

**Indian-Non Judicial Stamp
Haryana Government**

Date :23/10/2019

Certificate No. G0W2019J1076

Stamp Duty Paid : ₹ 101
(Rs. Only)

GRN No. 59196524

Penalty : ₹ 0
(Rs. Zero Only)**Deponent**

Name: Ranjan Narula

H.No/Floor : Na

Sector/Ward : Na

Landmark : Na

City/Village : Gurugram

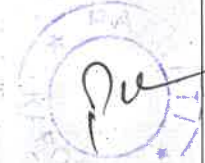
District : Gurugram

State : Haryana

Phone : 0



Purpose : ALL PURPOSE to be submitted at All place



RANJAN NARULA

ARBITRATOR

Appointed by the .IN Registry – National Internet Exchange of India

In the matter of:

Bennett, Coleman & Company Limited

Times of India Building

Dr. D. N Road

Mumbai- 400 013

Also at:

7, Bahadurshah Zafar Marg

New Delhi - 110 002

.....Complainant

Versus**Sarv Webs Private Limited**503-14, 5th Floor, Sunny Paradise

Tonk Road, Jaipur- 302 018, Rajasthan

E-mail: accounts@sarv.com; sales@sarv.com

support@sarv.com

.....Respondent

Disputed Domain Name: **WWW.ENOW.IN**

AWARD

1) The Parties:

The Complainant in this arbitration proceeding is Bennett, Coleman and Company Limited, a company existing under the provisions of the Companies Act, 2013 having its registered office at The Times of India Building, Dr. D. N. Road, Mumbai – 400 001 and subordinate/branch/corporate office at 7, Bahadurshah Zafar Marg, New Delhi - 110 002. The Complainant is represented by its authorized representative, Ms Mamta R. Jha, Advocate of INTTL ADVOCARE.

The Respondent in this arbitration proceeding is Sarv Webs Private Limited having address at 503-14, 5th Floor, Sunny Paradise, Tonk Road, Jaipur- 302 018, Rajasthan as per the details available in the Whois database maintained by National Internet Exchange of India (NIXI). The Respondent is represented by its authorized representative, Ankur Raheja, Advocate of CyLaw Solutions.

2) The Domain Name, Registrar & Registrant:

The disputed domain name is <www.enow.in>.

The Registrar is Endurance Domains Technology LLP

The Registrant is Sarv Webs Private Limited having address at 503-14, 5th Floor, Sunny Paradise, Tonk Road, Jaipur- 302 018, Rajasthan.

3) Procedural History:

This arbitration proceeding is in accordance with the .IN Domain Name Dispute Resolution Policy (INDRP), adopted by the National Internet Exchange of India (NIXI). The INDRP Rules of Procedure (the Rules) were approved by NIXI on 28th June, 2005 in accordance with the Indian Arbitration and Conciliation Act, 1996. By registering the disputed domain name with the NIXI accredited Registrar, the Respondent agreed to the resolution of the disputes pursuant to the .IN Dispute Resolution Policy and Rules (the Policy) framed thereunder.

As per the information received from NIXI, the history of the proceedings is as follows:

In accordance with the Rules 2(a) and 4(a), NIXI formally notified the Respondent of the Complaint and appointed Ms. Rachna Bakhru as the Sole Arbitrator for adjudicating upon the dispute in accordance with the Arbitration and Conciliation Act, 1996, and the Rules framed thereunder, .IN Domain Dispute Resolution Policy and the Rules framed thereunder. The Arbitrator submitted the Statement of Acceptance and Declaration of impartiality and independence, as required by NIXI.

- The Complaint was produced before the Arbitrator on January 30, 2020 and the notice was issued to the Respondent on January 31, 2020 at Respondent's email address with a deadline of 10 days (i.e. February 10, 2020) to submit his reply to the Arbitrator.
- The Respondent acknowledged receipt of the Complaint on February 7, 2020 and provided email id of his authorized representative on the same date.

