



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

*Reserved on: 16.08.2023
Date of decision: 06.09.2023*

+ **CS(COMM) 259/2019**

**POLICYBAZAAR INSURANCE WEB AGGREGATOR
& ANR. Plaintiffs**

Through: Mr.Amit Sibal, Sr. Adv. with
Mr.Mohit Goel, Mr.Sidhant Goel,
Mr.Deepankar Mishra,
Mr.Abhishek Kotnala,
Mr.Karmanya Dev Sharma,
Mr.Rishabh Sharma, Mr.Saksham
Dhingra, Advs.

versus

COVERFOX INSURANCE BROKING PVT. LTD. & ORS.

..... Defendant

Through: Mr.Peeyoosh Kalra, Ms.V.
Mohini, Ms.Aarti Aggarwal &
Mr.Udayvir Rana, Advs. for D-1.
Mr.Arun Kathpalia, Sr. Adv. with
Mr.Aditya Gupta, Mr.Sauhard
Alung Advs. for D- 2.
Mr.Arvind Nigam, Sr. Adv. with
Mr.Neel Mason, Mr.Ankit Ratogi,
Mr.Vihan Dang, Ms.Aditi
Umapathy, Ms.Pragya Jain, Advs.
for D- 3 (Google LLC).

+ **CS(COMM) 260/2019**

**POLICYBAZAAR INSURANCE WEB AGGREGATOR
& ANR. Plaintiffs**

Through: Mr.Sai Deepak, Mr.Mohit Goel,
Mr.Sidhant Goel, Mr.Deepankar
Mishra, Mr.Abhishek Kotnala,
Mr.Karmanya Dev Sharma, Advs.

versus

ACKO GENERAL INSURANCE LTD. & ORS. Defendants



Through: Mr.Sandeep Sethi, Sr. Adv. with Mr.Peeyoosh Kalra, Ms.V. Mohini, Ms.Aarti Aggarwal & Mr.Udayvir Rana, Advs. for D-1. Mr.Arun Kathpalia, Sr. Adv. with Mr.Aditya Gupta, Mr.Sauhard Alung Advs. for D- 2. Mr.Arvind Nigam, Sr. Adv. with Mr.Neel Mason, Mr.Ankit Ratogi, Mr.Vihan Dang, Ms.Aditi Umapathy, Ms.Pragya Jain, Advs. for D- 3 (Google LLC).

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

I.A. 7213/2019 & I.A. 8129/2019 in CS(COMM) 259/2019
I.A. 7219/2019 & I.A. 8003/2019 in CS(COMM) 260/2019

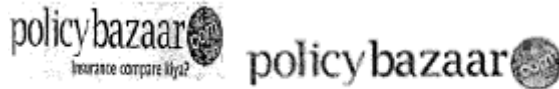
1. The above Suit(s) have been filed by the plaintiffs seeking to restrain the defendants from allotting and from using the trade name, terms and phrases as keywords on the defendant nos.2's and the defendant no.3's AdWords Program, which are identical to or deceptively similar to the plaintiffs' trade marks 'Policy Bazaar', 'PolicyBazaar' and 'Policy Bazar' in any manner, form, variation and/or combination, for its business through the Google Ads/AdWords program operated and managed by the defendant nos. 2 and 3.

Averments in the Plaint:

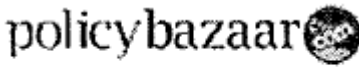
2. It is the case of the plaintiffs that the plaintiff no.1 is one of India's largest aggregators of insurance products and specializes in



making comparative analysis of insurance products and in assisting its customers to make an informed decision about their insurance policy needs. It is stated that the plaintiff no.1 is a wholly owned subsidiary of the plaintiff no.2, which is a fin-tech marketing company, providing technologically driven marketing services to its customers. The plaintiff no.2 is the owner/registered proprietor of the trade marks which are the subject matter of the above Suits. It is claimed that the plaintiff no.2 had adopted and used the ‘Policy Bazaar’, ‘PolicyBazaar’ and ‘Policybazar’ word marks and



the logos (hereinafter referred to as the ‘Policybazaar marks’), for all its business activities since the year 2008. The domain name www.policybazaar.com was registered in favour of the plaintiff no.2 in the year 2008. In 2014, the user rights in the Policybazaar marks were licenced to plaintiff no.1 through a licence agreement dated 15.12.2014. It is further claimed that the plaintiff no.2 is the registered proprietor of the following marks:-

| Mark | Registration No. | Class | Status |
|---|------------------|------------------------|------------|
|  | 1764845 | 16, 35, 36, 38, 41, 42 | Registered |



| | | | |
|---------------|---------|------------------------------|------------|
| | 1764846 | 35 | Registered |
| | 1764847 | 36 | Registered |
| | 1764848 | 38 | Registered |
| | 1764849 | 41 | Registered |
| Policy Bazaar | 2183635 | 16 | Registered |
| Policy Bazaar | 2183636 | 35 | Registered |
| Policy Bazaar | 2183637 | 36 | Registered |
| Policy Bazaar | 2183638 | 38 | Registered |
| Policy Bazaar | 2183639 | 41 | Registered |
| Policy Bazaar | 2672875 | 16 | Registered |
| | 2933536 | 16, 35, 36, 38, 41 | Registered |
| | 3734593 | 16, 35, 36, 38, 41, 42 | Registered |

3. The plaintiffs further claim that they enjoy enormous goodwill and reputation in the abovementioned registered trade




marks, as is evident from the yearly turnover generated by the plaintiffs in India, as set out in paragraph 11 of the plaint. It is further claimed that the plaintiffs make substantial investments in the advertising and other promotional activities of the said marks. The details of such marketing expenses incurred by the plaintiffs have been mentioned in paragraph 12 of the plaint. The plaintiffs claim that they also maintain an active and extensive presence on several prominent social-media platforms, including Facebook, Twitter, YouTube and Instagram. They state that the plaintiff no.1's website www.policybazaar.com is one of the most accessed and used online insurance aggregator service provider with an ever-increasing number of internet visitors on the said website. They give the internet hits on plaintiff no.1's website for the period 2009 to April 2019 in paragraph 17 of the plaint. They state that more than 78 Lakh people have used the services of the plaintiffs through plaintiff no.1's platform. They state that in 2014, plaintiff no.1 developed and launched a Mobile Application under the Policybazaar Marks. The said mobile application is available through various platforms, including Google Play Store and Apple's App Store, with a total of over 3.4 million downloads till 2019.

4. The plaintiffs submit that on account of extensive, continuous and uninterrupted use of the Policybazaar marks, the plaintiffs have acquired common law rights in the said marks and are, therefore, entitled to the exclusive and undisturbed use thereof. They submit that any use of the said marks by a third and unrelated



party would amount to a violation of plaintiffs' rights in their registered trade marks.

5. The plaintiffs state that the defendant nos.2 and 3 offer a keyword trigger advertisement program called Google AdWords, which is a self-serve online advertising service for businesses and which allows anyone, by paying a fee, to adopt and use the keywords or phrases, known as "AdWords", that match the terms or phrases that internet users are most likely to use/search for through the popular search engine of the defendant nos. 2 and 3 located at the web address www.google.com.

