

# LEXOLOGY®

## Delhi High Court yet again calls for accountability from e-commerce platforms.

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The Single Judge of the Delhi High Court (Court), Justice Pratibha Singh, has recently passed a detailed order on the role, responsibility and accountability of intermediaries and held that the e-commerce platforms are bound by the Model Framework for Guidelines on Direct Selling 2016 (Direct Selling Guidelines) and restrained the e-commerce platforms from selling the products of the Plaintiffs (defined below) except with the written consent from the Plaintiffs.

### Brief facts

The Court was considering applications for interim injunction in a bunch of seven suits, involving 'direct selling entities' viz: Amway India Enterprises Private Limited, Modicare Limited and Oriflame India Private Limited (Plaintiffs) and e-commerce platforms such as Amazon, Flipkart, Snapdeal, IMG, Healthkart along with some sellers on such platforms (Defendants) [CS(OS) 410/2018; 453/2018; 480/2018; 531/2018; 550/2018; 75/2019 and 91/2019].

The Plaintiffs who were engaged in the business of health and cosmetic products filed the abovementioned suits. It was the Plaintiffs' case that they sell their products through a system of 'direct selling' wherein they enter into agreements with their respective direct sellers, who in turn sell the products directly to consumers. Such agreements contain stringent terms and conditions in accordance with the Direct Selling Guidelines including that the direct sellers are restrained to sell the products on e-commerce platforms, except with prior written consent of the Plaintiffs. The Plaintiffs learnt that their products were widely sold by the Defendants on the e-commerce platforms despite the fact that they never gave any permission to their direct sellers. The Plaintiffs also found that the products sold by the Defendants were impaired inter alia as (a) QR codes on some products were removed; (b) the price shown on some products were higher than the maximum retail price (MRP); (c) refund, return, guarantee and warranty conditions were completely altered. Thus, the Plaintiffs contended that such sales on e-commerce platforms amounted to tortious interference of their agreements with their direct sellers, infringement of their trade marks, passing off, dilution and unfair competition among other concerns.

The Court passed ex-parte ad-interim orders and also appointed local commissioners who executed the orders and submitted their reports. Thereafter, the Defendants filed their replies and the applications for interim injunction in all the suits were heard together.

The Defendants inter alia contended that the Direct Selling Guidelines (a) are merely executive instructions and are not enforceable in law; (b) apply only to the Plaintiffs and their direct sellers, and not to them; (c) impinge upon their fundamental right to trade and business enshrined under Article 19(1)(g) of the Constitution of India. On the issue of infringement and passing off, the Defendants argued the 'doctrine of exhaustion' contending that once the Plaintiffs sold their products to the direct sellers, their proprietary rights stood exhausted as per Section 30 of the Trade Marks Act, 1999. The e-commerce platforms further heavily relied upon Section 79 of the Information Technology Act, 2000, the Information Technology (Intermediaries Guidelines) Rules 2011 (Intermediary Guidelines) and the judgment of the Hon'ble Supreme Court in Shreya Singhal v Union of India, inter alia contending that they have no role to play in such sales, and they merely act as facilitators. It was further contended that they are only required to take down content once they receive 'actual knowledge', in the form of a court order, that certain content is in violation of law. The e-commerce platforms also relied upon Press Note 2 of 2018 issued by Ministry of Commerce & Industry (Press Note 2) which permits facilitation services provided by them.

### Decision

The Court in its decision prima facie observed that the Direct Selling Guidelines were enforceable in law, and the guidelines do not infringe the fundamental rights of the Defendants inasmuch as it merely imposes a reasonable restriction upon the e-commerce platforms requiring them to permit sale of products only with the prior written consent of the Plaintiffs. The Court in its decision also took into account the reports submitted by the local commissioners which showed impairment of the goods at the warehouses of the e-commerce platforms. On the 'intermediary defense' of the Defendants, the Court observed that the role of the e-commerce platforms was prima facie not entirely passive. The Court found that the e-commerce platforms were not compliant with their own policies mentioned on their websites, supposedly in terms of the Intermediary Guidelines, which provides that the seller can only sell products on its platform when it is authorized to do so as an 'authorized seller'. The issue of the extent of liability of the e-commerce platforms and the applicability of the Press Note 2 were left open to be decided after trial.

In light of the above observations, the Court restrained the Defendants from selling the Plaintiffs' products. The Court further directed that if any of the sellers obtain the consent of the Plaintiffs to sell their products through e-commerce platforms, such e-commerce platforms must, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description on their platforms. The decision was challenged before the Division Bench of the Delhi High Court by some of the defendants where no interim reliefs were granted, against which Special Leave Petitions have been filed before the Hon'ble Supreme Court, which are currently pending. Interestingly, the decision or the suit proceedings have not been stayed.

### Comment

In course of probing upon various issues, the Court on more than one occasion underlined the relevance and importance of the e-commerce industry. The decision is, albeit in the context of a conflict between the specific business model of 'direct selling' vis-à-vis sale on e-commerce platforms, however, the implications are likely to be far and wide. Particularly, the obligation cast upon the ecommerce platforms to disclose complete details of the sellers on their platforms, may come to the aid and benefit of all – the brand owners, the sellers, e-commerce platforms, and most importantly, the consumers at large. In this context, it is relevant to mention that the draft Guidelines for ecommerce for consumer protection published by Ministry of Consumer Affairs is open for public comments until 16 September 2019. The draft Guidelines also cast an obligation upon the e-commerce platforms to disclose the details of sellers on their platforms. It would be interesting to see how these suits progress along with the draft Guidelines.

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