



दिल्ली DELHI BEFORE SHRI A.K.SINGH SOLE ARIBITRATOR, NEW DELHI C 723822

IN THE MATTER OF:

M/s Google,inc
1600 Amphitheatre
Parkway, Mount View,
California 94043,
USA

...Complainant/Petitioner

VERSUS

Chen Zhaoyang
E-1607, Jinghuayuan
Xiangmei Road
Futian, Shenzhen,
Guangdong 518034
China

...Respondent

AWARD

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...Respondent

AWARD

1. A Complaint under .in Domain Name Dispute Resolution Policy (INDRP) is filed by the complainant wherein I have been appointed as an arbitrator by National Internet Exchange of India to adjudicate upon the dispute between the complainant and the respondent.

2 The brief history of the dispute as raised by the complainant is as under:

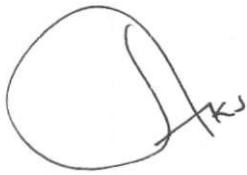
- a) The complaint is company organized and existing under the laws of Delaware having its corporate office at the address given under the cause title.
- b) The complaint is filed by the complainant for transferring the Domain Name GMAIL.Co.In currently registered in the name of the respondent.
- c) The complaint is filed by the complainant through its constituted attorney Shri Rahul Sethi.
- d) According to the complainant, it is one of the largest internet search service providers in the world and is well known in the field of Information - Technology. It is the world's No.1 search engine company and is responding to more search queries than any other service on the internet.
- e) The complainant claims to have about 8,000 employees, with a global annual turn over



of \$ US 6 billion. It claims that it provides the services to more than 150 countries and the well known companies of the world are its clients.

The complainant claims that GMAIL is complaint free web mail service and originate as an abbreviation of Google Mail. The complainant claims that for several years the software prepared remained available internally as an email service for the complainant's employees and now the GMAIL service is accessible worldwide and is available for the use of customers globally including those in India.

The complainant claims that this service was officially launched to the general public on 18th April 2004 but information about service and its name was accidentally leaked to the Press on 31st March 2004. The complainant claims that the service since its launch in April 2004 has attracted millions of registered users.



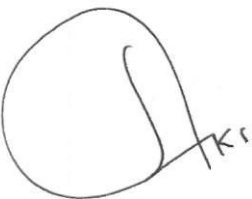
The complainant further submits that its rights in the mark / Domain Name GMAIL have been upheld in | a dispute concerning 'GMAIL.nl', which was referred to WIPO and Mediation Center, | where the award was passed in favour of the complainant.

The complainant claims though it does not really advertise its GMAIL service, its users numbered in millions.

The complainant claims it has applied for registration of mark GMAIL in over 150 countries of the world including India and the mark has been | registered in number of the countries as (detailed in Para No. 11 of the claim petition.

The complainant further claims that it has also applied in India for registration of the said mark | and has filed the application in thi|3 regard in March 2005.

The complainant further submits that the Technology Industry has also recognized its GMAIL service and a number of awards have been conferred upon it.

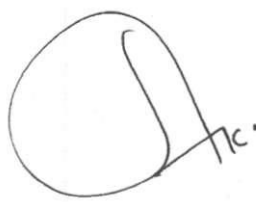


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m) The complainant further submits that the users of the service and general trade and public exclusively associate the mark GMAIL with the business and services of the complainant and none other. All of its products / service including GMAIL are well known and as such the respondent cannot deny that he was not aware of the fame and use of the GMAIL mark when it sought its registration as a domain name.

n) The complainant thus submits that on account of its extensive use and popularity, the Domain Name/ trade mark GMAIL has achieved the status of well known mark and thus the respondent intention is to take advantage of the goodwill and reputation enjoyed by the complainant trade mark / Domain Name GMAIL.

o) The complainant thus submits that it will suffer incalculable harm and injury to its goodwill, reputation and business in general if the respondent is allowed to maintain its registration of the Domain



Name GMAIL.IN. The loss and damage will not only be to the complainant's reputation but also result in confusion and deception among the trade and public who would subscribe to the respondent's service assuming it, to be sponsored, approved or authorized by the complainant. The complainant feels that trade and public may assume that there exists a collaboration between the complainant and respondent which is likely to further harm the reputation enjoyed by the complainant.