- On February 7, 2020 an email was received from Respondent's representative requesting for an extension of time of 10 days' to file the reply to the Complaint.
- The Arbitrator granted the requested extension to the Respondent's representative vide its email dated February 10, 2020.
- The Respondent submitted its reply by email on February 20, 2020.
- The Arbitrator directed both the parties on February 20, 2020 to submit their written note of arguments within 7 (Seven) days i.e. latest by **February 27, 2020**.
- The Respondent's representative filed its written note of argument within the given time. At the request of the Complainant, the Arbitrator granted extension of time of 7 days' i.e. until March 5, 2020 to Complainant's representative to file its written note of arguments.
- On February 27, 2020, the Respondent's representative requested for appointment of hearing to explain his case.
- The Complainant's representative submitted its Written note of arguments on March 5, 2020.
- The Arbitrator wrote an email on March 6, 2020 to Complainant representative, copying to Respondent representative that all arbitration proceedings, as per the INDRP rules, must be copied to both parties. The Arbitrator also sent Complainant representative's Written Arguments and as well as the earlier correspondence.
- On March 6, 2020 the Respondent raised objections the way Complainant had conducted by emailing unilaterally during the proceedings and introduction of new Annexures/Evidence at the time of filing written arguments.
- On March 6, 2020, the Arbitrator received an email from Complainant's representative stating that that the omission of Respondent's email IDs in their trailing emails was an inadvertent error and they apologized for the same. Further, they mentioned that the Respondent's objection to the Complainant's documents filed along with the written note of arguments is not tenable. The Complainant has filed the documents along with the written note of arguments as the same are very much relevant and vital in respect of the reply of the Respondent for the adjudication of the transfer of the disputed domain name www.enow.in.
- The Arbitrator vide his email dated March 13, 2020 fixed a hearing on March 17, 2020 at 3:00 pm at his office. Later on, due to spread of Covid 19 instead of a personal hearing, a hearing via video conferencing was fixed for March 17, 2020.
- on March 13, 2020 NIXI intimated to the parties that the personal hearing are subject to payment of the hearing fee.

- ON March 13, 2020, the Arbitrator informed the parties to fee deposit the fee for requested hearing as per NIXI's Policy which was duly paid by them.
- This hearing was adjourned to March 24, 2020 on Complainant's representative request.
- Thereafter a general lockdown was declared in the country due to Corona virus being declared as pandemic and all offices were closed. An order to this effect was passed by the Central government under disaster Management Act. Therefore, Arbitrator cancelled the hearing on March 24, 2020 vide his email dated March 24, 2020.
- On May 5, 2020, Arbitrator received an email from NIXI stating that they have resumed working and accordingly the Arbitrator appointed fresh date of hearing on May 11, 2020. The Respondent's representative consented his availability for the said date, no response was received by the Complainant's representative.
- As a last opportunity a hearing via video conferencing was fixed on Monday, 1st June at 11 am where both parties were present and submitted their oral arguments.
- The award in view of the emergency situation arising out of COVID 19 could not be passed within the 60 days period and is being decided as expeditiously as possible.

In view of the above, the Complaint is being decided based on materials and evidence submitted by both parties with the Complaint and the Response filed by the Respondent. Any evidence filed with the written submissions and written note of arguments has not been considered as no permission was sought to place the additional evidence. Further at the stage of hearing and written submissions no fresh evidence could be considered without parties seeking leave and explaining reasons for not filing the evidence with their Complaint and Response.

