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N 826296

ARBITRATION AWARD

.IN REGISTRY - NATIONAL INTERNET EXCHANGE OF INDIA
.IN domain Name Dispute Resolution Policy
INDRP Rules of Procedure

IN THE MATTER OF:

Double Eagle Brands NV
Kaya W.F.G Mensing
32 Willemstad
Curacao
Netherlands Antilles.

Complainant

VERSUS

Mr. Juwul Poon
Domains Masters
50-D
New Delhi.

Respondent

1. **THE PARTIES:**

The Complainant in this administrative proceeding is Double Eagle Brands NV Kaya W.F.G Mensing 32 Willemstad, Curacao Netherlands Antilles. Represented through DePenning & Depenning, 120 Velachery Main Road. Guindy, Chennai-600 032. India.

The Respondent is Mr.Juwul Poon, Domains Masters, 50-D, New Delhi.

2. **THE DOMAIN NAME AND REGISTRAR**

The disputed domain name <KETELONE.IN> has been registered by the Respondent. The Registrar with whom the disputed domain is registered is A to Z Solutions Pvt. Ltd.

3. **PROCEDURAL HISTORY**

The Complaint was filed with the .In Registry, National Internet Exchange of India (NIXI), against Mr.Juwul Poon, Domains Masters, 50-D, New Delhi. The NIXI verified the Complaint together with the annexures to the Complaint and satisfied the formal requirements of the .in Domain Name Dispute Resolution Policy ("The Policy") and the Rules of Procedure ("The Rules").

- 3.1 In accordance with the Rules. Paragraph-2(a) and 4(a), NIXI formally notified the Respondent of the Complaint and appointed me as a Sole Arbitrator for adjudicating upon the dispute in accordance with The Arbitration and Conciliation Act, 1996. Rules framed there under, .In Dispute Resolution Policy and Rules framed there under on **17th February, 2011**. The parties were notified about the appointment of an Arbitrator on **18th February, 2011**.



3.2 The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by NIXI to ensure compliance with the Rules (paragraph-6). The arbitration proceedings commenced on **18th February, 2011**. In accordance with the rules, paragraph 5(c). The Respondent was notified by me about the commencement of arbitration proceedings and the due date for filing his response.

3.3 The Respondent failed and/or neglected and/or omitted to file formal response to the Complaint within 10 days as was granted to him by the notice dated February 18, 2011.

The Panel vide e-mail dated March 8, 2011 once again granted a final opportunity to the Respondent to file his response to the Complaint filed by the Complainant within seven days. However, the Respondent again failed and/or neglected and/or omitted to file any response to the complaint besides the second opportunity granted by the Panel to the Respondent.

3.4 The Panel considers that according to Paragraph-9 of the Rules, the language of the proceedings should be in English. In the facts and circumstances, in-person hearing was not considered necessary for deciding the Complaint and consequently, on the basis of the statements and documents submitted on record, the present award is passed.

FACTUAL BACKGROUND

4.1 The Complainant in these administrative proceedings is Double Eagle Brands NV Kaya W.F.G Mensing 32 Willemstad, Curacao Netherlands Antilles. The Complainant is predominantly in the business of providing alcoholic beverages.

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- 4.2 The complainant: has trademark registrations for the trademark KETEL ONE for inter alia, alcoholic beverages worldwide including in the following territories, the United States of America, Canada, the European Community, the United Kingdom, the Benelux, Singapore, Hong Kong, Nepal, Malaysia, Sri Lanka, New Zealand, Australia, Taiwan, Thailand, Philipines, Japan, China, South Korea, Pakistan, Afganistan.
- 4.3 The Complainant is the owner/proprietor and registrant of the various domain names including ketelone.com.
- 4.4 The Respondent has obtained registration of Domain Name <ketelon.in>

5. PARTIES CONTENTIONS

5A COMPLAINANT

- 5A(1) The complainant is Headquartered in Curacao, and having the actual distillery (The Nolet Distillery being a licensee) in Netherlands, the Complainant is a leading global alcoholic beverages company, and promotes the goods online, using the Internet and worldwide web through their well known domain name ketelone.com as well as through various other country level domains (ccTLDs). The said Domain was registered on 29/07/1997 and the associated websites were launched in subsequent years. The websites also provides elaborate information about the complainant and their products. The Complainant combines global; expertise and operations with local knowledge in each of their markets and are marketed world wide.



5A.2 The Complainant owns the intellectual property of all the worldwide trademark applications and registrations and domain name registrations of the brand name "KETELONE".