The complainant submits that it is a settled law that where there is complete copying, dishonesty ought to be presumed and in the present case copying by the respondent is evident from its adoption of an identical domain name. The complainant thus claims that the respondent's intention is clearly to take a free ride on the goodwill and sales appeal that the complainant service under the mark / domain GMAIL has achieved.

- q) The complainant has enclosed printouts from the respondent website to demonstrate

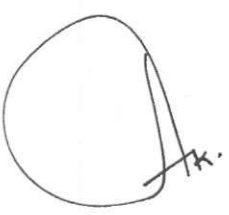


his dishonest conduct. The complainant claims that the website appears as a portal and on clicking the links grouped under the heading 'popular links' one is taken to link which seem to be pornographic material.

r) The complainant claims that this would hamper and harm the goodwill and reputation built by the complainant in the mark / Domain Name GMAIL.

The Complaint thus has presented its claim. However, no specific prayer specifying the relief which it want in its favour has been made by the complainant.

The complainant has relied upon the various documents in support of its complaint. It includes the abstract taken from the website, affidavit of one . Tu Tsao, copy of arbitration award, copy of certificate of Registration of Trade Mark in Australia and other records which it has considered relevant In support of its claim petition.



5. A response is sent by the respondent dated 23.11.2006. The respondent claims in his response that

- a) GMAIL Limited is a company incorporate and existing under the Company Act, 1985 of the United Kingdom and having its registered Office at 204, Woolwich Road, London, SE77QY, United Kingdom. In support of this averment the respondent has annexed a certificate of Incorporation of a Private Limited Company dated 30th October 2006 issued by the Registrar of Companies for England and Wales. The respondent claims that he is a sole Director and one of subscriber's of GMAIL Ltd, and was authorized by the company to have domain registration on behalf of GMAIL Ltd and the Domain Name Gmial.co.in is identical to the name of the Company GMAIL Ltd and as such has clear and legitimate interest in respect of the domain name.

- b) The respondent claims that the complainant is prohibited for using GMAIL as mark and is also prohibited from using it for its



webmail service in United Kingdom and Germany. Its application for said purpose was opposed and it has given up GMAIL.

- c) The respondent claims that according to Paragraph 11 (2) of Trade Marks Act 1994 of the United Kingdom " A registered trade mark is not infringed by (a) the use by a person of his own name or address", and further claims that this is highly similar to the cases details of which are given Sub-Para (d) of Para under the heading 'Factual and Legal Grounds' given in his response.
- d) The respondent in his reply on merits to the complaint has stated that the arbitration proceedings should be deemed to have been started on 22nd August 2006. The respondent has denied, parawise, averments made by the petitioner / complainant in its complaint. The respondent has stated that he can not permit to use as email, the name of his company. The respondent has further submitted that the information published with Wikipedia, cannot be an evidence.



- e) The respondent further submits that the affidavit filed by the complainant is false because GMAIL cannot be used worldwide. He has further stated that the complainant was forced to use Google Mail in respect of GMAIL as mark in United Kingdom and Germany.
- f) The respondent has further stated that the Domain Name registration policy between India and Netherland are different so are the Trademark Acts between United Kingdom and Netherland. It has further stated that the complainant has the trademark registered in Netherland, but not in United Kingdom or India in this case. In Netherland the complainant has trademark rights but not in this case. The respondent has further stated that the he owns his company name identifying to the domain name. He has relied upon the Paragraph 11 (2) of the Trademark Act 1994 of United Kingdom.
- g) The respondent has further submitted in his reply that the trademark application



of the complainant is opposed in European Union. The application on the class of 'Computer Software' goods in India is irrelevant to this case and there is no relevant business to the class 'Computer Software' carried out by the respondent or the respondent company's i.e. GMAIL Limited. The respondent further submits that he considers that the complainant is committing the behaviour of "Reverse Domain Hijacking" as defined by UDRP of ICANN.