6. The plaintiffs state that a business entity has to first subscribe to the AdWords Program, construct campaigns and submit its list of proposed keywords to the defendant nos.2 and 3, after which the proposed keywords are allotted to such an entity by the defendant nos.2 and 3. Only upon such allotment, an entity would be able to bid for these keywords, and once such an entity has successfully bid for an Ad-Word, the search engine will display the website of such an entity in the search result under the section of 'Sponsored Links' as an advertisement, along with the mark '  ', with the link of the website of such entity. Therefore, such an entity receives assistance from the keyword suggestion tool of the defendant nos.2 and 3. Once an internet user clicks on the sponsored link, the defendant nos.2 and 3 earn revenue by way of the costs paid by the entity for displaying its advertisement in the sponsored links. By bidding for frequently searched Ad-Words through the Google AdWords Program, an entity strives to gain



increased visibility on the search engine, leading to increased traffic on its website and diversion of business from other entity's websites. The website/search engine of the defendant nos.2 and 3 displays up-to three sponsored links immediately after the natural search results and also displays the sponsored links to the right of the search results. The advertisers purchase their keywords through an auction where they bid competitively against each other for page position on the search results page as generally, the users of the internet are more likely to click on an advertisement that appears higher up on the search result page.

7. The plaintiffs claim that they have also subscribed to defendant no.2 and 3's AdWords Program and maintain an official AdWords account. Through this AdWords account, the plaintiffs bid for keywords, such as, 'Policybazaar', 'Policy bazaar', etc., which are the registered trade marks of the plaintiffs and are thus proprietary to the plaintiffs under the Trade Marks Act, 1999 (hereinafter referred to as the 'Act'). It is stated that these keywords when searched by the internet user through the search engine, trigger and show the plaintiffs' website. The plaintiffs state that by availing this AdWords Program, they have been able to attract internet users to their website for their business of web insurance aggregator and, therefore, it has become a key and integral business medium for the plaintiffs. The plaintiffs gave the list of some of the campaigns run by them through the AdWords Program in paragraph 37 of the plaint.



8. The plaintiffs claim that in CS (Comm) 259/2019, the defendant no.1, that is, Coverfox Insurance Broking Pvt. Ltd. is a company engaged in identical and/or allied and cognate business services of insurance brokering under the marks Coverfox and

Coverfox

and operates a website under the domain name 'www.coverfox.com'. While both plaintiff no.1 and defendant no.1 are distributors of insurance policies/products, however, as an insurance broker, the defendant no.1 carries on its business in an online and offline mode, whereas the plaintiff no.1 carries on its business entirely in the online mode.

9. The plaintiffs are aggrieved of the defendant no.1 bidding for the plaintiffs' Policybazaar Marks as AdWords through the defendant nos. 2 and 3's AdWords Program, resulting in the defendant no.1's website being displayed as a sponsored link on the search engine of the defendant nos.2 and 3 when a person searches for keywords containing the plaintiffs' Policybazaar marks. The plaintiffs claim that the defendant no.1 is illegally bidding and using the keywords identical to the plaintiffs' Policybazaar Marks with the intent of diverting business from the plaintiffs' website by causing confusion and association with the plaintiffs, thereby violating common law and statutory rights of the plaintiffs in the said registered marks of the plaintiffs.

10. The plaintiffs submit that the defendant nos.2 and 3 increase the 'Cost Per Click' (in short, 'CPC'), that is, the cost incurred by



the plaintiffs to get a single order or transaction due to such unauthorized bidding and use of the plaintiffs' Policybazaar marks by the defendants, thereby causing financial loss and burden on the plaintiffs for use of their own marks.

11. In CS (Comm) 260/2019, similar allegations are made against the defendants. It is stated that the defendant no.1 herein, that is, Acko General Insurance Ltd., is a General Insurance Company dealing in identical and/or allied and cognate business services and offers its services under the marks Acko and



and operates a website under the domain name 'www.acko.com'. It is stated that the defendant no.1 herein creates insurance products/policies.

RELEVANT PROCEEDING IN THE SUIT(S):

12. This Court, by its *ad interim ex-parte* orders dated 16.05.2019, restrained the defendant no.1 in both the Suits from adopting and using the plaintiffs' Policybazaar marks in any manner, form, variation and/or combination as an Ad Word, an AdWord Program, or any other Ad-Word/Keyword Program through Google, in any manner whatsoever.

13. Thereafter, the defendant no.1 in both the above Suits respectively, filed application(s) under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908, being IA No. 8129/2019 and IA No. 8003/2019 respectively. In the said applications, the defendant no.1 respectively, *inter alia* contended that the above *ad interim*



ex-parte orders dated 16.05.2019 have been obtained by the plaintiffs by concealing from this Court the fact that the plaintiffs themselves were bidding for the registered trade marks of the defendant no.1 as keyword in the Google AdWords Program of the defendant nos.2 and 3 for their business activities.

14. The above applications, that is, IA No. 8129/2019 and IA No. 8003/2019, were listed before this Court on 29.05.2019 and 28.05.2019, respectively.

15. This Court, taking into account the concealment of the fact by the plaintiffs that the plaintiffs were themselves bidding for the trade marks of the defendant no.1 in the two Suits as Keywords/Ad-Words in the AdWords Program of the defendant nos.2 and 3, suspended the *ad interim ex-parte* order dated 16.05.2019, vide its order dated 28.05.2019 in CS (Comm) 260/2019, and vide order dated 29.05.2019 in CS (Comm) 259/2019, while also imposing costs on the plaintiffs.

16. In both the Suits, the plaintiffs, thereafter, moved applications, being IA No. 11953/2019 in CS (Comm) 259/2019 and IA No. 11955/2019 in CS (Comm) 260/2019, seeking to amend their plaint, so as to now allege that the defendant nos.2 and 3 are also liable for infringing the trade marks of the plaintiffs.

17. On 14.07.2022, the learned senior counsel for the plaintiffs insisted that the applications for *interim* orders be heard without awaiting the outcome of the amendment applications. On such submission, the following order was passed:-



“At the outset, the learned senior counsel appearing for the Defendant Nos. 2 and 3 points out there is an application seeking amendment to the plaint, filed by the Plaintiffs, being I.A. No. 11953/2019 in CS(COMM) 259/2019 and I.A. No. 11955/2019 in CS(COMM) 260/2019. He submits that the hearing of the applications on interim relief should be considered after the said applications are decided.

The learned senior counsel appearing for the Plaintiffs, on instructions, submits that no interim relief is sought against the Defendant Nos. 2 and 3 and the same would not be sought even if the amendment applications are allowed in favour of the Plaintiffs. He submits that, therefore, these applications have no bearing on the hearing of the applications seeking interim relief. He further submits that during the course of the arguments he would not refer to the replication application for the purposes of the interim injunction.

It is in view of the above statement that the hearing in the applications seeking interim relief has commenced.

Arguments heard in part. To come up for remaining arguments on 5th August, 2022.”

18. Thereafter, hearings on the applications seeking *interim* relief filed by the plaintiffs, and on the applications filed by the defendant no.1 in the two Suits seeking vacation of the *ad interim* order granted, were heard and judgment was reserved.

19. While the judgment was under preparation, a Division Bench of this Court pronounced a judgment dated 10.08.2023 in ***Google LLC v. DRS Logistics (P) Ltd. & Ors.***, Neutral Citation: 2023:DHC:5615-DB, which dealt with the similar issues as involved in the present commercial Suits.



