



महाराष्ट्र MAHARASHTRA

संख्या ३३

कॉपी 138

W 773905

कमुपार्व न्यायालय, मुंबई

दिनांक 22 MAY 2006

जॉर्जी/बी./जीवरी
श्रीमान नारायण ए. पुत्रांक ए.

Manoj Bhatt

श्रीमान ए. नारायण

Before The National Internet Exchange of India

ARBITRATION DECISION

Jagdish Purohit v. Daniel Fuehrer

Domain Name: jobs.in

1. The Parties

The Complainant is **Jagdish Purohit**, Indian individual located in Mumbai, India.

The Respondent is **Daniel Fuehrer**, German individual located in Hessen, Germany, represented before the Arbitrator by Paul Keating (the "Representative") of Renova, Ltd., Barcelona, Spain.

2. The Domain Name and Registrar

This domain name at issue is '**jobs.in**'. The domain name is registered with InterNetX GmbH.

3. Procedural Background

The Complainant filed its Complaint with the National Internet Exchange of India (the ".IN Registry"), for administrative proceeding in accordance with the INDRP (.IN Domain Name Dispute Resolution Policy) for Domain Name Dispute Resolution, adopted by the National Internet Exchange of India ("NIXI") on 28th June, 2005, (the "Policy"), INDRP Rules of Procedure, approved by NIXI on 28th June, 2005, (the "Rules") and The Indian Arbitration and Conciliation Act, 1996, any bye-laws, rules and guidelines framed there under and any law by Indian Government.

By registering the disputed domain name with the Accredited .IN Registrar, the Respondent agreed to the mandatory Arbitration proceeding for disputes resolution pursuant to the Policy and the Rules.

The .IN Registry formally commenced this proceeding and appointed Mr. Manoj Bhatt (the "Arbitrator") i.e. me, as arbitrator in this case out of the selected Arbitrator of arbitrators. I have on behalf of .IN Registry sent copy of complaint with all annexure to the Respondent on 26th February, 2006 and given 20 days time to file the response but on 22nd March, 2006 the Representative of the Respondent inform about his appointment and asked for extension for filing response, since the request of appointment of authorized representative had not come from the Respondent so I asked for confirmation of the appointment of the Representative from the Respondent and after the confirmation, time for filing reply extended till 30th March, 2006.

The Respondent filed its reply within the extended deadline, but the copy of the reply has not given to the Complainant and to the .IN Registry as per the Rules 2 (g), **due to which the process of decision is delayed** and explanation sought from the Respondent in this regard and also instructed him to provide copy of response to the Complainant so he can file the rejoinder. The Respondent by his email dated 9th May, 2006 sent details in PDF format about delivery of response to the Complainant details of which is discussed in later part of this decision.

In between the Respondent submitted additional submission on 5th May, 2006.

The Complainant received the copy of original response on 9th May, 2006 by email and he filed his rejoinder on 23rd May, 2006.

4. Factual Background

Based on the Complaint, the Response, Additional submission and the Rejoinder the following facts are discovered: Complainant is a hotelier in India with business and social interest in India. Respondent business details are not available except that he involves in the business of buying and selling of domain names and running the PPC (Pay Per Click) business. The other relevant facts are contested; the parties' allegations are set forth in the next section.

Parties' Allegations

Complainant avers that:

1. He is the owner of the registered trademark for "Jobs" in India since 2003 and having also the trademark pending in service mark category.
2. He is also owner of the website called "JOB.IN" and "JOB.S.IIM.IINDIAPRESS.ORG" which is currently a running job portal in India.
3. The Respondent in this case are well know domain speculator and having lot of domain name registration in his name.
4. The Respondent put the disputed domain name "for sale" and park the same on Pay Per Click site (SEDO).
5. As per the Policy and the Rules the burden of proof is upon the Respondent.
6. The Respondent in spite of given notice of IP (Intellectual Property) rights by the Complainants, the Respondent not checked the IP right violation and also not develop the website for last one year.
7. The Respondent hold this disputed domain name for the sole purpose of selling.

The Respondent, in contrast, argues that:

1. He is not provided with Trademark Certificate as referred in annexure, the Complainant holds graphical or design mark.
2. The Complainant's trademark is neither identical nor confusingly similar (visually and phonetically) to the disputed domain name and he not having prior knowledge of the Complainant's mark.
3. The burden of proof for compliance of policy requirement is upon the Complainant.
4. The disputed domain name is of generic nature.
5. PPC (Pay Per Click) and realizing revenue from the advertisements on the webpage is not consider as illegitimate and bad faith.
6. He never offered the disputed domain name for sale to the complainant and holding generic domain name "for sale" has legitimate right of the Respondent.

