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BEFORE SHRI SANJAY KUMAR SINGH, ARBITRATOR
IN DOMAIN NAME DISPUTE RESOLUTION POLICY
(INDRP)

IN MATTER OF:

GROUPE AUCHAN

40, avenue de Flandre

59170, CROIX, FRANCE

Through its authorized representative

DREYFUS & ASSOCIES

NATHALIE DREYFUS

78 avenue Raymond Poincare

75116, Paris, France.

E-mail: contact@drevfus.fr

.Complainant

Versus

YAN YEI

F0605013

No. 800, Dongcuan Road

200240 Sanghai.CHINA

E-mail: domainsnapping@gmail.com

..Respondent

Sanjay Kumar Singh

1. THE PARTIES:

The complainant is GROUPE AUCHAN, 40. avenue de Flandre, 59170, CROIX, FRANCE. (Complainant's authorized representative is DREYFUS & ASSOCIES NATHALIE DREYFUS, 78 avenue Raymond Poincare, 75116, Paris, France. E-mail: contact@dreyfus.fr)

The Respondent is YAN YEI, F0605013, No. 800, Dongcuan Road, 200240 Shanghai, CHINA, E-mail: domainsnapping@gmail.com

2. DOMAIN NAME AND TRADEMARK IN DISPUTE:

Domain name of the respondent is "**auchan. Co. in**"

The trademark of the complainant is "**AUCHAN**". The registry is National Internet Exchange of India (NIXI).

3. BRIEF BACKGROUND:

This arbitral proceeding commenced in accordance with IN Dispute Resolution Policy (INDRP) and rules framed there under. The complainant submitted his complaint in the registry of NIXI. Shri Sanjay Kumar Singh was appointed as Sole Arbitrator in the matter by NIXI.

A copy of complaint has already been sent to the respondent by the .In Registry through e-mail. Upon receipt of the complaint, the Arbitrator sent a notice dated 04-10-2010 to the respondent to send his defence / counter to the complaint along with supportive documents / evidence at his e-mail address within 07

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days from receipt. But the respondent did not come forward and send his defence / counter to the complaint.

Failing to send the defence / counter by the respondent, the Arbitrator again sent a notice dated 25-10-2010 by giving another opportunity to the respondent to send his defence / counter to the complaint with further notice that in default or non-filing or sending of the defence / counter to the complaint, the matter would be proceeded ex-parte and award would be passed ex-parte on merits of the case. It was also stated in the notice that it was last and final opportunity to the respondent and no further opportunity will be granted.

In spite of repeated notices, the respondent has again not come forward and has not sent any reply / defence / counter to the either notice or complaint to the Arbitrator.

Therefore, this matter is being decided on the merits of the case as per law of the land.

4. FACTUAL BACKGROUND

Complainant is a worldwide leader in the food retail industry Created by Gerard Mulliez in 1961' Complainant opened its first hyper marked in RONCQ, France in 1967 and invented the first commercial centre in Englos, FRANCE in 1969 **(ANNEX- 23)**.

Today, Complainant has more than 1000 business locations in 13 countries, consisting of hypermarkets supermarkets, real estate, and banking operations **(Annex-3)**

Large number of id's

Complainant has continued to expand its activities in Europe and Asia, and has seen accelerated growth for its e-commerce activities (**Annex-4**).

With the help of 243,000 employees, complainant was able to amass 39.7 billion in consolidated revenue in 2009 (**Annex-4**).

Complainant's international presence includes operations in China. It entered this market in 1999 with the opening of the AUCHAN hypermarket in Shanghai. Currently, there are 36 Auchan hypermarkets in China (**Annex 24**.)

Complainant owns numerous AUCHAN trademarks registered in India and AUCHAN International trademarks designated for CHINA. It also owns several domain names to promote and offer its products and services, such as www.auchan.fr, www.groupe-auchan.fr and www.auchan.in (**Annex- 5 and 6**).

The website to which Disputed Domain Name is linked is error page (**ANNEX- 7**).

After discovering the Disputed Domain Name, Complainant sent cease and desist letters to Respondent, by e-mail on March 5, 2010, and by post on March 8, 2010 (**Annex-8**)

Complainant sent reminder e-mails to Respondent on March 17, 2010 and March 25, 2010 (**Annex-9**).

Respondent did not reply to Complainant's cease and desist letter or the reminder e-mails.

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As no amicable settlement could be found, Complainant is forced to start the present procedure in order to obtain the transfer of the disputed domain name.