20. As the above judgment answers various issues that have been raised by the parties in the course of their submissions before this Court, this Court deemed it appropriate to list these applications for directions on 16.08.2023. On the said date, the learned counsels for the parties made their submissions on the effect of the judgment pronounced by the Division Bench of this Court in *DRS Logistics (P) Ltd. & Ors.* (Supra).

SUBMISSIONS OF THE LEARNED SENIOR COUNSEL FOR THE PLAINTIFFS

21. The learned senior counsel for the plaintiffs submits that by continuously bidding for the plaintiffs' Policybazaar marks, the defendant no.1 is guilty of infringing and passing off the marks of the plaintiffs and also causing loss to the plaintiffs as the plaintiffs have to pay the increased CPC. It also leads to the blurring of the distinctive character of the marks. The defendant no.1 also gains an unfair advantage by the use of the marks in the form of increased hits on its website and diversion of traffic from plaintiffs' website to its own.

22. He submits that if an internet user types any of the Policybazaar Marks, and the website of the defendant no. 1 appears in the search results, the internet user would at once perceive an association of the Defendant no. 1 with the Plaintiffs. The internet user is likely to be confused. He submits that the selected keyword is visible and perceivable to all internet users as it appears on the Google Search Engine and in the URL of the sponsored links.



23. He submits that the Google AdWords Program is an advertising service and, therefore, use by the defendant no.1 of a keyword, which is identical or similar to the plaintiffs' Policybazaar marks, would constitute 'use' in terms of Section 2(2)(b), Section 2(2)(c), and Section 29 of the Act. He submits that the defendant no. 2 and 3 also use the plaintiffs' marks by triggering/transmitting the advertisement of the defendant no. 1 on its Search Engine and by storing and aiding the selection thereof as keywords.

24. He submits that such use would result in infringement of the trade marks of the plaintiffs in terms of Section 29(2)(c) read with Section 29(3) of the Act, as the services for which the plaintiffs' trade marks are used by the defendant no.1, are identical to those of the plaintiffs. He submits that as the services of the plaintiffs' and the defendant no. 1 are identical, the Court will not inquire whether the infringement is such as is likely to deceive or cause confusion.

25. He submits that in terms of Section 29(7) of the Act, such use will also amount to infringement of plaintiffs' trade marks by the defendant no.1 inasmuch as the plaintiffs' marks are applied by the defendant no.1, and are also permitted to be applied by the defendant nos.2 and 3, to the web pages on the internet in order to be used for advertising defendant no.1's services.

26. He submits that as such the defendant no.1 is guilty of infringing the registered trade marks of the plaintiffs. He submits that in terms of Section 29(8) of the Act, the use of the registered trade mark by the defendant no. 1 provides an unfair advantage to



the defendant no.1; and it is contrary to the honest practices in industrial and commercial matters. It is also detrimental to the distinctive character of plaintiffs' marks and causes dilution on the part of the public.

27. He submits that the defence of the defendants that the use of the trade marks is invisible is also incorrect, inasmuch as the same is patently visible and perceivable to all internet users in a tangible form. Even otherwise, such invisible usage of trade marks, such as meta-tags, has also been held to constitute infringement of a trade mark. He submits that mere diversion of internet traffic to defendant no.1's website would also be actionable without the requirement of any further proof of confusion. He submits that the use of the trade marks as a keyword would cause initial interest confusion or pre-sale confusion, which also is actionable.

28. He submits that the test to be applied in the present case is that of a consumer of average intelligence having imperfect recollection. Applying such a test, and keeping in view that the services of the plaintiffs and the defendant no.1 are used by all classes of consumers, in both urban and rural areas, confusion being caused by the complained use is apparent, resulting in the passing off of the defendant no.1's services as that of the plaintiffs.

29. On the question of suppression, the learned senior counsel for the plaintiffs submits that the plaintiffs had made sufficient disclosure in the plaint that they were not bidding for the defendant no.1's marks at the time of the institution of the present Suits. He further submits that the plaintiffs have also deposited the costs that



were imposed by this Court and, therefore, the *interim* applications should now be decided on merits. He submits that even otherwise, the plaintiffs are claiming their statutory rights, which cannot be defeated on grounds of equity.

SUBMISSIONS OF THE LEARNED SENIOR COUNSEL FOR THE DEFENDANT NO.1

30. On the other hand, the learned senior counsel for the defendant no.1 submits that the plaintiffs are guilty of concealment and have approached this Court with unclean hands. He submits that this is a sufficient ground for denying any *interim* relief to the plaintiffs. He further submits that the plaintiffs are also guilty of acquiescence and their claim is barred by *estoppel*. He submits that having voluntarily acceded to the Google AdWords Program by themselves creating an AdWord account and bidding on the third party marks, including the trade marks of the defendant no.1, plaintiffs cannot now be allowed to raise any objections even to the defendant no.1's use of the Policybazaar marks for the very same program. The plaintiffs having utilized the Google AdWords Program for their benefit, hence, cannot now accuse the defendants of having committed any wrongful acts.

31. He submits that keywords for an internet search do not fall within the scope of a trade mark, as defined under Section 2(1)(zb) of the Act. It is merely a back-end trigger for triggering the pooling of the advertisements and does not perform any trade mark



function, such as, origin or source identification, and is, therefore, not a trade mark under the provisions of the Act.

32. He submits that the same is also not a use of the mark as defined under Section 2(2)(b) or Section 2(2)(c) or Section 29 of the Act.

33. He submits that the use of the keyword also cannot amount to an infringement of a trade mark under Section 29 of the Act. He submits that the use of a trade mark as a keyword, on its own, does not lead to any confusion, which is a *sine qua non* for trade mark infringement or passing off. For determining confusion or likelihood of confusion, the relevant or proper comparison ought to be made between the resulting advertisements.

34. He submits that the Google Ads Program is merely a medium for advertising, while the text of the advertisement displayed shall be material of advertising. Therefore, Section 29(7) of the Act shall be attracted only where in the text of the advertisement itself, there is use of plaintiffs' trade marks.

35. He submits that the advertisements complained of in the present Suits, do not contain any reference of plaintiffs' marks and clearly identifiable as those relating to the defendant no. 1. He submits that, therefore, Section 29(8) of the Act is not attracted in the facts of the present Suits.

36. He submits that a mere diversion of consumers/users is not actionable *per se*, without any confusion or likelihood of confusion on the part of the consumers. Similarly, the mere generation of



initial interest is not sufficient to hold the defendant no.1 guilty of infringement or passing off of a trade mark.

37. He submits that the persons using the internet to look for Insurance policies, are internet literate, having a basic understanding of how a search engine functions and know the difference between organic search results and the sponsored search results and advertisements. They cannot, therefore, be confused by the advertisements which clearly depict the source.

SUBMISSIONS OF THE LEARNED SENIOR COUNSEL FOR THE DEFENDANT NOS.2 AND 3

38. The learned senior counsel for the defendant nos.2 and 3 submits that use of trade marks as keywords does not amount to ‘use’ of a mark under the Act. He submits that the use of keywords as a backend trigger of an advertisement, which is invisible and can neither be seen nor be understood by any user/consumer, is not likely to be perceived as a trade mark being used, especially by the defendant nos.2 and 3.

39. He submits that mere triggering of an advertisement by a third party cannot *per se* give rise to an assumption of confusion being caused in public. In the absence of any actual or visible use of the trade mark within the text of an advertisement, no question of likelihood, confusion, or deception arises.