Discussion and Findings

Firstly, During the process of this Arbitration, The Arbitrator is in strong view that the process of justice is delayed because the Respondent has not provided copy of his response to the Complainant and on demanding the

explanations, he is provided the Arbitrator with the PDF format copies of the email he sent to the Complainant, which again shows that both the address of the Complainant is wrongly written, I am of the view that even if address is written wrong then the Respondent should get the e-mail back as undelivered. It is also observed that in all other emails the Respondent sent emails on proper address then why he did not mark the Complainant's address properly while sending his response. As per the .IN Registry Rules 2 (g) it is clearly required to sent copies of all communication to other parties and to the Registry, And the **Respondent has clearly violated the .IN Registry rules in this regard.**

Secondly, The application of the Policy is limited to situations in which a Complainant can file a complaint on which grounds are as stated hereunder:

- (i) the registered domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- (ii) the registrant has no rights or legitimate interests in respect of the domain name; and
- (iii) the domain name has been registered and is being used in bad faith,

Now according to the Policy and the Rules, I am of the view that **burden of proof lays upon the Respondent**, as the Policy adopted for .IN Disputes resolutions directly or indirectly does not put the burden of proof of any of the above upon the Complainant.

It is necessary to draw the attention to The Policy Paragraph 3. Which clearly states that:

" The Policy 3. The Registrant's Representations

By applying to register a domain name, or by asking a Registrar to maintain or renew a domain name registration, the Registrant represents and warrants that:

- (a) the statements that the Registrant made in the Registrant's Application Form for Registration of Domain Name are complete and accurate;*
- (b) to the Registrant's knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party;*
- (c) the Registrant is not registering the domain name for an unlawful purpose; and*
- (d) the Registrant will not knowingly use the domain name in violation of any applicable laws or regulations.*

It is the Registrant's responsibility to determine whether the Registrant's domain name registration infringes or violates someone else's rights."

The paragraph 3 of the Policy clearly puts the burden on the Registrant of the domain name. Particularly the last paragraph says *"it is the Registrant's*

responsibility to determine whether the domain name infringes or violates someone else's rights".

The Respondent in this case in his additional submission cited the ruling of another INDRP case where he try to establish that burden of proof is on the Complainant but the material of that case is completely different from the present one..

And on carefully going through the Policy and the Rufe, The entire document does not state anywhere that the Complainant has the burden of proof but It clearly puts the responsibility on the Registrant, thus **the Arbitrator is in view that the burden of proof entirely goes on the Respondent.**

Now, the arguments presented before me are required to weight in the light of the premises required by the Policy paragraph 4:

(i) The Registrant's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights;

In this case, the Arbitrator need to inquire into whether the Complainant has established rights to the trademark "Jobs" and is it identical or confusingly similar to the domain name. The Complainant provided with the copy of Indian trademark registration certificate which shows that the Complainant have the registered trademark for the "Jobs".

The Respondent argued that he is not provide with the required trademark certificate copy, which do not hold, as firstly, the entire copy of the complaint along with annexure are sent to the Respondent by me on behalf of the .IN Registry. Secondly, the Respondent in his response marked the details of trademark and even copied the mark from the certificate, dearly states that he is in receipt of the certificate.

The Respondent also made allegation that complaint must have given disclaimer for use of trademark, for which no such disclaimer is produced before me, therefore the said argument cannot be considered.

The Respondent has urged that the trademark is a graphical or design mark and he is using this domain as generic term in response to this the Complainant provided the detail (Annexure) search report from the Trademark Registry of India, which shows the said mark's word representation as "JOBS". The complainant also urged that he is also running the website called "JOB.IN" and the disputed domain name is just plural variant of his current website and in addition to that he also have service mark accepted by the trademark authorities for publication in official gazettes for the word "JOBS".

The Arbitrator finds that for present purposes, Complainant's ownership of an Indian trademark registration suffices to give it standing to proceed with this dispute.^

The Complainant is the owner of registered trademark in the India containing the words "JoBs". The registrations are valid and stand uncontested at this point in time. While deciding the Issue, one has to base its decision on the presumption that Complainant has valid trademark rights to the mark "JOBS".

The contested domain name < jobs.in > is identical to Complainant's marks and also visually and phonetically equivalent to the complainant's mark "JoBs", the only difference being that the letter J and B is represented in capital letters which is irrelevant. The Complainant also holds and running the website on the singular version of the disputed domain name i.e. "JOB.IN", this also gives the Complainant edge over the Respondent.