5. PARTIES' CONTENTIONS:

The following legal grounds have been submitted by the complainant:

The domain name registered by the Respondent is identical or at least similar to the of the Complainant (policy, para. 4 (1); Rules, para 3(b) (VI) (1))

Complainant is the owner of numerous AUCHAN TRADEMARKS registered in India. These trademarks include **(Annex 5 A)**.

AUCHAN, India Trademark No. 991797, filed on February 22, 2001, designating the goods in class 13;

AUCHAN, Indian trademark no. 991805, filed on February 22, 2001 designating the goods in class 21;

AUCHAN, Indian Trademark No.991806, filed on February 22, 2001 designating the goods in class 22:

AUCHAN, Indian Trademark No. 991807, filed on February 22, 2001

AUCHAN Indian trademark no. 991809, filed on February 22, 2001, designating the goods in class 25;

Complainant is also the owner of several AUCHAN International trademarks designated for China including **(Annex- 5B):**

AUCHAN, International Trademark no.898156, registered on April 18, 2006, designating goods and services in all classes:

AUCHAN, International Trademark No 1011777, registered on February 19, 2009, designating goods and services in all classes.

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The complainant has submitted that in addition to these Indian and International trademarks Complainant is the owner of several domain name that incorporate the name Auchan, such as www.auchan.in, www auchan.fr, and www.groupe-auchan.fr (**Annex- 6**)

The complainant has submitted that the predominant part of the disputed domain name is Auchan which is complainant's registered trademark, company name, and trade name. The presence of the country code top level domain, <.co.in> should not be taken into account.

The complainant has submitted that it is indeed well established that the mere addition of the CC TLD <.CO.IN> is not a distinguishing feature and does not diminish the likelihood of confusion. Therefore the extension, Co.in should not be taken into consideration when examining the similarity between Complainant's trademark and the Disputed Domain Name (Societe des produits Nestle SA V. Nescafe Limited Case No. Indrp/100, May 24, 2009; Mothercare UK Limited v. Rajkumar Jalam, Case No. INDRP/061, April 27, 2008- **Annex- 10**)

The complainant has submitted that the Disputed Domain Name incorporates Complainant's AUCHAN trademark in its entirety. The complainant has submitted that when a domain name contains a trademark in its entirety the domain name is identical or at least confusingly similar to the trademark (Tenneco Inc. v. Toni Li Case No INDRP/ 130, March 5, 2010; ITC Limited V travel INDRP/065, April 15, 2008- **Annex - 11**).

The complainant has submitted that not only does the Disputed Domain Name include the AUCHAN trademark in its entirety, but it does not incorporate any other terms in the

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disputed domain name. There is no difference between the AUCHAN trademark and the core of the Disputed Domain Name (Shri Jagadish purohit v. Stephen Koeing, INDRP/006, July 5, 2006- **Annex - 17**).

The complainant has submitted that given the distinctiveness of Complainant of Complainant's trademark and its extensive use in commerce, it is likely that Respondent purposefully chose the Disputed Domain Name in order to attract internet traffic.

The complainant has submitted that by registering such a domain name, respondent created a likelihood of confusion in Internet users' minds, possibly leading them to believe that the Disputed Domain Name and the webpage to which it is linked are affiliated with Complainant.

The complainant has submitted that for all the reasons above, it has been established that Complainant has rights to the AUCHAN trademark and the Disputed Domain Name is identical or confusingly similar to this trademark.

The Respondent has no rights or legitimate interests in respect of the domain name:

(Policy, Paras. 4(ii) and 7; Rules Para. 3 (b) (vi) (2)

The complainant has submitted that the predominant part of the Disputed Domain Name is AUCHAN, which is complainant's registered trademark, company name and trade name. Complainant is also the owner of many domain names incorporating the term AUCHAN.

The complainant has submitted that respondent does not have prior rights or legitimate interests in the AUCHAN trademark Where Complainant's rights in a trademark predate Respondent's registration of the disputed domain name

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incorporating that trademark Respondent does not have rights or legitimate interests in the disputed domain name (Compagnie Gervais Danone v. Digitech Software Solutions, INDRP/ 096, June 27, 2009- **Annex 21**).