40. He submits that the users of the Google Search Engine understand how the search results are generated and also understand the difference between the normal organic search



results and the advertisements, as the advertisements/sponsored links are visible under the mark ‘ Ad ’ and, therefore, there is no likelihood of confusion being caused in the public/users of the search engine.

41. He submits that no case of infringement of the trade marks of the plaintiffs is made out in the facts of the present case. He submits that in the absence of confusion or misrepresentation, no case of passing off is also made out.

42. He submits that even otherwise, the defendant nos.2 and 3 would be entitled to seek protection under Section 30(1) of the Act, against the claim of infringement by the plaintiffs.

ANALYSIS AND FINDINGS:

43. I have considered the submissions made by the learned counsels for the parties. In fact, I must state that the legal submissions on the applicability of Section 2(2)(b), 2(2)(c) and Section 26 and also Section 29 of the Act to the Google AdWords Program of the defendant nos.2 and 3 have been answered by the Division Bench of this Court in *DRS Logistics (P) Ltd. & Ors.* (Supra) and, therefore, I can do no better but merely refer to the relevant findings of the Division Bench to answer the submissions made by the learned counsels for the parties herein.

WHETHER USE OF A MARK AS KEYWORD AMOUNTS TO ‘USE’ UNDER SECTION 2(2), 2(3), AND 29(6) OF THE ACT



44. In *DRS Logistics (P) Ltd. & Ors.* (Supra), the Division Bench of this Court has held that the expression ‘use of a mark’ is to be understood, as instructed by Section 2(2)(b) or Section 2(2)(c) of the Act, depending on the context in which the said expression is used. The Court held that Section 2(2)(c)(i) of the Act is couched in wide terms. Any reference to the use of a mark in relation to goods is not only limited to use in any physical form but also ‘*in other relation whatsoever*’ to such goods. The Court further held that it is difficult to accept that the use of a mark in relation to services must be construed in a narrower sense than the use of the mark in respect of goods, however, the same would depend on the context in which the expression ‘*use of the mark*’ is used.

45. It has been further held by the Division Bench that the words of Section 2(2) of the Act do not control the width of Section 29(6) of the Act. Thus, if any action falls within the scope of Section 29(6) of the Act, the same would necessarily have to be construed as use of the mark for ascertaining whether the trade mark is infringed in terms of Section 29 of the Act.

46. The Division Bench on the ‘*use of a trade mark*’ in relation to Google AdWords Program has held as under:-

“90. Indisputably, the Ads Programme is Google’s commercial venture to monetize the use of the Search Engine for advertising by displaying the sponsored links of various advertisers, who seek to display their advertisements on the SERP pursuant to search queries initiated by an internet user. The use of a trademark as keywords for display of advertisements in respect of goods or



services clearly amounts to use of the trademark in advertising within the meaning of Section 29(6) of the TM Act.

91. The expression “in advertising” as used in Section 29(6)(d) of the TM Act is not synonymous to the expression ‘in an advertisement’. It is not necessary that the registered trademark physically appears in an advertisement for the same to be used “in advertising”. The use of a trademark as a keyword to trigger display of an advertisement of goods or services would, in plain sense, be use of the mark in advertising.

92. The conclusion of the Court of Justice of the European Union in Google France SARL and Google Inc. v. Louis Vuitton Malletier SA& Ors. that use of a sign by an advertiser, which is identical to the trademark as a keyword, in the context of an internet referencing service, would be the use of the same in relation to goods or services, is persuasive on this aspect, our view is similar.

93. It is important to distinguish between use of a mark as a trademark, and its use other than as a trademark. The use of a trademark as a keyword by an advertiser for the purposes of displaying its advertisements on the Search Engine, is use of the mark in relation to the goods and services offered by an advertiser. But it is not use that mark as a trademark.”

(Emphasis supplied)

47. The Division Bench also rejected the submission of defendant nos.2 and 3 that as the keyword is not visible to the internet user, the same would not amount to a use of the trade mark. The Court observed as under:-

“98. There is merit in the contention that meta tags are materially different from keywords used in the Ads Programme. For one, the paid advertisements in the Ads Programme are displayed as sponsored links. Meta tags are embedded by proprietors of websites in the source code to take advantage of the internet search



engine's process of indexing. The internet search engine would index links to sites associated to the search query and the use of meta tags relevant to the search query, result in the advertiser's website being displayed as a part of the organic search. This may give an impression to the internet user that that the links displayed have a connection with the search query. However, the learned Single Judge had referred to meta tags and the decisions rendered in cases relating to use of meta tags, to address the contention whether use of trademarks which is not visible to the internet user may in given circumstances amount to infringement of the trademarks.

99. We find no infirmity with the reasoning of the learned Single Judge in considering the use of trademarks as keywords analogous to using the same as meta-tags, for the limited purposes of examining whether use of a trademark, which is not visible may infringe the trademark. Merely because the meta-tags may be visible to a person who examines the source code of a website is not material. The use of meta-tags and keywords, in one sense, serves similar purpose for displaying advertisement and attracting internet traffic.

100. As noticed above, meta-tags serve as a tool for indexing the website by a search engine. Thus, if a trademark of a third party is used as a meta-tag, the same would serve as identifying the website as relevant to the search query that includes the trademark as a search term. The use of keywords in the Ads Programme also serves the same purpose. It, essentially, in a manner of speaking, tags a link of an advertiser (sponsored link) with the keyword(s). The same are used as a device to catalogue the sponsored link. The fact that using a keyword may not necessarily lead to display of the advertiser's link as a sponsored link on the SERP, pursuant to a search query that includes a keyword as a search term, makes little difference. Admittedly, the use of the keywords enables an advertiser for placing its sponsored link in the short list, which is finally considered



for display on the SERP. There may be other parameters that are relevant for determining the final list of sponsored links that are displayed on the SERP pursuant to a search query that includes the keyword as a search term. But that does not dispel the fact that keywords are used to index the sponsored links for the purposes of displaying the same on the SERP.

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106. As discussed earlier, we are unable to accept that merely because the trademark is not visible, its use as a keyword in the Ads Programme would not amount to use of the trademark under the TM Act. The advent of internet and e-commerce have added new dimensions to trade and commerce. Thus, the provisions of the TM Act would necessarily have to be read in an expansive manner to address the novel issues thrown up by the advancement of technology.

(Emphasis supplied)

WHETHER DEFENDANT NO. 2 AND 3 CAN ALSO BE SAID TO BE USING THE MARK

48. Though the learned senior counsel for the plaintiffs herein had, as recorded in the order dated 14.07.2022 of this Court reproduced hereinabove, stated that no *interim* relief is sought against the defendant nos.2 and 3, as the Division Bench of this Court has already answered the issue as to whether the defendant nos.2 and 3 can be made liable on an action of infringement or passing off, I deem it appropriate to refer to the same.

49. The Division Bench has held that the role of the defendant nos.2 and 3 in the Google AdWords Program is anything but passive. Its program is designed to attract maximum revenue by display of sponsored links. It is an active participant in the use and



selection of the keywords as the responsibility for the selection of Ads displayed by it and the process used for the same, substantially, if not entirely, rests with Google, that is, the defendant no.2 and 3 herein. The Court has held as under:-

“128. Prima facie, we are unable to accept the view that use of trademarks as keywords in the Ads Programme is use only by the advertisers and not Google. We reject the substratal premise that Google’s participation in the Ads Programme is limited to merely providing the tools and the technical framework for advertisers to use the keywords. As stated before, Google actively encourages and suggests use of the keywords. It determines, albeit by use of its software and algorithms, the Ads that are displayed on the SERP. It auctions use of keywords, including trademarks, as it is not disputed that the advertiser that bids the higher Cost Per Click amount is accorded a higher priority for display of its Ads. It is difficult to accept that whilst Google, in a manner of speaking, sells keywords for use in its proprietary software; it does not use it.