5A.3 The complainant has trademark registrations for the trademark KETEL ONE for inter alia, alcoholic beverages worldwide including in the following territories, the United States of America, Canada, the European Community, the United Kingdom, the Benelux, Singapore, Hong Kong, Nepal, Malaysia, Sri Lanka, New Zealand, Australia, Taiwan, Thailand, Philippines, Japan, China. South Korea. Pakistan, Afganistan and asserts that the mark KETELONE has been extensively used in commerce worldwide since 1983. The complainant manufactures and markets (through licensees) various alcoholic beverages and one brand being the premium Vodka under the name KETEL ONE. The website www.ketelone.com proclaims and advertises about the alcoholic beverages manufactured on behalf of the complainant.

5A.4 The complainant submits that there are a large number of visitors to the Complainant's various websites one being www.kctelone.com, thus generating business and efficient service, goodwill and repute. Every month the Complainant's website www.ktelone.com reveals about 1,33,000 hits on average daily.

5A.5 The Complainant submits that he has spent a considerable amount of money its brand KETEL ONE worldwide. The complainant has a huge annual turnover and approximately an average USD 17.9 million per year is spent on advertising the brand KETEL ONE in United States alone. The Complainant and its predecessor in title have participated in various events (exhibitions etc.), national and

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international of which some of it were sponsored by them.

5A.6 The Complainant further submits that he also generated a substantial reputation and goodwill in the name of KETEL ONE. This has been possible through extensive promotion of the KETEL ONE range of products through widespread advertisement which has appeared in a number of publications.

5A.7 The Complainant asserts that he is the first to conceive, adopt, use and promote the mark KETEL ONE in respect of the alcoholic beverages. The Complainant is also the first to conceive, adopt, use and promote www.ketelone.com and various other domain names. On account of extensive usage of the mark KETEL ONE, the said mark is identified solely and exclusively only with the Complainant and none other. Further, the KETEL ONE brand, has gained a huge customer base internationally and is identified, associated and recognized only with the Complainant. Therefore, adoption and/or usage of the mark KETEL ONE by others would amount to not only dilution of the Complainant's rights over the distinct mark but also would result in confusion and deception by any unauthorized usages of others. Such unauthorized usages of the Complainant's mark KETEL ONE and domain names comprising of KETEL ONE by others would also amount to infringement and passing off actions and is liable to be prevented in Courts of law.

5A.8 The Complainant has filed evidence by way of Exhibits A to H in support of the averments made in the Complaint.

B. RESPONDENT

5B (1) According to the WHOIS Database filed by the Complainant, the Respondent in the administrative



proceedings is Mr. Juwul Poon, Domains Masters. 50-D, New Delhi.

5B(2) The Respondent has been given opportunity to file his response to the Complaint by the panel by its notice(s) dated February 18, 2011 and March 8, 2011.

5B(3) The Respondent has, however, failed and/or neglected and/or omitted to file any response to the Complaint and/or to deny the evidence marked as Exhibit A to H to the Complaint.

5B(4) The Panel, therefore, has no other option but to proceed with the proceedings and to decide the complaint on the basis of the material on record and in accordance with the .In Dispute Resolution Policy and the Rules framed thereunder.

6. **DISCUSSIONS AND FINDINGS**

6.1 The Complainant, while filing the Complaint, submitted to arbitration proceedings in accordance with the .In Dispute Resolution Policy and the Rules framed thereunder in terms of paragraph (3b) of the Rules and Procedure. The Respondent also submitted to the mandatory arbitration proceedings in terms of paragraph 4 of the policy, while seeking registration of the disputed domain name.

6.2 Paragraph 12 of the Rules provides that the Panel is to decide the Complaint on the basis of the statements and documents submitted and that there shall be no in-person hearing (including hearing by teleconference video conference, and web conference) unless, the Arbitrator, in his sole discretion and as an exceptional circumstance, otherwise determines that such a hearing is necessary for deciding the Complaint. I do not think that the present case is of exceptional nature where the determination cannot be

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made on the basis of material on record and without in-person hearing. Sub-Section 3 of Section 19 of The Arbitration & Conciliation Act also empowers the Arbitral Tribunal to conduct the proceedings in the manner it considers appropriate including the power to determine the admissibility, relevance, materiality and weight of any evidence.

- 6.3 It is therefore appropriate to examine the issues in the light of the statements and documents submitted as evidence as per Policy, Rules and the provisions of the Act.
- 6.4 In accordance with the principles laid down under order 8 Rule 10 of the Code of Civil Procedure, the arbitrator is empowered to pronounce judgment against the Respondent or to make such order in relation to the Complaint as it think fit in the event, the Respondent fails to file its reply to the Complaint in the prescribed period of time as fixed by the panel.

The award can be pronounced on account of default of Respondent without considering statements or averments made by the Complainant on merit. However, in view of the fact that preliminary onus is on the Complainant to satisfy the existence of all conditions under the policy to obtain the reliefs claimed, the panel feels it appropriate to deal with the averments made by the Complainant in its Complaint in detail and to satisfy itself if the conditions under the policy stand satisfied.