Respondent is in way affiliated with complainant. Complainant has no authorized or licensed respondent to use and register the AUCHAN trademark, nor to seek registration of any domain name (Tenneco inc. v. Toni Li Case No INDRP/ 130, March 5, 2010; Kenneth Cole Productions, Inc. v. Naveen Tewari, Indrp/090, April 27, 2009- **Annexes -11 and 22**)

The complainant has submitted that although Respondent is the current owner of disputed Domain Name the simple use of the AUCHAN trademark in the Disputed Domain Name does not confer rights or legitimate interests to Respondent (ITC Limited v. Vishal Case No. INDRP/050, November 30, 2007 - **Annexes-12**)

The complainant has submitted that nor can the webpage to which the Disputed Domain Name is linked be evidence of Respondent's rights in the Disputed Domain Name. Currently, the Disputed Domain Name leads to an error page (**Annex-7**). That does not constitute Respondent using or making demonstrable preparation to use the disputed Domain Name in connection with a bonafide offering of goods or services.

The complainant has submitted that , Respondent has not provided evidence that it is known or recognized by the Disputed Domain Name previous panels have concluded that where respondent has not provided evidence that it is known or recognized by the domain name, Respondent has no rights or legitimate interests in the domain name (Accor v. Tang Wei, Case No INDRP/127, February 24 2010, Starbucks

Laundry for gift

Corporation vs Mohanraj, case no INDRP/118, November 26, 2009-**Annex 13**).

The complainant has submitted that not only has respondent failed to provide evidence that it is known by the Disputed Domain name, but respondent has not presented any evidence, nor replied to complainant's communications. The complainant has submitted that in the absence of response, Respondent has no right in the Disputed domain name. The complainant has submitted that Domain name (Societe des Produits Nestle SA V. Nescafe Limited Case No. Indrp/100, May 24, 2009 **Annex- 10**).

The complainant has submitted that respondent did not have right to the domain name at issue because complainant had legally registered similar domain names before respondent the Disputed Domain name and the former was legitimately using the domain name for business purposes (Societe Anonyme des Eaux Minerales d' Evian (SAEME) v. Rajesh Aggarwal, CASE NO. INDRP/099, June 12, 2009 **Annex-10**). The domain names www. auchan in, wwwauchan fr, and www. groupe- auchan. fr were registered before the Disputed Domain Name.

The complainant has submitted that for the aforementioned reasons, the Respondent has no right or legitimate interests in respect of the Disputed Domain Name under paragraph 4 (ii) of the policy.

The complainant has submitted that domain name has been registered or is being used in bad faith. (Policy, paras. 4 (iii) and 6; Rules, para. 3 (b) (vi) (3)-

Lawyer for right

The complainant has submitted that as established by the evidence presented above, Complainant's AUCHAN trademark is well-known throughout the world. It is highly unlikely that respondent was unaware of Complainant's existence or trademark right before registering the Disputed Domain Name. The word 'auchan' is also not a common word in any of the languages spoken in China or India.

The complainant has submitted that it has been held that the registration of a domain name containing a well-known mark is strong evidence of bad faith (M/S GENPACT LIMITED V. Shri Manish Gupta, INDRP/056, March 24, 2008; Bacarrat SA V. Doreen Jungnickel/ Darius Herman Domcreate, INDRP/018, October 6, 2006; NBA properties, Inc. v Rickson Rodricks, INDRP/051, November 5, 2007- **Annex 18**).

The complainant has submitted that because of the distinctiveness of Complainant's trademark, it is reasonable to infer that Respondent registered the Disputed Domain Name with full knowledge of Complainant's trademark. Where a domain name is found to be registered with an intention to attract Internet users as by exploiting the fame of a well-known trademark, it constitutes bad faith registration (Lego Juris A/S v Robert Martin, INDRP/125 February 14, 2010- **Annex- 20**)

The complainant has submitted that according to the policy, paragraph 6(iii), if by using the domain name the Registrant has intentionally attempted to attract Internet users to the Registrant's Website 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, this is evidence of registration and use of the domain name in bad faith.

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The complainant has submitted that even if Respondent was unaware of Complaint, which is unlikely in the present case, a quick trademark or online search would have shown the existence of Complainant and its trademark rights (**Annexes- 5 and 14**). According to the policy, paragraph 3, Respondent was under an obligation to conduct a trademark search before registering the Disputed Domain Name. Respondent's failure to conduct this search, or choiceto ignore the results of this search, is evidence of registration in bad faith (L' Oreal VDomain park Limited, WIPO Case No D2008- 0072: Bouygues V Communications, Inc v Rarenames, Webreg WIPO Case No. D2006- 0964- **Annex- 15**).

A finding of bad faith can be made where Respondent "Knew or should have known" of Complainant' trademark rights and nevertheless registered a domain name incorporation a mark in which he had no rights or legitimate interests (Accor S .A V. KRISTEN HOERL, WIPO Case no D2007- 1722: Myer Stores Limited v. Mr. David John Singh, WIPO Case no D2001- 0763- **Annex-26**).