129. As noted above, in Google France SARL and Google Inc. v. Louis Vuitton Malletier SA., the Court was of the view that a referencing service provider (such as Google) allows its clients to use signs, which are identical with or similar to trademarks “without itself using those signs”. We are unable to subscribe to this view.

130. As noted above, the role of Google is not a passive one; Google actively promotes and encourages the use of trademarks identified with the leading goods and service providers – which apparently yield a higher incidence of search queries in respect of a particular category of goods and services – as keywords by suggesting the same and further monetizing their value. In our view Google’s PPC model, which actively



uses keywords, derives a distinct advantage by use of trademarks as keywords.

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174. In a given case, if it is found that Google has actively participated in the infringement of the trademarks by use of the trademark as keywords and had taken no remedial steps on being made aware of the same, an action for holding Google contributorily liable for infringement may be permissible. Google's policy to permit the use of trademarks as keywords heightens the level of its responsibility to take steps that such use does not amount to infringement. It is difficult to accept that Google has no responsibility if the Ads prioritized by it on the basis of use of trademarked terms as keywords, are found to be infringing the trademark."

(Emphasis supplied)

50. The Court also rejected the submission of the defendant nos.2 and 3 herein, that it is entitled to claim exemption against an action complaining of infringement, under Section 79 of the Information Technology Act, 2000. I may quote from the judgment as under:-

"182. Whilst it is undisputed that an intermediary is not liable for any third-party information, data or communication link available or hosted by it in terms of Section 79(1) of the IT Act, the said exemption is not available if the function of the intermediary is not limited to merely providing access to the communication system over which information made available a by third-party is transmitted or hosted. The safe harbour is also not available to the intermediary if he selects the receiver of the transmission. Further, the exemption is provided if the intermediary observes due diligence while discharging its duties under the IT Act.

183. Sub-section (3) of Section 79 of the IT Act also makes it amply clear that restriction of



liability is not available where an intermediary has conspired, abetted, aided or induced the commission of an unlawful act. The limitation of liability under Section 79(1) of the IT Act is lifted if an intermediary fails to expeditiously remove or disable access to the material on receiving actual knowledge that the information controlled by the intermediary is being used to commit an unlawful act.

184. In the facts of the present case, the allegations of infringement are in relation to the Ads Programme which is run by Google. Prima facie, Google is an active participant in use of the trademarks of proprietors and was selecting the recipients of the information of the infringing links.

185. Undisputedly, the trademarks are monetized by Google by using the same as keywords for displaying the paid Ads on the SERP. In one sense, Google effectively sells the use of the trademarks as keywords to advertisers. Prima facie, it encourages users for using search terms, including trademarks, as keywords for display of the Ads to the target audience. Given the aforesaid allegations, it is difficult to accept that Google is entitled to exemption under Section 79 of the IT Act from the liability of infringement of trademarks by its use of the trademarks as keywords in the Ads Programme. It can hardly be accepted that Google can encourage and permit use of the trademarks as keywords and in effect sell its usage and yet claim the said data as belonging to third parties to avail an exemption under Section 79(1) of the IT Act. Prior to 2004, Google did not permit use of trademarks as keywords. However, Google amended its policy, obviously, for increasing its revenue. Subsequently, it introduced the tool, which actively searches the most effective terms including well known trademarks as keywords. It is verily believed that in the year 2009 Google estimated that use of trademarks as keywords would result in incremental revenue of at least US Dollar100 million. Google is not a passive



intermediary but runs an advertisement business, of which it has pervasive control. Merely because the said business is run online and is dovetailed with its service as an intermediary, does not entitle Google to the benefit of Section 79(1) of the IT Act, in so far as the Ads Programme is concerned.

186. We concur with the prima facie view of the learned Single Judge that the said benefit would be unavailable to Google if its alleged activities are found to be infringing DRS's trademarks."

(Emphasis supplied)

WHETHER USE OF MARK AS A KEYWORD PER SE IS INFRINGEMENT

51. Having held the above, however, the Division Bench has answered the key question as to whether the use of trade marks as keywords, in absence of any confusion, unfair advantage, dilution or compromise of the trade marks, is an infringement, in the negative. The Court held that the keyword does not perform any primary function of identifying the source of the goods or services, and its use cannot be perceived as a 'use of trade mark'. Thus, Section 29(1) of the Act is inapplicable.

52. It was further held that unless it is established that in a particular case, the use of a trade mark as a keyword has resulted in the internet user being confused, the action of infringement of a trade mark under Section 29(2) of the Act would also not lie.

53. The Court held that Section 29(4) of the Act is applicable if the use of a mark is identical or similar to the registered trade mark, and is used in respect of goods not covered under the



registered trade mark and its use takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark. Use of a trade mark as keywords is, essentially, to seek the attention of the internet users who may find information relating to goods and services covered under the said trade mark as relevant. It is not illegal to seek out such internet users as targets for advertisements that they may find relevant. The Division Bench has held as under:-

“139. There has been an exponential increase in customers shopping online and using the internet for securing information relating to products and services. This has obviously thrown up various issues in trade and commerce. This also includes the extent of protection that may be available in relation to a trademark. We are of the view that a balance must be struck, and it would be essential to anchor the protection available to trademarks based on the core functions of a trademark; both for the purpose of protecting the public as well as preserving the investment value of the trademark. It is relevant to note that DRS also avails the Ads Programme. Thus, it is also required to bid for its own trademarks as a keywords to ensure that its sponsored link appears on the SERP, which is displayed as a result of a search query comprising of its trademarks or containing the same. There may be other advertisers who may outbid DRS for its trademark to ensure that their links are reflected on the same SERP. According to DRS, Google’s activity in permitting others to bid for its trademark as keyword is an infringing activity. Prima facie, we are unable to accept the same. We find nothing illegal in Google using trademarks as keywords for display of advertisements if there is no confusion that the links or Ads displayed are not associated or related to DRS. If the Ad or link displayed does not lend itself to any confusion, DRS’s grievance



regarding use of its trademarks as keywords in the Ads programme is not actionable.”

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166. Google uses keywords for shortlisting of Ads to be reflected on the SERPs, and in one sense its use is in connection with selection of Ads and the order of priority, in which they are reflected on the SERPs. However, we do not accept that the keywords are not used in relation to the goods and services of the advertiser. The very selection of a keyword is based on enterprise and the goods and services offered by the Advertiser. The use of trademarks as keywords is, plainly, in relation to the goods and services offered by the Advertiser. The same may or may not be similar to the goods or services covered by the registered trademark, which is used as a keyword. If the goods or services are similar to those covered under the registered trademark, Section 29(4) of the TM Act is inapplicable. However, if the goods are dissimilar to those covered under the trademark and the trademark has a reputation, it is necessary to determine whether such use amounts to unfair advantage and is detrimental to the distinctive character or repute of the registered trademark. This would depend upon the facts of each case. However, the contention that use of trade marks, absent anything more, would amount to infringement of the trademark simply for the reason that the same is used to display advertisements, is erroneous. The use of trademarks as keywords in the Ads programme does not, per se, amount to without cause, taking an unfair advantage of the trademark; nor can be construed as detrimental to the distinctive character or repute of the trademark. Keywords are, essentially, used to identify the persons who may be interested in the sponsored Ads. Undoubtedly, Google and the advertisers draw certain advantage by using keywords, which are similar to trademarks, in as much as they use the same to identify users, who are probably interested in the goods and services covered by



the registered trademark. However, every advantage drawn by use of a trademark cannot be termed as drawing, unfair advantage of the trademark, without cause. As discussed above, identifying customers, who may be looking for goods or services of a particular brand, for offering them alternatives is not unfair.