4) Grounds for administrative proceedings:

Paragraph 4 of .IN Domain Name Dispute Resolution Policy provides grounds on which INDRP complaint can be filed:

- i. the Registrant's domain name is identical or confusingly similar to a name, 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 Registrant's domain name has been registered or is being used in bad faith

5) Summary of the Complainant and Respondent's contentions:

The Complainant in support of its case has made the following submissions:

- a) The Complainant submits that it adopted and commenced use of the trade mark/logo **ENOW** in the year 2008 in relation to entertainment programmes. Since then, it has been using trade mark **ENOW** intermittently for a while and now, the Complainant has re-launched its entertainment programmes under the trade mark **ENOW** on 02.08.2019. The Complainant further submitted that on account of long, continuous commercial use, the trade mark **ENOW** has acquired substantial goodwill and reputation in the trade and amongst consumers at large. The said trade mark has come about to acquire distinctiveness, goodwill and reputation and become the indicia of trade origin and source of authentic and reliable broadcast pertaining to the Complainant and no one else. In order to accord statutory protection, the Complainant has filed application for the trade mark **ENOW** and same are pending registrations.
- b) The Complainant submits that it is the proprietor of the trade mark **NOW** and has been using it as a prominent part of its various news and entertainment channels namely, **TIMES NOW, ET NOW, MOVIES NOW, MIRROR NOW** and **ROMEDY NOW**. Moreover, the television arm of the Complainant has a tagline "**NOW** or Nothing". The Complainant adopted the trade mark **NOW** in 2004 and commenced the use of same in 2006 through **TIMES NOW**, a 24-hour English news channel **TIMES NOW** having extensive reach throughout India as well as in the international market.
- c) The Complainant further submits that it also operates an official website www.timesnownews.com created on 01.07.2008 on which it publishes news articles. The popularity of the Complainant's channel **TIMES NOW** is evident from the fact that it has approx. 56.6 lakhs likes and 58.5 lakhs followers on its official Facebook page, approx. 91.8 lakhs followers on its official Twitter handle and approx. 12.8 lakhs subscribers and approx. 44 crores views to its official YouTube channel as on the date 9th January, 2020 as shown in Annexure 8.
- d) The Complainant submits that in June 2009, the Complainant launched its business news channel in India under the trade **ET NOW**. Today, the said channel is India's one of the top premium business and financial news channel which covers domestic as well as International business news and is available in various countries internationally like USA, Canada, UAE, Dubai, parts of Africa etc. The Complainant also operates and maintains an official website of **ET NOW** channel on www.etnownews.com registered on 03.08.2017. The same redirects to <https://www.timesnownews.com/business-economy> which pertains to online publication of financial and economic news.
- e) The Complainant states that they have secured registrations for ET NOW marks under registration no. 1643599 in class 38 and No. 1643597 in Class 42; and various other marks containing NOW i.e. **TIMES NOW, MOVIES NOW, ROMEDY NOW, MIRROR NOW** and **NOW per se** The said registrations are valid and subsisting in the records of the Indian Trade Marks Registry.
- f) The Complainant submits that the Internet domain names have now become much more than mere representing of the websites of different companies on the internet. Today, in this age of well-developed information technology and worldwide businesses through Internet, these domain names have attained the

status of being business identifiers and promoters. Since the commercial activities on the Internet go on increasing day by day, the importance and usefulness of domain names too, are to be enhanced for the purposes of greater publicity, popularity, and profitability of businesses in all economic sectors. In the commercial field, each domain name owner provides information/services which are associated with such domain name. In fact, a domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify its corresponding online internet location. Hence, the websites/domain names are of great value not only to the users, but also to the owners of the domain names/websites.