- h) The respondent claims that his company is incorporated under the Company Act 1985 of United Kingdom and the Domain Name is identical to the name of his company. The case of the respondent is that the complainant cannot use the mark GMAIL in United Kingdom, which is the country where GMAIL Limited resides in. He states that since Domain Name is identical to his company name, and he has the ownership of the Domain Name he has legitimate interests in respect of the Domain Name. The respondent has denied to have ever offered to sale the Domain Name to the third party and that the respondent has



got registered the Domain Name only for his company.

i) The submissions of the respondent are that there are several links in the website to the third party's website which might contain pornographic contents as GMAIL Limited is not prohibited from doing so by law by using its name.

6. In response to the reply given by the respondent, the complainant preferred to file a response through its attorney Rajesh Narula Associates.

7. The complainant has raised the following points therein for the arbitrator's attention:

a) The Domain Name GMAIL.co.in was registered by the respondent as an individual on 16th February 2005. Until the submission of the complaint, the company, GMAIL Limited was not in existence.

b) The company GMAIL Limited was formed on 30th October 2006 after filing of the complaint.



- c) Mere incorporation of the company that too subsequent to filing of complaint cannot be ground for asserting rights in. mark / Domain Name 'GMAIL'.
- d) The respondent has not offered any explanation for adoption of the Domain Name GMAIL. It has not denied the knowledge and use of the Domain Name/ trademark 'GMAIL' by the complainant. The use by the respondent of an identical Domain Name would only result in confusion amongst the relevant trade and public and the relevant consumers would associate the respondent's website as affiliated, sponsored or approved by the complainant.

In respect of the respondent averment about German decision in support of its case and Press reports from United Kingdom, the complaint submits:

- i) There is no Court decision from the United Kingdom Court's which restrains complainant from using mark / Domain Name in United Kingdom. It was strategic



decision to discontinue service to the new users. The existing users continue to use the GMAIL.

ii) The fact that certain parties in Europe have challenged complainant's rights does not create any legitimate right in favour of the respondent.

iii) The reasons for use and adoption of GMAIL were entirely different and no adverse inference can be drawn. As far as the proceedings before the German Court are concerned, they are subjudice and have not reached the final stage.

iv) The complainant is the prior adopter of the mark "GMAIL" as it has popularized by virtue of its extensive use since April 2004. The respondent simply wishes to usurp the Domain Name and ride on the goodwill that the complainant has build over the years by its hardwork.

v) The incorporation of the company 'GMAIL Limited' is an afterthought.



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- a) The complainant has further stated that the existence of the GMAIL Limited under the UK Companies Act is meaningless under the present proceedings and that the company has been incorporated to set-up a defence as an afterthought.

- b) The respondent has further submitted that the ownership of shares is a private arrangement and has been initiated after the complaint has been submitted.

- c) To say that 'GMAIL.co.in' is identical to 'GMAIL Ltd' is an afterthought. Under this logic, any one can explain adoption of a well-known Trademark / Domain name by incorporating a company with the identical and similar domain name.

- d) The complainant continues to provide services to the existing users under mark / Domain Name 'GMAIL' . The changes were only for new users as a part of a strategy.

- e) Complainant further submits that the respondent adoption of the Domain Name

GMAIL is tainted from its inception and he has miserably failed to establish his legitimate interest in the domain name.

f) The complainant has relied upon the judgements passed by the Hon'ble Supreme Court in the case titled as Satyam Infoway Limited versus Sify Net Solution Private Limited passed on 06.05.2004 in civil appeal No. 3028/2004, Yahoo! .Inc on 19.02.99 in suit no. 2469/1998 and another judgement of Delhi High Court titled as Acgua Minerals Limited versus Pramod Borse and others passed on 24.04.2001 in suit no. 371/2000.

g) The complainant in his rejoinder has denied that the dispute is similar to the case referred by the respondent and that the complainant has not joined any legitimate business under the Domain Name GMAIL.co.in since it was registered.

In rejoinder to the complaint, the complainant has denied the averments made in the reply and reiterated and reaffirmed its submission made in the complaint.



i) In the rejoinder the complainant has made specific prayer to transfer the Domain Name GMAIL.co.in to the complainant and for payment of the cost.