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168. *The use of trade marks as keywords to identify the internet users who may be interested in the Ads is not per se deceitful. As noticed above, the proprietor of a trademark does not have any extended right for interdicting any and all use of marks, which are similar to his trademark.*

169. *We are also unable to accept that the use of a trademark as keyword, absent any element of blurring or tarnishment of the trademark, is detrimental to the character or repute of the trademark. However, if in a given case, the Ads displayed are found to be detrimental to the distinctive character or repute of the registered trademark, an action for infringement of the trademark would lie.*

170. *It is also relevant to bear in mind that fair use of a trademark by a person who is otherwise not the owner or otherwise authorized to use the same, is also permissible.”*

(Emphasis supplied)

54. The Division Bench also rejected the submission that since the search query is also reflected on the Search Engine Results Page (in short, ‘SERP’), the internet user could get confused that the advertisement shown is associated with the search query as they appear on the same page. The Court held that any person using an internet search engine, such as the one operated by Google, for finding information relating to a search query, is obviously aware that all search results may not be relevant. The



Court held that it would be erroneous to extend the test of a person of average intelligence and imperfect recollections, for assuming the knowledge or prowess of a person using the electronic, mechanical or other devices or processes, in regard to such devices or processes. The person using a device to browse the internet is aware of not only the functioning of the device but also its application. A person using the search engine not only knows how to put in a search query, but is also aware of the nature of results the search engine is likely to display. It would, therefore, be erroneous to hold that the use of a trade mark as a keyword, itself, would result in confusion from the perspective of a person who is ignorant of the functioning of the search engine.

55. I may quote from the finding of the Division Bench, as under:

“152. In such cases, if the SERP displays an advertisement, which the internet user is led to believe is associated with the trademark, which is entered as, or is a part of, the search query, the use of the trademark as keyword would infringe the trademark. This is notwithstanding that on accessing the website, the internet user realises that it is not the website which he intended to access and that the goods and services are not those as associated with the trademark which is keyed in as a search term or is a part, thereof. Although, there is no scope for any of the internet users being misled or deceived into entering into any transaction in relation to goods and services believing the same to be associated with the trademark, the use of the trademarks may be actionable. The courts, in such cases, found the use of meta-tags, which are similar to the trademarks, for deceiving or confusing the internet user to click on the web link as an



infringement of the trademark and have accordingly interdicted the same.”

INITIAL INTEREST CONFUSION

56. On the plea of ‘*initial interest confusion*’, the Division Bench has held that if the advertisements displayed would lead the internet user to believe the same to be associated with the trade mark, then the use of the trade mark as keyword would infringe the trade mark, notwithstanding that on accessing the website, the internet user realises that it is not the website which he intended to access and that the goods and services are not those as associated with the registered trade mark. There should, however, be a real likelihood of confusion. If there is no deception or confusion, mere generation of interest in the sponsored link, without any likelihood of confusion, cannot be construed as an infringement of a registered trade mark. The Court also held that the facts of each case are required to be considered in determining whether in a given case use of a trade mark as a keyword amounts to infringement under the Act.

57. I may quote the relevant finding of the Division Bench, as under:-

“156. The Doctrine of ‘Initial Interest Confusion’ has been applied where the courts have found material confusion albeit at an initial stage, resulting from the display of the use of meta-tags, keywords and domain names for reflecting results which are identical or similar to registered trademark. In cases, where the internet users are deceived, to access the websites other than the websites offering goods, services and information



as may be associated with the trademark, the use of the trademark in internet advertising may be actionable.

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162. Under Section 29(2) of TM Act, a registered trade mark is infringed by a person who not being a registered proprietor or a person permitted to use the same, uses the mark which is identical or similar to the registered trade mark in respect of goods “which is likely to cause confusion on the part of public or which is likely to have an association” with the registered trade mark. Section 29 of the TM Act does not specify the duration for which the confusion lasts. The trigger for application of Section 29(2) of the TM Act is use of a mark, which would result in confusion or indicate any association with the registered trademark. Thus, even if the confusion is for a short duration and an internet user is able to recover from the same, the trade mark would be infringed. Once the applicability of Section 29(2) of the TM Act is triggered, it would be no defence to state that the interest user was not deceived in entering into the transaction and/or in fact, did ascertain that there was no association of the advertiser or its goods with the trademark.

163. We, thus, accept the contention that even confusion for a brief period of time would offend Section 29(2) of the TM Act.

164. Having stated the above, it is necessary to state that the use of the trademark as a keyword coupled with the display of a sponsored link must have real likelihood of confusion. Mere generation of interest in the sponsored link without any likelihood of confusion cannot be construed as infringement of a trademark. It is necessary to be careful to not conflate initial interest with the Doctrine of ‘Initial Interest Confusion’. Thus, sponsored links may be relevant to the search query and what the internet user is searching for. It may thus generate interest that would obviously not constitute infringement



of a registered trademark under Section 29(2) of the TM Act, if there is no deception or confusion.”

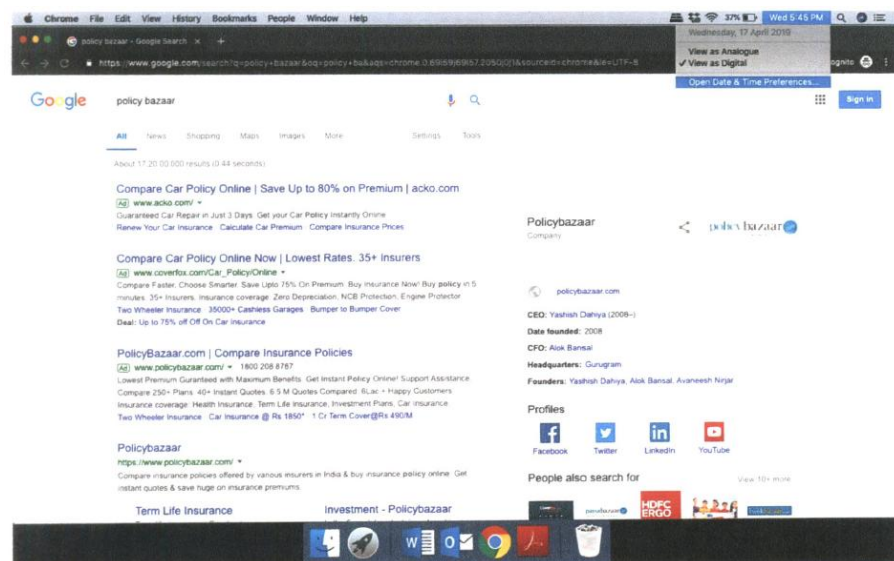
58. The Division Bench has, therefore, held that mere use of a trade mark as a Keyword *sans* further material to show that it causes confusion or deception, would not amount to infringement of the trade mark.