- g) As per the Complainant, the Respondent has registered the domain www.enow.in which is identical to the Complainant's earlier trade mark **ENOW** and consist of Complainant's registered trade mark **NOW** as whole.
- h) The Complainant alleges that the domain name www.enow.in gives rise to enormous confusion and deception *qua* its origin because the disputed domain name is using the Complainant's trade marks **ENOW** and **NOW** as a whole apart from the disputed domain name/mark being phonetically and structurally deceptively similar to Complainant's **NOW** centric trade marks. Further, the disputed domain name www.enow.in will lead to confusion *qua* the Complainant's trade marks **ENOW**, **NOW** and **NOW** centric trade marks as search engines are likely to turn up hits for Respondent's disputed domain name www.enow.in based on searches for **ENOW/ NOW**.
- i) The Complainant further alleges that the Respondent has no rights or legitimate interests in the disputed domain name www.enow.in as the Respondent's adoption and registration of the impugned domain name www.enow.in on 24.11.2010 is much subsequent to the Complainant's adoption and use of the trade mark **ENOW** (adopted and used since 2008), registration of **NOW** per se (earliest registration of trade mark **NOW** bearing nos. 1716887 and 1716889 in classes 35 and 41 respectively dated 31.07.2008) and registration and use of **NOW** centric trade marks (**TIMES NOW**-earliest registration bearing no. 1306899 in class 38 dated 03.09.2004 and used since 2006.).
- j) It is also an allegation that a perusal of the disputed domain name will show that the Respondent has registered the disputed domain name www.enow.in in the absence of any business connection, approval or consent from the Complainant, which may mislead the Complainant's present as well as future customers into visiting the disputed domain name which redirects to website www.sarv.com. It is also submitted that the Respondent has no business connection, approval or consent from the side of the Complainant in any manner to use the Complainant's trade marks **ENOW** and **NOW** as part of its disputed domain name www.enow.in which is deceptively similar to the Complainant's **NOW** centric trade marks. The Complainant claims that the Respondent is intending to ride upon the goodwill and reputation of the Complainant's trade marks **ENOW**, **NOW** and **NOW** centric trade marks.

- k) Further, the Complainant submits that the Respondent's website www.sarv.com, which is redirected from the disputed domain name www.enow.in, is an interactive website which invites public to post their queries and feedbacks from all over the country and is therefore targeting consumers in India. The consumers are visiting the said website redirected from the disputed domain name under the belief that either the said website belongs to the Complainant or there is an association or endorsement of the same by the Complainant, which is not the case. Further, the customers are likely to be directed to the Respondent's website www.enow.in on account of the incorporation of the Complainant's trade marks **ENOW** and **NOW** as a whole and its similarity with the Complainant's domain names under the **NOW** centric trade marks.
- l) The Complainant states that the *mala fide* intent of the Respondent is writ large inasmuch as the said Respondent has no affiliation or connection with any of the Complainant, despite which the Respondent has registered the disputed domain name www.enow.in, which contains the Complainant's trade mark **ENOW** and registered trade mark **NOW** and **NOW** centric trade marks. The Respondent is beyond a doubt, intentionally and methodically attempting to confuse and deceive consumers at the expense of the Complainant. The conduct of the Respondent is *mala fide*, dishonest, unethical, fraudulent, unlawful and solely motivated to encash upon the goodwill and reputation of the Complainant in the trade mark **ENOW**, **NOW** and **NOW** centric trade marks. The Respondent's conduct constitutes trade mark infringement, passing off and unfair competition apart from misrepresentation and misappropriation of Complainant's goodwill and reputation in the said trade marks on account of the registration of the disputed domain name www.enow.in.
- m) The Complainant further states that the Respondent's conduct clearly establishes that the disputed domain name www.enow.in was registered by the Respondent to traffic the disputed domain name as well as misuse the proprietary rights in the trade marks **ENOW**, **NOW** and **NOW** centric trade marks vesting with the Complainant alone. The name of the disputed domain www.enow.in has been deliberately chosen by the Respondent to target the consumers of the Complainant and is a dishonest attempt to piggy back upon the enormous goodwill and reputation of the Complainant.

Respondent:

The Respondent in support of its case has made the following submissions:

- a) The Respondent is an online technology company into Domain Registration, Website Hosting, Cloud Services, Email Marketing and related solutions for businesses online. It was incorporated on 09th June, 2011 but the business was in the form of a partnership business among the promoters, when the disputed domain name was registered in 2010.
- b) The Respondent claims that it registered domain name <snet.in> on 9th September 2009, followed by <sarv.in> and <sarvmail.com> in mid-2010 while it registered the disputed domain name <[enow.in](http://www.enow.in)> on 24 Nov 2010 in good faith, followed by <[enowindia.com](http://www.enowindia.com)> in Feb 2011, after fully understanding the generic nature of the dictionary term **ENOW** and it never had knowledge of Complainant's

TV show then or even now relaunched in 2019, Complainant admitted to its intermittent use. Importantly, it implies the addition of prefix "E" and combining with another generic term 'NOW'. Even **ENOW** is a registered TM under class 42 in India and Register NOW is quite a common term, used in such business.