10. Though under law there is no provision to give any response to the rejoinder however the respondent has preferred to file response to the rejoinder wherein he has reasserted what he has stated in his reply.

11. That from the above pleadings, the certain questions arose and the parties were directed to give their reply. The following queries was asked from the respondent.

a) As to when did he apply for the incorporation of his company Gmail Ltd.

b) What commercial business the said company has undertaken in last three years with evidence like balance sheet etc. of the company.



- c) The details of the business, company has undertaken in India or intends to undertake.

The petitioner was also asked to reply the following queries of the arbitrator.

- a) What has prevented the petitioner to apply the domain name gmail.co.in during the sunrise period.
- b) Why the petitioner did not apply to the domain name gmail.co.in immediately after the expiry of the sunrise period.

13. Since the matter is of importance, in the interest of justice the parties were directed to appear before the arbitrator through their counsels for the personal hearing". Date was adjourned to accommodate the parties and finally the personal hearing took place on 15th April 2005.

14. I have gone through the pleadings of the parties and the documents placed by them before me.



Finding of the Arbitrator

The complainant while filing the complaint submitted to arbitration in accordance with the Dispute Resolution Policy and the rules framed there-under in terms of Paragraph 3 (b) of the rules and procedures. The respondent also submitted to the mandatory arbitration proceedings in terms of Paragraph 4 of the policy.

Paragraph 12 of the rules provides that the arbitrator has to decide the complaint on the basis of the statements and documents submitted and there shall be no in-person hearing unless the arbitrator in his sole discretion and as an exceptional matter otherwise determines that such a hearing is necessary for deciding the complaint.

That the arbitrator looking into the allegation and counter allegations of the parties decided to give them personal hearing and as such information was sent to both the parties.

That since the complainant counsel was in difficulty on the hearing fixed, the case was fixed for 5th April 2007 for hearing with the directions to the parties to make their submissions and to provide

any other material which they want to produce in support of their averments.

Counsel of complainant Shri Rajan Narula with Shri Mohit Chopra advocate appeared for the complainant. None appeared for the respondent. The Ld. Counsel for the complainant reiterated his submissions as given in the complaint and other documents, filed written note of arguments and a copy of judgement passed by Hon'ble Supreme Court of India. He was directed to send the copy of the said documents to the respondent also.

Mr. Narula Counsel of the complainant vide mail dated 12th April 2007 again sent copy of the judgement reported in 2007 (34) PTC 298. In the interest of justice, the respondent was given five days more time to file any other document in response to the judgement / documents filed by the counsel of the complainant during hearing and subsequently. Respondent did not file any other document / judgement.

I therefore, proceed to examine the issues in the light of the pleadings and the documents submitted as evidence as per policies, rules and the provisions of the Act.



Both the parties have not denied the documents filed by each other. The documents filed by them as such needs no formal proof.


Exhibit A & B the documents filed by the complainant along with the complaint are in support of submissions that the complainant launched Gmail search based web mail in 2004. Exhibit-C is an affidavit of TU Tsao Trademark and Product counsel of the complainant to the fact that trademark Gmail is being used by complainant to designate a free web-based email service accessible worldwide and located at www.gmail.com and this service was launched on 1st April 2004. Exhibit-F is the copy of certificate of registered trademark. Exhibit-D is a copy of the arbitration award passed by WIPO Arbitration and Mediation Centre in case no.WIPO2005NL5, the other exhibits are the copies taken from other websites by the complainant and filed to strengthen its case.

The documents filed by the respondent includes certificates of incorporation of the company Gmail Ltd, the prints taken out from the website google mail to show that google gives up on gmail name in UK and Detschland. The respondent has also filed the copy of a decision passed by WIPO Arbitration and Mediation Centre in case DBIZ 2002-00264.

From the documents placed on record it is clear that the complainant started its web based email service www.gmail.com on 1st April 2004.