APPLICATION OF ABOVE PRINCIPLES TO THE FACTS OF THE PRESENT SUITS

59. Applying the above principles, enunciated by the Division Bench in *DRS Logistics (P) Ltd. & Ors.* (Supra), to the facts of the present cases, I am of *prima facie* opinion that the plaintiffs have been unable to make out a case of infringement or passing off of their trade marks by the defendants.

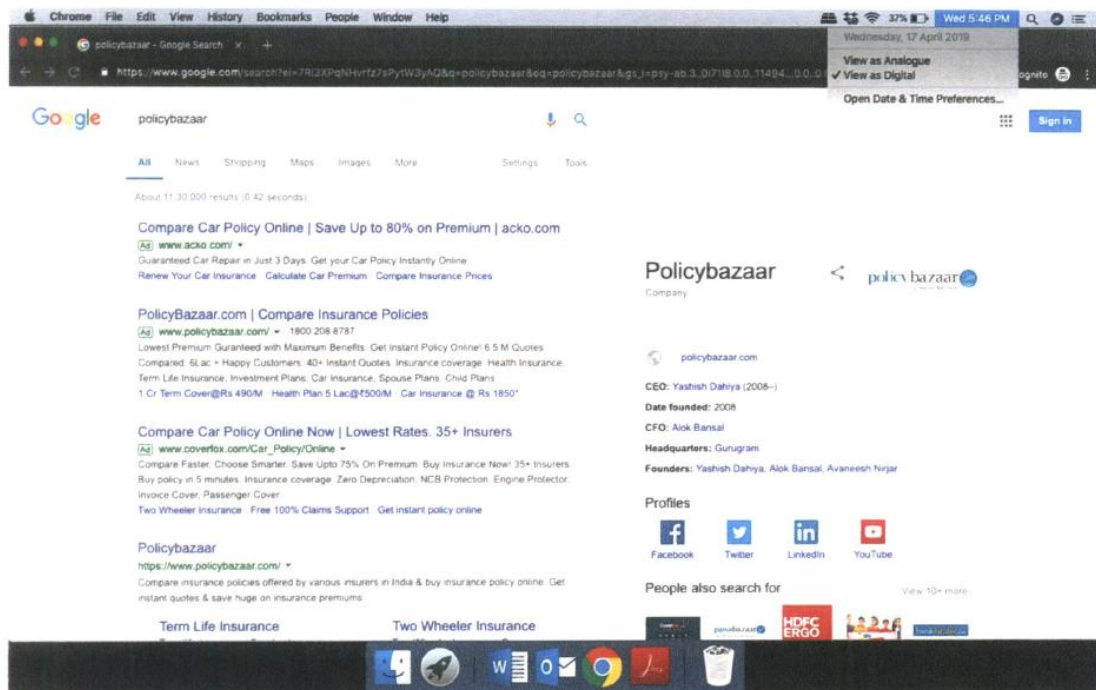
60. The relevant extracts from the display of the search engine of the defendant nos. 2 and 3, as complained of by the plaintiffs in the plaints, are as under:-

i. Keyword-Policy bazaar (with spaces)

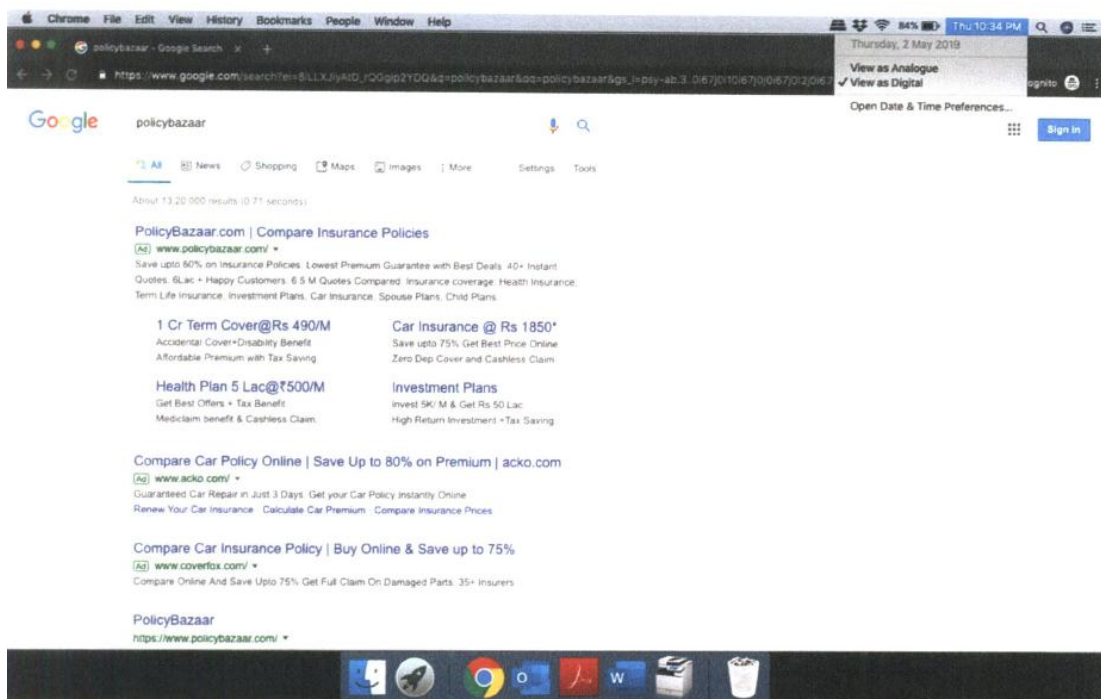




ii. Keyword Policybazaar (Without Spaces)

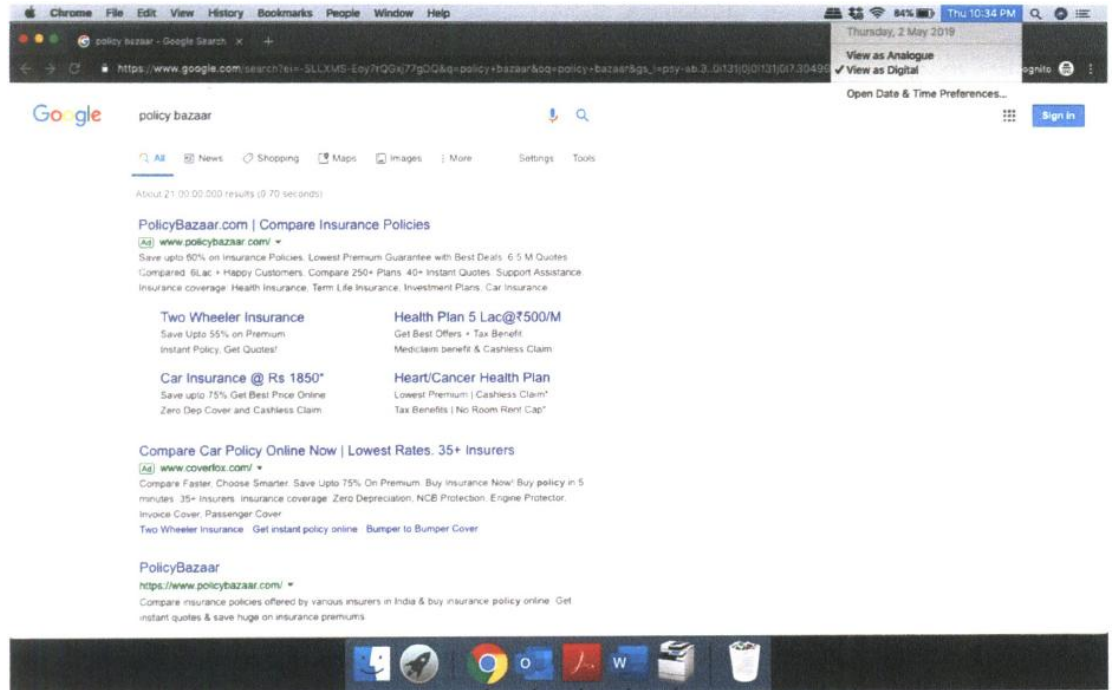


iii. Keyword Policybazaar (Without Spaces)