- c) The Respondent states that Complainant has no monopoly over this common **ENOW**, as it was not invented by the Complainant and does not exclusively belong to the complainant. But it is mainly a dictionary word and used as brand-able names by businesses globally. It is also a first name for many individuals around the world. Otherwise in India, POLARIS SOFTWARE LAB LTD. was one of the earliest to get **ENOW** registered as Trademark under classes 9 & 16 in 2001, while Complainant does not hold any registered Trademark rights over the term **ENOW** even as on date, while its Trademark Applications was made in **2017** only and have the status as OPPOSED. Pending trademark do not confer rights.
- d) The Respondent further states that the Term **NOW** indicates an action and is quite a powerful word in marketing. The same is frequently used online and helps to convert an online user into a customer. Accordingly, ENOW is a powerful brand-able term and it is not something that is distinctive or has been invented by the Complainant but has been mostly in use globally by different businesses since the year 1999 or 2000 when the Internet became a reality. Even an online search over Google or Social media for **ENOW** does not throw any search results for the Respondent. It is a well-settled law, that as long as the domain names have been registered because of their attraction as dictionary words and not because of their value as trademarks, this is a business model that is permitted under the Policy [*Gen. Mach. Prods. Co. v. Prime Domains, (NAF FA 92531)*]. Respondent owns many four letter domain name - snet.in, sarv.in, enow.in, tld6.com, depm.com & sarv.com.
- e) The Respondent submits that initially, **ENOW** was used as business name for the Respondent and the Website was active at ENOWINDIA.com, and has been mostly redirected to Respondent's different .COM domains. Though, in mid-2013, it was planned to be used as a Q&A website portal like QUORA.com - technology but for the last many years is being redirected to <sarv.com>. Redirection of a website indeed is very much a legitimate purpose.
- f) The Respondent submits that the domain name <enow.in> has been used by the Respondent in its business for use in the background process of allocation of numerous IP addresses by IRINN c/o NIXI (4096 IPv4 IP addresses in addition to 256 IPv6 end-site addresses). The allocated IPs have monthly relay of over 400 Crores (i.e. the number of emails that pass through these IP addresses in a month). Respondent is known by the Domain Name in terms of clause 7 (ii) of INDRP.
- g) The disputed domain name <enow.in> has been indicated as a contact (netadmin@enow.in, etc.) for the allocation of the IP addresses by IRINN C/o NIXI. Further, emails ending @enow.in have been published online on various websites as well and is a point of contact for various authorities including ISPs, NIXI, Enforcement agencies requiring specific user details, using any of the allocated IPs and otherwise 15 more such emails @enow.in are in use.
- h) The Respondent states that in *Real Estate Edge, LLC V. Rodney Campbell, WIPO# D2017-1366; <Greataustinreality.com>*) it was held that "the weaker the mark the stronger must be the evidence". In this case, the mark is weak and so is the evidence. The same has been held in the matter of INDRP/1063, involving domain name ZOAI.in, wherein the claim of Microsoft Corporation was rejected and domain transfer denied. As not necessarily every big Corporate, which otherwise has a huge reputation, can claim rights to each and every domain name based upon its

unknown Trademarks. As the reputation of the specific brand/mark needs to be proved, that is **ENOW** in this matter. Moreover, "UDRP proceedings are for clear cases of cybersquatting, not for resolving trademark infringement or other matters more appropriately dealt with through the courts" [Audi AG v. Stratofex Case No. D2012-1894].