From the documents placed on record by the respondent, it is also crystal clear that respondent got its company Gmail registered only on 30th October 2006 i.e. much after filing of the complaint. The said company was got registered at London. The memorandum of transfer of domain name filed as Annexure 3 by the respondent makes it clear that the domain name gmail.co.in was registered in the name of respondent and was transferred by him only on 31.10.2006 to Gmail Ltd, company of which he is a sole Director and he for and on behalf of the company also accepted the said domain name.

Paragraph . 4 of the .in domain-name dispute resolution policy (hereinafter called as policy) requires three elements that the complainant must prove to get a finding that the domain name of the respondent be transferred to the complainant or cancelled.

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- a) The domain names are identical or confusingly similar to a name, trademark

or service mark in which the complainant has rights and

b) The respondent has no right or legitimate interests in respect of the domain names and

c) The domain names have been registered and are being used in bad faith.

The above would show that for transfer of the domain name to the complainant or for its cancellation all the above three ingredients are required to be proved.

The policy makers in its wisdom have use the word 'and' after every element making it mandatory to the parties to prove all of them.

In view of the pleadings of the parties and the documents submitted let us examine, whether the complainant has discharged its on-us to prove each of the three above elements.

a) Whether domain name is identical or confusingly similar.



It is not disputed that the complainant is a company having its global network and also provides service to business and consumers in India. It is also not disputed that the complainant started its free web-based email service accessible worldwide and located at www.gmail.com on 1st April 2004. It is also clear from the pleadings and documents that the complainant has applied for registration of mark Gmail in number of countries including India. In India it was applied in March 2005 vide application no. 134987. The complainant's submission that it has its proprietary right in the mark Gmail has strength in it.

The proprietary rights in a trademark / service mark are not acquired merely on account of registration in India but on account of priority in adoption, use and even on account of Trans Border Reputation spilling over to India.

It has been so held time and again by the Courts in India.



The Hon'ble Supreme Court of India in a case Milmt Ottho Industries and others/ Allergan Inc. reported in 2004 (28) PTC585 (SC) has held in Para No.10 that the mere fact that respondents have not been using a mark in India would be irrelevant if they were first in the world market. Similarly, in the case titled as Montari Overseas versus Montari Industries Ltd., reported in 1996 PTC 142 it is held

"When a defendant does business under a name which is sufficiently close to the name under which the plaintiff is trading and that name has acquired a reputation and the public at large is likely to be misled that the defendant's business is the business of the plaintiff or his branch or department of the plaintiff, defendant is liable for an action in passing off".

In Card Service International Inc. versus MCGee reported in 42 US PQ 2d 1850 it was held that the domain name serve same function as a trademark and is not a mere address or like finding number on the internet and it is therefore entitled to equal protection as trademark. It was further held that the domain name is more than a mere internet address for it also identifies the internet site to those

who reach it, much like a person's name identifies a particular person or more relevant to trademark disputes, a company's name identifies a specific company.

A Division Bench of Delhi High Court while dealing a matter of N.R. Dhongre Versus Whirlpool reported in 1996 PTC 16 which was subsequently upheld by the Supreme Court in its decision reported in 1996 PTC 583 held that the reputation of the trademark Whirlpool in respect of washing machines has traveled to Trans Border India and therefore although the respondents are not registered proprietor of the 'Whirlpool' in India in respect of washing machines can maintain action of passing off against the appellants in respect of the use of the same which has been registered in their favour in respect of same goods. It was further held the registration of a trademark under the Act would be irrelevant in an action of passing off.

The Hon'ble Judge was further pleased to hold that the said words although are dictionary words have acquired uniqueness and distinctiveness and are associated with the business of the concerning company and such words have come to receive maximum degree of protection by Courts.



That from the records made available to the arbitrator, it is undisputably clear that the complainant has thus discharged its onus in establishing its proprietary rights in the mark 'Gmail' on account of priority in adoption, use and registration in various countries. The complainant has also succeeded in establishing its rights to the domain name consisting of the mark www.gmail.com on account of its prior use and registrations.

When one access the website on the domain name www.gmail.com the site shows the official site hosted by the complainant and has all the text and the information, data and material of the complainant. The domain name www.gmail.co.in registered by the respondent in India is identical to the trademark / trade name and domain name of the complainant. The arbitrator therefore holds that domain name registered by the respondent is identical and confusingly similar to the trademark/ trade name / service mark and domain name of the complainant.