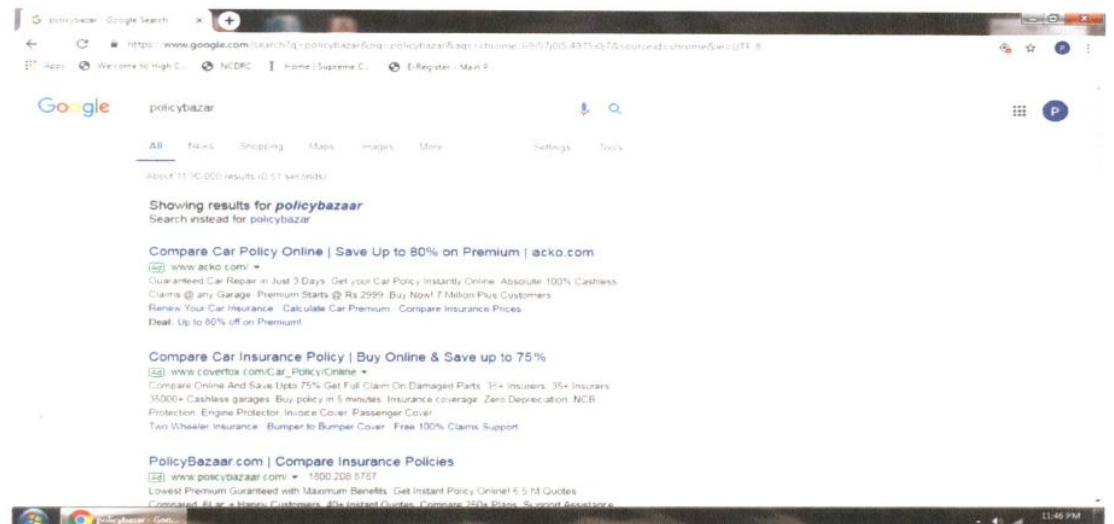




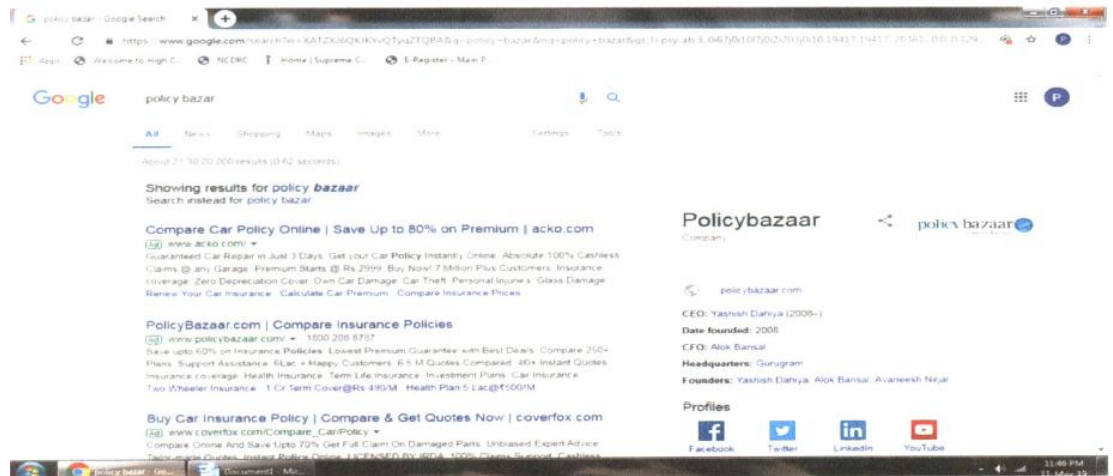
iv. Keyword Policy bazaar (With Spaces)



v. Keyword Policybazar (without spaces)



vi. Keyword Policy bazar (without spaces)



61. The Suits are based on the allegations of mere use of plaintiffs' registered trade marks as keywords by the defendant no.1 in the two Suits in the Google AdWords Program run by the defendant nos.2 and 3. It is not the case of the plaintiffs that the advertisements as they appear on the search engine under the sponsored link or under the advertisement/sponsored links are *per se* deceptive or may result in confusion in the mind of the internet user. In fact, these search results shown by the plaintiffs in their plaint clearly depict the website of the defendant no.1 in the two Suits as a sponsored link with a mark ' Ad ' and under the own name of the defendant no. 1. They do not also reflect, in their brief summary as it appears on the front page, any connection with the plaintiffs.

62. It may be true that use of such keywords may have added to the cost of advertisement for the plaintiffs and may even result in additional hits on the website(s) of the defendant no.1 in the two Suits, however, as held by the Division Bench, the same itself is



not sufficient to find the defendants guilty of infringing the registered trade marks of the plaintiffs or passing off the same. In my *prima facie* view by mere appearance of the website(s) of the defendant no.1 in the two Suits as advertisements or as sponsored link is not sufficient to hold that the internet user will be confused thereby.

63. Coupled with the above, is the fact that the plaintiffs, themselves, were admittedly using the registered trade marks of the defendant no.1 in the two Suits as keywords till before the filing of the present commercial Suits. They, therefore, have accepted this as a fair and honest commercial practice. They cannot now be heard to be complaining against the same merely because they have now realised that others may be gaining more advantage of their trade marks rather than in the reverse.

64. I also find that the plaintiffs having concealed in the plaint, the fact of them using the trade marks of the defendant no.1 in the two Suits as a keyword in the Google AdWords Program, have, even otherwise, disentitled themselves to grant of any discretionary relief from the Court. Mere payment of costs imposed by this Court vide orders dated 28.05.2019, would not wash away the taint and the effect of such concealment by the plaintiffs.

CONCLUSION:

65. I accordingly, find no merit in the applications filed by the plaintiffs, that is, IA No. 7213/2019 in CS (Comm) 259/2019 and



IA No. 7219/2019 in CS (Comm) 260/2019. The same are accordingly dismissed.

66. Correspondently, IA No. 8129/2019 in CS (Comm) 259/2019 and IA No. 8003/2019 in CS (Comm) 260/2019 filed by the defendant nos.1 respectively in the two Commercial Suits are allowed. There shall be no order as to costs.

POST SCRIPT

67. I must re-emphasise that any and all observations made by me hereinabove are merely *prima facie* in nature and should not be read as a conclusive and binding opinion.

CS(COMM) 259/2019

CS(COMM) 260/2019

68. List the suits before the learned Joint Registrar (Judicial) for further proceedings on 10th October, 2023.

NAVIN CHAWLA, J

SEPTEMBER 6, 2023/rv/am/AS