- i) The Respondent further states that Complainant has been emailing Respondent since 2017 for the domain name through email ID mgaldwani@gmail.com though Complainant falsely states that it came to know about the disputed domain in Sept 2019 and tried to contact through SEDO. *In TOBAM v. M. Thestrup [WIPO D2016-1990], it was laid down "this is a classic "Plan B" case, i.e., using the Policy after failing in the marketplace to acquire disputed domain". "Moreover, where a Complainant is represented by intellectual property counsel who even on a rudimentary examination of the Policy and its application in this area should have appreciated that the complaint could not succeed, RDNH may be found" (Wirecard AG v. Telepathy Inc. (WIPO D2015-0703). RDNH was also found in the matter of Shevaldas C Raghani v. Stephen Koenig [INDRP/008: Computer.in]. Furthermore, it seems that the Complainant owns the domain name <e-now.in> since 09 May 2017 and <enow.co.in> since 09 August 2019. That is, after it had already enquired about disputed domain <enow.in> from the Respondent in March'17 & July/August 2019 respectively. WHOIS has been hidden, which reads DATA PROTECTED for organization name.*

6) Discussion and Findings:

The submissions and documents provided by the Complainant and Respondent show that:

- a) The Complainant is the registered proprietor of NOW formative trade marks TIMES NOW, ET NOW, MOVIES NOW, ROMEDY NOW, MIRROR NOW in class 38, 42 since 03.09.2004 as well as in the trade mark NOW per se in class 16, 35, 31 since 31.07.2008 as shown in **Annexure 12**. Further, Complainant is also the registered proprietor of ET NOW (reg. no. 1643597), TIMESNOW.COM (reg. no. 3530309) in class 42, the relevant class wherein the Respondent claims to be doing business in respect of said services. However, it does not own registration for the mark ENOW and their application filed are under opposition.
- b) The Arbitrator notes that Complainant claims adoption and the use of the trade mark/logo ENOW in the year 2008 and has re-launched its entertainment programmes under the trade mark ENOW on 02.08.2019 as shown in **Annexure 4**. Further, Complainant also operates now centric domain name websites such as www.timesnownews.com as shown in **Annexure 7** www.etnownews.com as shown in **Annexure 10** and other domains as shown in **Annexure 14** which have subscribers in lakhs as shown in **Annexure 11**. The complainant by way of **Annexure 6 and 9** has enclosed internet news articles showing launch of the TIMES NOW channel and launch/use of the ET NOW channel respectively and by way of **Annexure 8** has enclosed relevant pages of the social media platforms pertaining to the channel/trade mark TIMES NOW.
- c) The Respondent has contended that all materials enclosed by Complainant as on the date of filing of complaint show use of the mark NOW along with the combination of TIMES, ET, MOVIES, MIRROR AND ROMEDY in respect of various news and entertainment channels. Respondent also contended that Complainant has not filed any documents supporting the independent use of mark NOW on which Complainant is claiming monopoly.

- d) The Respondent as per **Annexure VIII (b)/ Respondent** which shows online records of the Trade Mark registry submitted that registration of mark NOW has been secure by Complainant on proposed to be used basis in July 2008 but also in 2014 under classes 35 and 41. The Respondent also contended from the admission made by Complainant in para 4 of its complaint about intermittent use of the mark ENOW and document evidencing re-launch of program under mark ENOW in 2019, it should be taken into account that Complainant has not earned reputation and goodwill associated with the trade mark ENOW.
- e) The Arbitrator notes the contention of Respondent that Complainant does not hold any registered Trademark rights over the term **ENOW** even as on date, while its trademark Applications was made in **2017** only and have the status as OPPOSED as shown **Annexure VIII (c) & (d) filed by Respondent**.

Based on the submissions and documents provided in support by the Complainant and Respondent, I now deal with the three requisite conditions laid out in paragraph 4 of the .IN Domain Name Dispute Resolution Policy which is listed below. Further the Respondent has not contested the claims, therefore deemed to have admitted the contentions of the Complainant.