The Complainant has filed evidence by way of **Exhibits 'A' to 'H'** in support of the averments made in the Complaint.

The Respondent has not filed any reply or documentary evidence in response or in rebuttal to the averments made in the complaint, and evidence on



record. The averments made in the complaint and the authenticity of documentary evidence, thus remain unrebutted and unchallenged.

- 6.5 The onus of proof is on the Complainant. As the proceedings are of a civil nature, the standard of proof is on the balance of probabilities. The material facts pleaded in the Complaint concerning the Complainant's legitimate right, interest and title in the trade mark, trade name and domain name <KETELONE.IN> and the reputation accrued thereto and evidence produced in support thereof have neither been dealt, with nor disputed nor specifically denied by the Respondent. The Respondent, has not also denied the correctness and genuineness of any of the Annexures/Exhibits filed by the Complainant along with the Complaint.
- 6.6 Under the provisions of Order 8 Rule 5 of the Code of Civil Procedure, 1908 the material facts as are not specifically denied are deemed to be admitted.
- 6.7 The decision of Hon'ble Supreme Court of India in the matter of Jahuri Sah Vs. Dwarika Prasad - AIR 1967 SC 109, be referred to. The facts as are admitted expressly or by legal fiction require no formal proof. (See Section 58 of the Indian Evidence Act, 1872).
- 6.8 The Panel therefore accepts the case set up and the evidence filed by the Complainant and concludes that the same stand deemed admitted and proved in accordance with law.
- 6.9 Paragraph 10 of the Policy provides that the remedies available to the Complainant pursuant to any proceedings before an arbitration panel shall be limited to the cancellation or transfer of domain name registration to the Complainant.

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6.10 Paragraph 4 of the Policy lists three elements that the Complainant must prove to merit a finding that the domain name of the Respondent be transferred to the Complainant or cancelled:

A. **IDENTICAL OR CONFUSINGLY SIMILAR**

6A.1 The Complainant contends that the Registrant's Domain Name is identical or confusingly similar to a trade mark in which the Complainant has prior rights.

6A.2 The Complainant is the proprietor of the trade mark "Ketel One" in India as stated herein below for the goods falling in Class 33.

Trademark	Country	Application No.	Registration No.	Goods/Services
KETEL ONE	INDIA	1415494	1415494	Class 33 : Alcoholic beverages (Except Beers) included in class 33
KETEL ONE & Device	INDIA	756125	756125	Class 33 : Alcoholic beverages (Except Beers) included in class 33.

6A.3 The Complainant is also registered proprietor of the trade mark KETEL ONE in different countries in the world as per the material on record.

6A.4 The Complainant, is also the proprietor of various Domain name registrations at International and domestic level. The trademark(s) as well as the domain name(s) of the Complainant with KETEL ONE as an essential feature are validly subsisting in Complainant's name.

6A.5 The Respondent's domain name ketelone.in is identical to the said trade mark KETEL ONE and various other domain names including ketelone.com, in which the Complainant has a vested right on account of prior registrations and use in different parts of the world.

6A.6 The Respondent's domain name is nothing but a blatant imitation of the Complainant's prior and registered trade mark. The Respondent has made a calculated approach wherein he has not created any content to his website but is merely offering his Domain for sale. This act of the Respondent establishes a malafide intention on his part to merely ride on the goodwill associated with the complainants website www.ketelone.com. This act of the Respondent is bound to result in conflict and confusion and lead to dilution of the reputation associated with the Complainants business. As a result, the complainants search engine rankings would be adversely impacted thereby directly resulting in drop in reputation and revenue.

6A.7 The existence of the Respondent's domain name would cause the public to believe that the respondent and their domain name is sponsored by or affiliated to the Complainant.

6A.8 The Respondent's domain name without any due cause is taking or would take unfair advantage of and/or be detrimental to the distinctive character and repute of the Complainant's trade mark, corporate name and domain names.

6A.9 The corporate name, trademarks and domain name of the Complainant are distinctive on account of their extensive use which has qualified "KETELONE" into a well known mark under Intellectual Property Law. Under the circumstances, if the Respondent is allowed to proceed to operate the website under the disputed domain name, the potential customers would be induced to:

- (a) Subscribe to the services of the impugned website and deal with Respondent believing it to be licensed or authorized by the Complainant:



- (b) believe that the Respondent is carrying on activities that has been endorsed by the Complainant.