The complainant has submitted that furthermore, the Disputed Domain Name is identical or at least confusingly similar to Complainant's Auchan trademark. The complainant has submitted that ' registration of a domain name that is confusingly similar or identical to a famous trademark by any entity, which has no relationship to that mark is itself sufficient evidence of bad faith registration and use' (I Kingston Technology CO. V. Web Master Skype Network Limited , Case No. INDRP/ 033, November 6, 2007 "also Tenneco Inc V. Toni LI Case No INDRP/ 130, March 5, 2010 - **Annexes 16 and 11**)

Sanghy kv Singh

The complainant has submitted that adding to this confusion is fact that Internet users perceive a domain name as being owned by , sponsored by , affiliated with , or endorsed by the person or entity owns the trademark contained in the domain name (Monster.Com (India) Pvt. Ltd. V Domain Leasing Company, Case No INDRP/ 002, May 20, 2006, **Annex-19**).

The webpage to which the Disputed Domain Name is linked is currently not being used for any purpose: it is an error page. The complainant has submitted that passive holding and non-use of a domain name is evidence of bad faith (Intesa Sanpaolo S.P.A.v. SRIRATREE Meekhot, INDRP/ 108, August 10, 2009 and Telstra Corporation Ltd. v. Nuclear Marshmallows, D2000- 0003, FEBRUARY 18, 2000 **Annex - 27**).

The complainant has further submitted that regarding the use of the disputed domain name the relevant issue in this matter is not whether Respondent is undertaking a positive action in bad faith in relation to the domain name, but instead whether, in all the circumstances of the case, it can be said that Respondent is acting in bad faith. The distinction between undertaking a positive action in bad faith is important. The significance of the distinction is that the concept of a domain name 'being used in bad faith' is not limited to positive action; inaction is within the concept. It means that in certain circumstances, inactivity by Respondent amounts to the domain name being used in bad faith (Intesa Sanpaolo S. P. A. v Sriratree Meekhot , INDRP/108, August 10, 2009 and Telstra Corporation Ltd. v. Nuclear Marshmallows, D2000-0003, February 18 , 2000- **Annex 27**).

Lawyer for Sign

The complainant has submitted that in the present case, these circumstances are the following;

The complainant has submitted that Complainant's trademark AUCHAN has a very strong international reputation and are widely known, as explained above. It is impossible that Respondent ignored it when registering the domain name.

The complainant has submitted that Respondent's failure to meet Complainant's demands set out in the cease and desist letter, and the former's failure to respond also suggest registration and use of the Disputed Domain Name in bad faith (Accor v. Tang Wei, Case No INDRP/127, February 24 2010, **Annex -13**)

The complainant has submitted that Respondent's failure to present any evidence that demonstrates the use of the Disputed Domain name in good faith. In previous decisions, panels found the fact that Respondent did not provide any substantial evidence in his support constituted registration of the Disputed Domain name in bad faith (Samsung Electronic Co. Ltd vs Vishal Didwania, case no. INDRP/141, June 26, 2010; Telenor ASA v Dr. Prashant Shukla, case no. INDRP/105, August 24, 2009; Starbucks Corporation vs Mohanraj, case no INDRP/118, November 26, 2009 **Annex 25 and 13**).

The complainant has submitted that this leads Complainant to conclude that the Domain name is registered and used in bad faith.

The complainant has submitted that in view of the above, the Respondent registered and used the Domain name in bad faith.

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The complainant has prayed that in accordance with paragraph 10 of the policy, for the reasons described above the domain name <auchan.Co.in> be transferred to AUCHAN. The complainant has also prayed for costs incurred by Complaint in order stop the infringement of its rights by the reservation of the domain name, Respondent should be ordered to settle to Complaint the sum of RS 350,000 corresponding to attorney fees, procedural costs and damages.

6. OPINION/FINDING:

The para no.4 of the IN Domain Dispute Resolution Policy (INDRP) is as follows:-

TYPES OF DISPUTES:

Any person who considers that a domain name conflicts with his legitimate rights or interest may file complaint to .IN Registry on following premises:

- "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."

The Para no.6 of the IN Domain Dispute Resolution Policy (INDRP) is as follows:

7. EVIDENCE OF REGISTRATION AND USE OF DOMAIN NAME IN BAD FAITH

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:

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Sanjay Kar Singh

- "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
- ii) by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other online 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 para no.7 of the IN Domain Dispute Resolution Poli (INDRP) is as follows:-

8 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

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demonstrate the Registrant's rights to or legitimate interests in the domain name for the purpose of paragraph 4 (ii):

- "i) before any notice to the Registrant of the dispute, the Registrant's use of, or demonstratable preparations to use, the domain name or a name corresponding to the domain name in connection with a bonafide offering of goods or services;
- ii) the Registrants (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 other fact, which is to be dealt with before going into merit is, that, as to whether, the cases decided by WIPO- Administrative Panel could be considered, while deciding the present controversy. Moreover these cases throw light upon various important aspects of controversy. As such they would be considered, while deciding the present controversy, in so far as they do not conflict with INDRP.