The INDRP policy lists the following three elements that the Complainant must prove to merit the finding that the domain name of the Respondent be transferred to the Complainant or whether any other remedy in terms of the paragraph 10 of the INDRP Policy will be available or not:

(i) Identical or confusingly similar with the Trade Mark, etc [Para 4(i) of INDRP Policy]

To determine the first element under the Policy, the essential element of competing domain names have to be compared. The Arbitrator does not need to get into the considerations as to whether the competing marks are liable to cause confusion with one another since it is not relevant to the assessment under this element of the Policy.

On considering the trademark rights of the Complainant which are supported by documents of trademark registration as shown in **Annexure 12**, the Complainant has established rights in trademark NOW, using it as a part of its various NOW marks, TIMES NOW, ET NOW, MOVIES NOW, MIRROR NOW and ROMEDY NOW. Further, it has intermittently used the mark ENOW. Accordingly, the Arbitrator concludes that disputed domain name is confusingly similar to that of the Complainant and that the requirements of paragraph 4 (i) of the Policy have been satisfied.

(ii) Rights or Legitimate Interests in the Domain Name [Para 4(ii) of INDRP Policy]

In order to satisfy requirement of INDRP Policy paragraph 4(ii), the Complainant is required to make out a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name. On making such *prima facie* case, the burden of proof shifts to the Respondent to provide appropriate allegations or evidence to demonstrate rights or legitimate interests in the domain name.

Paragraph 7 of INDRP Policy deals with Registrant's Rights to and Legitimate Interests in the Domain Name:

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*
- (iii) 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 has asserted that the Respondent can have no rights or legitimate interests in the disputed domain name as it contains the Complainant's famous ENOW and NOW centric marks. The Complainant also submitted that the Respondent had obtained registration of <enow.in> which re-directs the consumers to a completely different website <Sarv.com>, having no similarity of common element with the disputed domain name. Thus, redirection cannot be legitimate. Complainant contended that that prior to registration of the disputed domain name <enow.in> in November 2010, the Respondent adopted <snet.in> on 9th September 2009, followed by <sarv.in> on 31 May 2010 and <sarvmail.com> on 27 June 2010 as shown in **Annexure X/Respondent**.

The Respondent's case in answer, focus majorly on contention that it has registered the impugned domain name under the generic nature of term ENOW. In a detailed and comprehensive response, the Respondent explained that it adopted the disputed domain name <enow.in> in good faith, followed by <enowindia.com>, after fully understanding the generic nature dictionary term 'ENOW' (*means ENOUGH*) by addition of prefix "E" that is electronic, which is any data or information transmitted over a network or the Internet and combining with another generic term 'NOW' as shown in **Annexure III/Respondent**. Respondent denied the reputation of Trademark NOW and mark ENOW and contended that at no time the Respondent ever heard of the Complainant or its marks at the time of registration (November 2010) of the disputed domain name as all the evidence of use of complainants marks are of the time before the registration of the disputed domain name by the Respondent and not at the time of registration of Domain Name by the Respondent. The Respondent further emphasized upon Complainant's admission to the intermittent use of the mark ENOW and re-launch of promotion program under the said mark in 2019, showing no use when Respondent registered the domain name. It was also contended by Respondent that the redirection of a website is very much a legitimate purpose even <enow.in> redirects to main business website Sarv.com but in the background the said domain name has been used for allocation of IP addresses for the business server.

In light of the evidence provided by the Respondent, the Arbitrator holds that that the Respondent has used the domain name <enow.in>. Arbitrator notes that the redirection of Disputed Domain Name to another company's legitimate website is use of the Disputed Domain. As held in *MasterCard International Inc. V Champion Software Technologies Ltd. (INDRP/978*. "any person / company may

register more than one Domain Name to secure *its rights to particular keywords in various domain names but it may not be feasible to run a website on each and every domain name as it may cause confusion among visitors*".

The remaining question for the Arbitrator is whether adoption and use of <enow.in> can be said to be in *bona fide*, bearing in mind the existence of the Complainant's NOW centric and ENOW mark prior to adoption of impugned domain name. The Arbitrator considers that the answer depends upon the intentions and motives of the Respondent when the disputed domain name was registered. Did the Respondent intentionally select the Complainant's trademark as part of the disputed domain name or did the Respondent adopted the same owing to generic nature of ENOW.

