section 12 of the Contempt of Courts Act, as such these are quasi criminal proceedings. The response of the alleged contemnors needs to be brought on record and at least one opportunity in this regard can be accorded to them.

19. Notice, therefore, is required to be issued to defendants No.1&3 / respondents / alleged contemnors No.1 & 6.

20. Since they are already before the court, notice is issued on the application only formally.

21. Six weeksâ€™ time is granted to the defendants No.1&3 / respondents / alleged contemnors No.1 & 6 to file a response to the application.

22. Coming to the remaining respondents/ alleged contemnors, there are certain aspects that require to be considered. The application is silent on the

responsibility of the respondents/alleged contemnors No.2 to 5 and 7 to 17, except for the fact that they are Directors. No doubt the company would

act through its Directors but without anything more, the court cannot attach knowledge of the passing of directions on 30th October, 2021 to them, nor

can these respondents/alleged contemnors be held liable for disobedience that too willful without further details. The applicants/plaintiffs will first have

to establish that the orders were conveyed to one or all of these respondents/alleged contemnors, before it can be held whether despite knowledge,

there has been disobedience. It would then be the defence of the respondents/alleged contemnors that they were not involved in the execution of the

directions. Furthermore, as held by the Supreme Court in Dr.U.N. Bora case (supra), there cannot be vicarious liability in contempt proceeding.

Therefore, for the present, none of these respondents/alleged contemnors, need to be even issued notice on the application.

23. However, this would not pre-empt the applicants/plaintiffs, on disclosures made in the responses of defendants No.1&3/respondents / alleged

contemnors No.1&6, regarding the actual responsibility of complying with the directions issued, to amend the application and seek notices to be issued

to the persons responsible, so as to initiate proceedings against them.

24. Thus, while proceedings shall continue qua defendants No.1&3/alleged contemnors No.1&6, the other respondents/alleged contemnors are

discharged, subject, of course, to anyone of them being named by the defendants No.1&3/alleged contemnors No.1&6, as being responsible for

compliance of court directions and upon such disclosure, the applicants/plaintiffs seeking appropriate directions from the court. Ordered accordingly.

25. List before the Roster Bench for further proceedings on 5th May, 2022.

26. The order be uploaded on the website forthwith.