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VISHESHWAR SHRIVASTAV

SOLE ARBITRATOR

IN

ARBITRATION PROCEEDINGS OF DOMAIN NAME

www.vrbo.co.in

between

HOMEAWAY.COM, INC

...COMPLAINANT

AND

AJAY GUPTA

...RESPONDENT

AWARD

1

Statutory Alert:

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1. This Arbitral Tribunal was constituted by nomination of undersigned as the Arbitrator in the aforesaid proceeding vide communication by NIXI and accordingly this Tribunal issued notice to the parties on 07/12/2018. This Tribunal was in receipt of an email from NIXI dated 05/12/2018 showing the dispatch of the complaint vide Overnite Express Courier. Accordingly vide the aforesaid communication this Tribunal directed the Respondents to send their Statement of Defense by 17/12/2018.
2. This Tribunal vide its order dated 20/12/2018 drew the attention of the parties w.r.t. non compliance of directions passed on 07/12/2018 and directed the complainants to comply with the order dated 7/12/18 which they had failed to do and also directed the Complainants to file their Evidence by way of Affidavit in support of the complaint by 27/12/2018.
3. However, there was no reply from the complainants side w.r.t. the compliance of orders also this Tribunal on 25/12/2018 finally called upon the complainants giving them a last and final

opportunity to comply with the order dated 07/12/18 and 20/12/18.

4. Mean while this Tribunal had received an email from NIXI stating that the Complaint sent by Courier to Respondent has been returned back with a note "SHIFTED". However, it was seen that the emails sent by this Tribunal to the Respondent had not bounced back and the Respondent despite receiving emails of this Tribunal had not provided their new postal address so as to enable the Complainants to send the hard copy of the complaint and also to send their response / SOD w.r.t. the complaint filed against them. However, there was a stoic silence from the side of the Respondent. In view of this situation it is noticed that the Complainants have tried their best to serve the Respondents at their last known notified address. Hence this Tribunal takes it as a case of deemed service so far as the Respondents are concerned.
5. Since this Tribunal had not received any response from the complainants till 31/12/18 hence, this Tribunal gave them last

and Final Opportunity to file their Evidence by 3rd January, 2019.

6. This Tribunal on 31/12/2018 finally received an email from the Complainants that all the emails sent by this Tribunal had been caught in the spam folder, hence they had not seen the emails and prayed for an extension to file their Evidence by way of Affidavit as the offices were closed for Christmas and New Year. Hence, vide order dated 01/01/2019 this Tribunal extended the date of filing evidence till 10/01/2019.
7. This Tribunal having received both hard and soft copy of the Evidence by way of Affidavit on 10/01/19, reserved its Award vide order dated 14/01/ 2019.

CLAIM

8. The claim as put forward by the complainant is briefly as under:
 - A. It is claimed that the Complainant, HomeAway.com, Inc., located at 1011 W. Fifth Street, Suite 300, Austin, Texas 78703, United States of America and is owned by Expedia, Inc.

("Expedia"), which is claimed to be one of the world's largest travel companies by placing reliance on **Annexure A**.

- B. It is claimed that Expedia acquired the Complainant and all of its brands, including VRBO, in November 2015 and purportedly "expanded into the fast growing \$100 billion alternative accommodations markets".
- C. It is further claimed that the Complainant is a global online marketplace for the vacation rental industry, with sites currently representing more than 2 million unique places to stay in 190 countries including in India and it additionally offers software solutions to property managers through its HomeAway Software for Professionals. Reliance has been placed by the Complainants in a screen shot which finds place in the complaint.
- D. It is claimed **VRBO** was one of the original online vacation rental companies that was founded in 1996 by husband and wife team, Dave and Lynn Clouse and since 1996, **VRBO** has

become one of the most trusted accommodation brands for travellers and hosts, later on **VRBO** was acquired by the Complainant in 2006 and subsequently, the Complainant was acquired by Expedia, Inc. in 2015. It is further claimed that **VRBO**(via its website www.vrbo.com) attracts more than 19 million traveller visits each year. For this purpose reliance is placed on **Annexure B**.