In Stanley Black & Decker, Inc. v. Domain Administrator, PrivacyGuardian.com / Dwayne Rowland, D2019-2218 (WIPO November 5, 2019) (<craftsmans.com> "[G]iven that the Domain Name does correspond to a dictionary term and that Respondent asserted a previous legitimate use for the Domain Name, there is insufficient evidence to show that Respondent has maintained ownership of the Domain Name primarily for the purpose of disrupting Complainant's business by depriving Complainant of the ability to avail itself of this Domain Name."

Further, Arbitrator finds that Complainant has failed to show through the evidence that on the date when the Respondent registered the disputed domain name, Complainant marks had goodwill, reputation or Respondent was aware of the Complainant's ENOW and NOW centric marks.

The case of the Complainant is based on reputation and goodwill of NOW family of marks with no clear evidence before the Arbitrator to conclude the Respondent's motivation in selecting the disputed domain name <enow.in> is to *misleadingly divert consumers or to tarnish the trademark or service mark of the Complainant*. Accordingly, the Arbitrator finds no assistance in answering the primary question of the Respondent's intent from the Complainant's various criticisms of the Respondent's use of <enow.in> mainly for redirection to its another website <sarv.com>.

The Arbitrator reminds himself that according to the Policy, it is the Complainant who must prove each of the three necessary elements of the Policy on the balance of probabilities to the Arbitrator's satisfaction, including that the Respondent has no rights or legitimate interests in the disputed domain name. In such a finely balanced case, where neither of the Parties have demonstrated the Respondent's good or bad faith intent in selecting the disputed domain name to the full satisfaction of the Arbitrator side, the Arbitrator considers that the Complaint must fail on the basis that the Complainant has failed to prove that the Respondent has no rights or legitimate interests in respect of the disputed domain name <enow.in>.

The present case based on rights in NOW family of marks appears suitable to be resolved through a trademark infringement or unfair competition claim rather than a complaint of abusive cybersquatting. As held in *Intel Corporation v. Intelsitio Mexico, [WIPO Domain Name Decision: D2012-0718]* and *Audi AG v. Stratofex [WIPO Case No. D2012-1894]*, "INDRP proceedings are generally for clear cases of cyber squatting as Policy is of narrow compass and is intended to deal with cases of abusive cybersquatting".

The Arbitrator further considers the observation in the case of *Regency Furniture of Laurel, Inc. v. David Lively*, [WIPO Case No. D2018-0919] which pertinently notes that “to determine whether a Respondent’s business infringes the Complainant’s rights, it is not appropriate to resolve the dispute through an administrative proceeding”.

In the circumstances, Arbitrator concludes that Complainant has failed to satisfy beyond reasonable doubt the conditions laid out in paragraph 4 (ii) of the Policy. The Arbitrator would like to make it clear that it is not expressing any view on whether the Respondent is infringing the Complainant’s rights in its registered trademarks. The conclusion is based on the assessment that the dispute between the Parties does not on balance appear to fall under the policy and conditions laid out for determination.

C. Registered and Used in Bad Faith

Arbitrator concludes that since Complainant has failed to establish that Respondent lacks rights or legitimate interests in the disputed domain name, in these circumstances it is not necessary to make a finding under this element of policy. As held in *Saltworks, Inc. v. Gary Pedersen, Salt Works* [Case No. D2013-0984]-“if Complainant fails to establish an element necessary for a finding of abusive domain name registration and use, the Panel need not address the element of bad faith registration and use”.

7. Decision

The Complainant has not established the three grounds required under the policy to succeed in these proceedings. For all the foregoing reasons discussed, the Complaint is denied.

Parties to bear their respective cost.

**RANJAN
NARULA**

**RANJAN NARULA
SOLE ARBITRATOR
NIXI
INDIA**

Digitally signed by
RANJAN NARULA
Date: 2020.06.17
13:30:34 +05'30'

June 17, 2020