9. OPINION AND FINDINGS ON MERITS:

A) Whether the domain name is identical or confusingly similar to a trademark in which complainant has right.

Sanjay Singh

It has been held in Indian decision **M/s Satyam Infoway Ltd. Vs. M/s Sifynet Solution (P) Ltd. JT. 2004 (5) SC 541**, that Domain name has all characteristics of trademark. As such principles applicable to trademark are applicable to domain names also. In the said case the words, 'Sify' & 'Siffy' were held to be phonetically similar and addition of work 'net' in one of them would not make them dissimilar.

It is held in Indian case **JT.2004 (5) SC 541**, that in modern times domain name is accessible by all internet users and thus there is need to maintain it as an exclusive symbol. It is also held that it can lead to confusion of source or it may lead a user to a service, which he is not searching.

Thus conclusion is that domain name and trademark, which may be used in different manner and different business or field, or sphere can still be confusingly similar or identical.

Thus the conclusion is that the domain name of respondent is identical and confusingly similar to the trademark of complainant.

Now the other important aspect that needs consideration is, as to whether the complainant has right in the trademark. It is important to mention here that as per the claim of the complainant that the respondent has no trademark right on the said domain name.

This principle is settled in many above Indian cases and referred cases **JT 2004(5) SC 541 and 2004(5) SCC 287**. The complainant has made submission that he has legitimate trademark.

Thus the conclusion is that the domain name '**auchan.Co.in**' is identical and confusingly similar to the trademark of complainant '**AUCHAN**' and the complainant has established that he has right in the trademark.

Sanjay for Sify

B) Whether the respondent has no right or legitimate interest in the domain name got registered by him.

It is pertinent to mention here that paragraph 4 (ii) of INDRP is to be read with paragraph no.7.

As already stated that paragraph 4 (ii) and 7 of INDRP are to be read together. Their combined effect is that, onus to prove the ingredient of these paras is prima facie on complainant. The onus is not very weak and prima facie, but it heavily shifts on respondent. Respondent can discharge the onus by direct cogent and positive evidence which are in his special knowledge and power. The complainant has made positive assertions that respondent has no legitimate right in domain name and the respondent has no trademark on the domain name. The complainant has made positive assertions regarding the fact that respondent has got registered the disputed domain name in the .IN Registry for which the respondent has no right or trademark. As such in above circumstance it is clear that the complainant has prima facie discharged the initial onus cast upon him by virtue of paragraph 4(ii) and 7 of INDRP.

The respondent on other hand has not come forward inspite of repeated notices to file any reply / counter or to provide any positive, cogent and specific evidence that it is known or recognized by domain name. The respondent has neither put forth his reply and has nor provided any such evidence in his support.

Thus the conclusion is that respondent has no right or legitimate interest in the domain name.

Lawyer for Sign

Whether the respondent's domain name has been registered or is being used in bad faith

It is to be seen as to whether the domain name has been got registered in bad faith. The paragraph no.4 (iii) and 6 are relevant and as already stated; the onus is primarily upon complainant.

Keeping in view above facts and circumstances it is thus clear that the respondent has registered the disputed domain name and in spite of repeated notices, he has not come forward and has neither filed any reply nor provided any substantial evidence in his support. The respondent has failed to put his defence to the complaint of the complainant.

Thus the conclusion is that the respondent has got registered his domain name "auchan.co.in" in bad faith.

10. CONCLUSION:

The domain name of the respondent is identical and confusingly similar to trademark of the complainant. The respondent also does not have right or legitimate interest in the domain name. He has got it registered in bad faith; as such he is not entitled to retain the domain name. The complainant is entitled to transfer of domain name "**auchan.co.in**" to him, as he has established his bonafide rights in trademark as per law discussed above. Hence I direct that the Domain name be transferred to the complainant by the registry on payment of requisite fee to the registry.

I also direct the respondent to pay Rs. 25, 000/- (rupees twenty five thousands) as costs of the proceeding to the complainant.

Delhi
Date: 02-11-2010.

Sanjay Kumar Singh
(Sanjay Kumar Singh)
Arbitrator