- E. By relying on **Annexure D** the Complainant claims to be the sole proprietor and user of the trademark **VRBO** which allegedly stands for Vacation Rentals by Owner.
- F. By relying on **Annexure E & F** the Complainant claims that it owns the domain, viz. <www.vrbo.com> which was registered on 30th July, 1996 and has an active commercial website i.e., www.vrbo.com which details the background of the Complainant and its services. Further, the Complainant also has a mobile application in the name of **VRBO** which is available for download on Android and Apple devices.

- G. By relying on Annexure G it is claimed that the Complainant is also active on social networking websites and information regarding the services under the mark **VRBO** is available on Facebook (with 711,915 likes and 713,483 followers as on 17November 2018) and Twitter (with 26.6K followers as on 17November 2018) and Instagram (24K followers as on 17November 2018).
- H. By relying on **Annexure H 1** and **H2** the complainant have tried to prove that the trademark **VRBO** belongs to the Complainant and is popular in India.
- I. It is claimed that the Complainant has received several awards over the years, including a Travel Weekly 2016 Gold Magellan Award in the Hospitality - Vacation Rentals/Villas/Time Share category; a Gold Award in Bulldog Reporter's 2014 Digital/Social Awards; and Customer Service Department of the Year - Bronze awards in the Stevie Awards for Sales & Customer Service in 2017 and 2015; and was listed in the top ten of USA Today's Best App/Website for Booking Your Stay in

2015. Reliance is placed on **Annexure I** by the complainants in order to buttress their aforementioned contentions and are claiming that the Complainant has a longstanding and uninterrupted use along with promotions under the trademark **VRBO**, and the public and the trade recognize and associate **VRBO** with Complainant alone.

- J. It is pleaded by relying on **Annexure J** the complainants claim that in the month of September 2018, the Complainant became aware of the domain www.vrbo.co.in, registered in the name of the Respondent and found that the disputed domain name was registered on 12th January, 2011, i.e. years after the Complainant established its rights in the trademark **VRBO**.
- K. It is alleged that the Complainant on verification found that the Respondent Mr. Ajay Gupta was operating a travel agency named Flight Center Travels Pvt. Ltd. Reliance is placed on **Annexure K and L**. It is alleged that Flight Center Travels Pvt. Ltd. is a travel agency, and is thus in the same field of activity as the Complainant, and thus were aware of Complainant's

trade mark VRBO.

- L. **Annexure M** is a legal notice dated 13/09/2018 to the Respondent setting out its legal rights and demanding that the Respondent cease use of the disputed domain name www.vrbo.co.in and seeking transfer of the same to the Complainant. However, the Respondent chose not to reply to the legal notice.
- M. By relying on **Annexure N** which are snapshots from a website Wayback Machine on <https://archive.org/web> the Complainant claim that the disputed domain www.vrbo.co.in has been parked and no website has been hosted on it.
- N. It is alleged that the Respondent being in the same field of activity as the Complainant, has "registered the domain name either with a view to commence operations under the mark VRBO with a view to capitalise on the reputation and goodwill of the Complainant's trademark or to squat on the said domain name." Thus the disputed domain name has been registered in bad faith by the Respondent as the disputed domain name is

identical to the trademark/ trade name in which the Complainant has right and the Respondent has no rights or legitimate interest in the domain name.

O. The Complainant has relied upon

i. Nike Inc. v. Nike Innovative CV v Zhaxia (Case No. INDRP/804);

ii. Metropolitain Trading Company v. Chandan Chandan (Case No. INDRP 811);

iii. Lego Juris A/s v. Robert Martin (Case No. INDRP/125)

iv. Kraft Foods Global Brands, LLC v. Jet Stream Enterprises Limited, Jet Stream (Case No. D2009-0547) besides relying on **Annexure O.**

v. Croatia Airlines d.d. v. Modern Empire Internet Ltd., WIPO Case No. D2003-0455; Belupod.d. v. WACHEM d.o.o., WIPO Case No. D2004-0110."

FINDINGS

As per the averments/documentation /deposition/placed before the Tribunal following facts emerge:

- (i) Complainants are HomeAway.com Inc. located at 1011 W. Fifth Street, Suite 300, Austin, Texas 78703, United States of America. The term "Inc." suggest that the complainants are an incorporated Company but it is not clear under which US Federal or State Law they are incorporated as no documents i.e. Certificate of Incorporation have been placed on record.