Under the Trademark law of India, a trademark registration is generally entitled to a strong presumption that the term is not generic unless otherwise disclaimer from the trademark registry is attached to it, In light of that presumption, as well as the inherently limited scope of evidentiary presentations under the Policy so the first test goes in favour of the Complainant.

{ii) the Registrant has no rights or legitimate interests in respect of the domain name; and

The Policy paragraph 7 states that:

Any of the following circumstances, in particular but without limitation, if found by the Arbitrator to be proved based on its evaluation of all evidence presented, shall demonstrate the Registrant's rights to or legitimate interests in the domain name for the purposes of Paragraph 4 (ii) :

(i) before any notice to the Registrant of the dispute, the Registrant's use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;

(ii) the Registrant (as an individual, business, or other organization) has been commonly known by the domain name, even if the Registrant has acquired no trademark or service mark rights; or

(Hi) the Registrant is making a legitimate non-commercial or fair use of the domain name, without Intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

The Complainant argument mainly based on point (li) and (iii) of the Policy paragraph 7, the Complainant claims that the Respondent is not known by this disputed name and he is not making fair use of the disputed domain name, in support of his argument he has provided details regarding the use of disputed domain name with Pay Per click, the SEDO parking page with "May be For Sale" message displayed on webpage and non developing of the domain name since last one year etc. provided.^

The Respondent argued that the burden of proof of proving the above is on the Complainant, in addition to this he has also given instances of WIPO cases where he argued that PPC (Pay Per Click) and realizing revenue from the advertisements on the webpage is not consider as illegitimate use of the domain name.

After going through both the parties arguments, I am of the opinion that The burden on a complainant regarding the second element is necessarily light, because the nature of the registrant's rights or interests, if any, in the domain name lies most directly within the registrant's knowledge. And once the complainant makes a prima facie showing that the registrant does not have rights or legitimate interest in the domain name, the evidentiary burden shifts to the registrant to rebut the showing by providing evidence of its rights or interests in the domain name.

For the requirements of the Policy paragraph 7(i), the Respondent's use of the disputed domain name must be in connection with a "bona fide" offering of goods or services. In the circumstances of this case, however, the Respondent has not at all hosted his own web page and on reaching the disputed domain name url, it shows the SEDO parking page which shows the variety of advertisement on the webpage, every time webpage is refreshed it shows different advertisement and contents So Respondent not shown any use of the domain name and also not shown that the Respondent demonstrably prepared to use the domain name in future or a corresponding domain name in connection with a bona fide offering of goods or services.

The Policy paragraph 7(ii), The Respondent not given any evidence that, the Respondent has been commonly known by the disputed domain name or that the disputed domain name is derived from one of Respondent's trademarks or trade names.

The Policy paragraph 7(iii), The Respondent is using the domain name for SEDO parking and in his argument he contented that showing webpage for PPC (Pay Per Click) use and realizing revenue from the advertisements on the webpage is not consider as illegitimate use of the domain name, in support of his arguments he provided with some WIPO decisions and in reply of that the Complainant also provided WIPO decisions to counter the same claim of the Respondent.

I am of the view that the merits and scope of .IN CCTLD's INDRP (.IN Dispute Resolution Policy) is certainly different from the UDRP (Uniform Dispute Resolution Policy) on which WIPO decisions are based. All the cases referred by both the parties are from the GTLD's (.Com, .Net and .Org etc.) and all GTLD cases are governed by the UDRP and the Dispute resolution policy (INDRP) adopted by the .IN Registry is different from the UDRP.

The question in this case is therefore whether Respondent has any legitimate interests in the contested domain name. In my view, it must be taken into consideration that the contested domain-name is registered under the CCTLD .IN, which makes a complainant's defense based on alleged facts related to specific territories, especially in a case like this

where actual use of domain will take place in a territory (India) in which the domain name corresponds to a trademark.

In addition, the contested domain name does not consist of the alleged generic term but for domain name purpose it is the MARK that is identical and also phonetically equivalent to the word "jobs".

Providing the any parking page with intention of commercial gain from the same, is illegitimate use of the domain name as the registrant in this case is not hosting his own contents or any material content on the webpage and on the contrary try to gain from the advertisement on the webpage, which is not at all considered as registrant legitimate right and interest in the domain name. Moreover if the Policy element (1) regarding the trademark right of the Complainant is established then this kind of use of the domain name certainly satisfy the requirement of the Policy paragraph 7 (iii).

The Arbitrator considers on the above grounds that the Respondent clearly failed to establish the right and legitimate interest in the disputed domain name.