6A.10 The Respondent has not disputed any contentions raised by the Complainant in the Complaint. The question of deceptive similarity of the competing marks and/or name is to be decided with reference to their phonetic, visual or structural similarity in the mind of unwary purchasers. The Panel also find and hold that the disputed Domain Name www.ketelone.com is identical and/or deceptively similar to the earlier registered trade marks and Domain names of the Complainant. The whole of Complainant's trade mark /domain name has been incorporated in the disputed domain name and there is bound to be confusion and deception in the course of trade by the use of disputed domain name. Therefore, the Complainant has been successful in proving that the domain name www.ketelone.in is identical and/or confusingly similar to the trademark KETEL ONE of the Complainant.

B. RIGHTS OR LEGITIMATE INTERESTS

6B.1 Paragraph 7 of the Policy lists the following three non-existence methods for determining whether the Respondent has rights or legitimate interests in a disputed domain name:

6B.2 The disputed domain name was registered by the Respondent on 20th September 2010. At this time, the Complainant as per the material on record had already built considerable reputation in the mark KETEL ONE and had been actively using the website www.ketelone.com which can be assessed from any corner of the world. The Complainant also has common law rights in the KETEL ONE in all prominence and is the only identifiable name of the Complainant.



- 613.3 The disputed domain name was registered by the Respondent on 20th September 2010 which is a date much after the hoisting of the website by Complainant under the domain name ket.elone.com on 17/11/1995.
- 6B.4 The website of Respondent's domain name www.ketelone.in does not depict any activity. This clearly shows that this is a cyber squatting activity, which is a menace to the society as a whole.
- 6B.5 The Respondent is not or has never been known by the name KETEL ONE or by any confusingly similar name.
- 6B.6 The Respondent's registration and use of the disputed domain name is a clear case of cyber squatting, whose intention is to take advantage of the Complainant's substantial reputation and its prominent presence on the internet and thereby to confuse the public by offering similar services and goods as that of the Complainant, divert business, tarnish the repute and goodwill of the Complainant and the said marks and unduly gain in all aspects to the detriment of the Complainant.
- 6B.7 The Respondent did not dispute any of the contentions raised by the Complainant in its Complaint and evidence filed therewith. The case set up by the Complainant is deemed to be admitted as not disputed by the Respondent. The Panel also find, on the basis of the material available on record, that the respondent has no legitimate right or interest in the disputed domain name. The respondent has failed to show any justification for the adoption, use or registration of disputed domain name.
- 6B.8 The Panel, therefore holds that the circumstances listed above demonstrate rights or legitimate interests of the Complainant in the domain name ketelone.in and holds that Respondent has infringed the rights of the Complainant by registering the Domain Name and has no legitimate right or interest therein.



C Registered and used in Bad Faith

- 6C.1 For the Complaint to succeed, the Panel must be satisfied that a domain name has been registered and is being used in bad faith.
- 6C.2 Paragraph 6 of the Policy states circumstances which, if found shall be evidence of the registration and use of a domain name in bad faith:
- 6C-3 The Respondent has not been authorized, licensed or otherwise consented by the Complainant to use the mark KETEL ONE or to seek any sort of registration incorporating the said marks and domain name of the Complainant.
- 6C.4 That being aware of the Complainant's mark, domain names, the repute, recognition and goodwill that the Complainant has achieved worldwide, the respondent has subsequently, with malafide intention adopted the disputed domain name incorporating the said marks of the Complainant.
- 6C.5 The registration of the domain name and its subsequent use by the Respondent is for the purpose of defrauding the public. The registration of the Domain Name and its subsequent use by the Respondent is a deliberate attempt by the respondent to attract, for commercial gain, internet users to another online location by creating a likelihood of confusion with the Complaint's KETEL ONE mark and domain name such that the public would in all likelihood falsely believe that the Domain Name is sponsored, endorsed or authorized by or in association with the Complainant. The Complainant believes this has been done for fraudulent purposes.
- 6C.6 The Respondent did not use or register the mark KETEL ONE or any variation thereof prior to the date upon which the disputed domain name was registered. Neither does it.

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appear that the Respondent is/was commonly known by the mark or name KETEL ONE or any variation thereof prior to the disputed domain name registration.

6C.7 The Respondent does not dispute any of the contentions raised by the Complainant(s). The facts and circumstances explained in the complaint coupled with the material on record clearly demonstrate that the domain name www.ketelone.in was registered by the respondent in bad faith and to attract the internet users, through disputed domain, to the website of the competitor.

6C.8 The panel accepts the contentions of the Complainant as have been raised by them and holds that the registration, of the domain name on part of the Respondent is in bad faith.

7. **DECISION**

In view of the fact that all the elements of Paragraphs 6 and 7 of the policy have been satisfied and in the facts and circumstances of the case, the panel directs the transfer of domain name <ketelone.in> to the Complainant.



AMARJIT SINGH
Sole Arbitrator

Dated: 18th April, 2011.