- (ii) This Tribunal finds that the complaint which has been signed by a Counsel of Fidus Law Chambers on the basis of a POA signed by Angela Niemann to appoint M/s Fidus Law Chambers as their attorneys. However, the POA dated 14.11.2018 does not empower the Advocates of FIDUS Law Chambers to sign and institute the complaint. The said power has been given to one Mr.Vishal Vig by another POA dated 09/01/2019 signed by one Krista S Mirhoseini copy of which has been filed with Affidavit in Evidence wherein Mr.Vishal Vig is the deponent who

purportedly has been empowered to sign & verify pleadings etc. Thus the complaint signed by FIDUS Law Chamber cannot be taken to be properly signed or verified as there exists no Board Resolution of HomeAway.com Inc. giving power to Ms. Angela Niemann (POA Holder) to authorize FIDUS Law Chamber to sign and verify the pleadings and institute the complaint at hand.

- (iii) As stated *supra* I further find that on the basis of POA dated 9th January, 2019 signed by one Ms. Krista S. Mirhoseini, Corporate Counsel Intellectual Property, Mr. Vishal Vig, R/o No. 33, Shanti Vihar, New Delhi-110092 has been authorized to sign pleadings etc. and has filed an Affidavit in Evidence in support of the complaint. It is again noticed that no Board Resolution has been filed by the complainants [HomeAway.com Inc.] to show that power has been given to Ms. Krista S. Mirhoseini, Corporate Counsel Intellectual Property and hence the Evidence filed by Mr Vishal Vig is not supported by a proper documentation and cannot be accepted. This Tribunal is

constrained to take help of the provisions of the Indian Company Law i.e. Sec. 291 of Companies Act, 1956, (old Act) Sec. 179 of the Companies Act, 2013 as well as Order 29 Rule 1 of Code of Civil Procedure 1908 and cites a Judgment of Madras High Court reported at **2013 (2) RAJ 616 (Mad)** and a judgment of Hon'ble Delhi High Court reported at **78 (1999) DLT 123** which hold that an action not support by a proper Resolution of the Board of Directors of the Company has to be dismissed.

- (iv) Be it that as it may, the complainants i.e. [HomeAway.com Inc.] state that they had acquired VRBO.COM from Dave and Lynn Clouse who were husband and wife in the year 2006. This Tribunal finds that the complainants have not annexed any legally admissible document to show such acquisition of VRBO.COM from Dave and Lynn. There after the complainants assert that they i.e. HomeAway.com Inc. in turn were acquired by Expedia Inc. in the year 2015. This Tribunal again finds that no legally admissible document annexed with the complaint to support this contention.

- (v) So far as complainants are concerned they state that they are HomeAway.com Inc. which purportedly shows that they are incorporated as a Company. However as stated *supra* no details of their Registration under the US Laws have been given which makes the matter unclear as to whether the complaint is a Firm, Proprietorship, Company, LLC, or Limited Company duly registered under the relevant US Law.
- (vi) It is averred that complainants [who had purportedly acquired VRBO.COM from Dave and Lynn] were in turn acquired by Expedia Inc. It is not clear as to the type of entity Expedia is whether it is a Firm, Proprietorship, Company, LLC, or Limited Company duly registered under the relevant US Law. However, later on in the documentation filed there exists a suggestion that Expedia is also "Inc." however, the required documentation is missing.
- (vii) Same way on page 69 of Annexure C is some correspondence w.r.t. Service Mark VRBO and the same is dated 09.03.2004 and the same is in favor of VRBO.COM LLC (Colorado LTD

LIAB CO) 42555 Buckley Road #308 Aurora CO80015, this shows that VRBO.COM was an LLC and thus if it was acquired in 2006 as claimed, the acquisition of VRBO.COM [which suggest that the same was a LLC] by HomeAway.com Inc purportedly a company could have been done by way of amalgamation under the relevant [US / Federal/ State Law/Company Law] that too by a Legal Authority of which no documents have been annexed to display beyond reasonable doubt the said takeover / merger / acquisition / amalgamation. It is necessary to take notice of the Law w.r.t. companies in India as it existed in 2006 and it is found that as per Sec. 391 to 394 Indian Companies Act 1956 (Old Act as the matter relates to the year 2006) an order is required from the concerned High Court. This Tribunal presumes that similar laws w.r.t. acquisition / merger / amalgamation exist in US. However no such order is cited or annexed.