(iii) the Registrant's domain name has been registered or is being used in bad faith.

The Policy paragraph 6 states that;

For the purposes of Paragraph 4(fU), the following circumstances, in particular but without limitation, if found by the Arbitrator to be present, shall be evidence of the registration and use of a domain name in bad faith:

(I) circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant, who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's documented out-of-pocket costs directly related to the domain name; or

(ii) the Registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Registrant has engaged in a pattern of such conduct; or

(HI) by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.

The Complainant's arguments are based on all the three points mentioned in the Policy paragraph 6. In support of his arguments for the Policy paragraph 6(i) he provided with copy of webpage which shows "For Sale" notice on disputed domain name and copies of email communication where

the Respondent shown Interest in selling the disputed domain name, In support of the Policy paragraph 6(ii) argument he provided with copy of email communication with the Respondent, giving him details about his trademark and IP (Intellectual Property) right in the domain name, and also provided list of other trademark domain name registered by the Respondent and for the Policy paragraph 6(iii) argument he provided with SEDO parking page copy where the disputed domain name was resolving.

The Respondent in his response again claimed that the burden of proof is on the Complainant, In support of his argument he denied all charges of the Complainant regarding the Policy paragraph 6 and again given some details of the WIPO cases where he tried to establish that (i) he never offered disputed domain name for sale, the notice on the site was provided by the SEDO not by the Respondent, (ii) he is not having any prior knowledge of IP rights of the Complainant and holding generic domain names for the purpose of sale is legitimate and (iii) PPC (Pay Per Click) and realizing revenue from the advertisements on the webpage is not consider as bad faith.

After going through both the parties arguments and the Policy requirements, the Arbitrator decided that the burden of proof as explain above lies on the Respondent,

For the requirements of the Policy paragraph 6(i), main question arises that weather the Respondent acquired the disputed domain name for the purpose of sale?, both the parties in their arguments provided with the details and I finds that the Respondent offered the disputed domain name for sale, as in his argument he contented that he has not put the notice of sale but it is put by the SEDO, since domain is hold by the Respondent and it is his duty to see that what kind of contents he provides on the domain name and he cannot refute the charges by shifting this responsibility on SEDO, secondly in email communication with the registrar of the Complainant he clearly shown his interest in selling the domain name.

For the requirements of the Policy paragraph 6(ii), the Respondent claim that he not having any prior knowledge of the trademark of the Complainant. It is very much clear from the Policy paragraph 3 that the Registrant should check that whether his registration is infringes or violates someone else rights, and the Complainant provided the Arbitrator with the copy of email communication by which the Complainant informed the Respondent about the trademark rights of the Complainant.

Now for the purpose of the Policy paragraph 6(H), it is necessary to established that the Respondent's registration of the disputed domain name prevents the Complainant from reflecting his business name and trademark in a corresponding domain name AND the Respondent shall also engaged in a pattern of such conduct, Since the trademark right of the Complainant is already established above and the Complainant provided the list of other domain name registered by the Respondent, out of which some of the domains names are trademarks term not only in India but also in another countries. This act of the Respondent clearly establish that he is engaged in such pattern of registering the trademark domain names and preventing^

the rightful owners in reflecting their trademarks or service marks in corresponding domain names. If any term which is registered as trademark it is a mark for the purpose of trademark owner's business, no matter it is a generic term or not. So the Respondent fails to prove the Policy paragraph 6(ii).

For the purpose of the Policy paragraph 6 (Hi) the Respondent argues that realization of revenue from parking page is not bad faith, I am of view that providing the any parking page with intention of commercial gain from the same and particularly when trademark right of the Complainant is established, and the trademark owner never given any kind of permission to use his trademark to the Respondent, then it consider as bad faith use of the domain name.

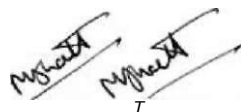
I consider on the above grounds that the Respondent used the disputed domain name in bad faith.

7. Decision

For the foregoing reasons, as per the Policy and the Rules, I find that the burden of proof is on the Respondent and he has failed to establish his rights as per Paragraph 4 and also failed in discharging his duties as per the Paragraph 3 of the Policy, and at the same time the Complainant established all the requirement of Paragraph 4 of the Policy.

The Arbitrator therefore directs that the registration of the disputed domain name <jobs.in> be **transferred** from the Respondent to the Complainant.

As per the Policy paragraph 11 copy of this decision or any part thereof can be published unedited on the .IN Registry website and in media.



Manoj Bhatt
Advocate, Arbitrator.

Dated: 26th May, 2006