- (viii) Same way w.r.t. taking over of the complainant i.e. HomeAway.com by Expedia Inc. too remains nothing but a bare and a bald assertion without any reference / annexing of an


order passed by any legal authority of US w.r.t. Company Laws of US. [Federal or State]

(ix) Be it that as it may, presuming for a moment that VRBO LLC amalgamated /merged and was acquired by HomeAway.com Inc. and HomeAway.com Inc. was in turn acquired by way of merger, acquisition /amalgamation by Expedia Inc. then post such act HomeAway.com Inc. was to lose its identity and would be represented by Expedia Inc. Reliance is placed on a judgment of the Hon'ble Delhi High Court reported at **2007 IXAD (Delhi) 713** which in turn relied on the judgment passed by Supreme Court of US (para 15 &16) besides those passed by Supreme Court of India [para 17 & 18] has categorically held that *"...upon amalgamation between two companies, the transferor company dies a civil death ..."* thus ceases to exist.

(x) Hence the question which emerges is that whether HomeAway.com Inc. has the locus coupled with the necessary documentation to file the present complaint.

- (xi) This Tribunal does not have the order w.r.t. acquisition /amalgamation of VRBO.COM LLC by HomeAway.com Inc and acquisition of HomeAway.com Inc. by Expedia Inc. and without the same the present complainant i.e. HomeAway.com lacks the *locus standi*.
- (xii) This Tribunal has perused the documents filed with the complaint and finds that the documents at Annexure C Page 70-73 onwards relates to Canadian Trade Mark Details w.r.t. VRBO which has disclaimers and even says at Page 72 that it has no legal value. Same way document at Page 74 shows some opposition to the Trade Mark. Same way another document at page 80 also shows some opposition to the Trade Mark VRBO (page 85, 86). Document at Annexure D Page 89 shows objection. Annexure A is a decision by WIPO Arbitration and Mediation Center in a case between Expedia, Inc. Vs Avaro Collazo which is w.r.t. domain name "expedia.com" shows that Expedia Inc. is an incorporated company and this was required to maintain the present complaint as transferee to

HomeAway.com Inc. presuming that necessary documentation of acquisition of VRBO.COM LLC exists. Even otherwise post its merger with Expedia Inc. HomeAway.com Inc. does not exist hence cannot maintain the present complaint. The complainants are relying on some News report which is not a legal document. In fact Page 53 of Annexure B is a part of the press release where there is a mention of some legal formalities which are required to be done. None of those have been filed before this Tribunal. Beside these, the complainants are relying upon internet downloaded pictures etc. and reports to support their case. However, the same are only reports and not legal documents hence cannot be taken note of by this Tribunal in terms of Evidence Act especially to Sec.78(2) of the Evidence Act, 1972. This Tribunal relies upon judgments of Hon'ble Delhi High Court and Hon'ble Supreme Court reported at **215(2014) DLT 108(DB), 2015 XAD (Delhi) 456 & 1999(7) SCC 435** which do not take "Blogs" "News Reports" as good Evidence.



ORDER

9. This Tribunal has perused the complaint / Evidence and the documents relied upon by the complainants and even though the Respondent have not filed any rebuttal to the complaint and /or its documentary evidence yet it has to be seen as to whether the present complaint is maintainable or not as in a proceeding a plaintiff / petitioner / complainant has to prove his case on his own merit and not on the weakness of his opponent. This principle finds place in many judgments of Hon'ble Supreme Court of India.
10. Looking into the aforesaid facts and Law this Tribunal holds that the complaint in its present form is not tenable as the complainants have not been able to show their locus to file the present complaint since post their merger with Expedia Inc. they are not in existence and secondly the complaint has not been signed and verified properly (even if the lacuna of non existence is dispensed with). This Tribunal finds that the Complainants have not given their best evidence and they have



relied on News reports, internet downloads etc to establish their case which is not admissible.

11. Hence this Tribunal dismisses the complaint leaving it at the parties to bear the costs.
12. This Tribunal makes it clear that nothing stated in this Award affects the merit of the contentions stated in the Complaint under consideration.
13. The original copy of the Award is being sent along with the records of these proceedings to National Internet Exchange of India (NIXI) for their record and a copy of the Award is being sent to both the parties for their records.

Signed this 28th day of January, 2019.

NEW DELHI
28/01/2019



V. SHRIVASTAV
ARBITRATOR