- b) Whether the respondent has no right or legitimate interests in respect of domain names?

During the course of the proceedings, the queries as mentioned in para 11 supra were raised by the arbitrator from the petitioner and the respondent.

The respondent reply dated 18.02.2007 to said queries shows that Memorandum of Association and Articles of Association of the company Gmail Ltd was signed by the respondent on 06th October 2006. On 30th October 2006 the certificates of incorporation is issued to the company.

The respondent started the domain name registration service since April 3rd 2006.

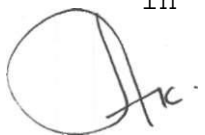
The domain gmail.co.in and its related services were transferred to Gmail Ltd w.e.f. October 31st 2006. The trade name of the said service is also changed.

The respondent claims that he has been providing English Learning Mobile Service since November 2005. He claims that Gmail Ltd also provides postal services, WAP site building tool etc in India and UK and stated that it would continue to provide all the aforesaid services in India.



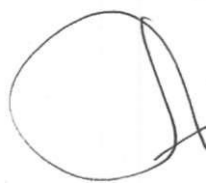
The respondent claims right and legitimate interest in the domain name in question on the ground that the disputed domain name is derived from the name of his company and that under the Trademarks Act of United Kingdom, a registered trademark is not infringed by the use of a person of his name or address.

The registration of the disputed domain name, as is evident from the records maintained by NIXI, was made in the name of the respondent. At the time of registering the disputed domain name, the company Gmail Ltd had not even been incorporated. The question which arises for consideration is as to whether the respondent's use of the disputed domain name is in fact use his own name at the first instance and whether such use is bona-fide. Gmail is admittedly the registered trademark of the complainant. The domain name www.gmail.com is registered in the name of the complainant. It is evident from the record that million of users in the World are attached to the said site. The company Gmail Ltd was incorporated by the respondent as a sole Director on 30th October 2006 much after filing of the above complaint with .in registry. The incorporation of the company with an identical name in UK is an attempt to set up a defence by the



respondent of the complaint but before formal commencement of the proceedings does not affect the proceedings. Paragraph 8 of the policy describes the pendency of the proceedings. The evidence on record shows that respondent having full knowledge of its obligations under paragraph 8 (a) of the policy, proceeded to incorporate a company with complainants trademark as part of his corporate name and entered into a sham transaction between himself as transferor and also on behalf of the transferee, without the knowledge, consent or information to the complainant. It is thus clear that object of such transfer could not be other than to create a defence and to have commercial gain and to create the confusion in the mind of the internet users.

In the case of B.K. Engineering versus Ubhi Enterprises reported in 1985 PTC 1, it was held that even if " a man uses his own name as to be likely to deceive and so to divert the business from the plaintiffs to the defendants he will be restrained": Similar principle is adopted by the Hon'ble High Court of Delhi in case of K.G.Khosla Compressors Ltd Versus Khosla Extraction Ltd 1986 PTC 211 and Anil Food Industries Versus Alka Food Industries (1989 PTC 129).



Since the respondent makes no claim that it has been commonly known by the disputed domain name and that it has attempted to make any legitimate non-commercial or fair use of the domain name, I hold that the respondent has grossly failed to have any right or legitimate interest in respect of the disputed domain name.

c) Whether the domain name has been registered and is being used in bad faith?

Paragraph 6 of the policy states circumstances which shall be the evidence of the registration and use of a domain name in bad faith

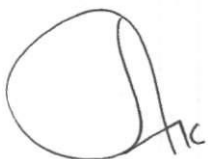
i) Circumstances indicating that the registrant has registered or the registrant has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to be Complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of our 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 you have engaged in a pattern of such conduct; or

iii) by using the domain name, the registrant has intentionally attempted to attract, internet users to the registrant website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the registrant website or location or of a product or service on the registrant website or location.

Overriding objectives of the policy is prevent abusive domain name registration and use the benefit of the legitimate trademark owners.



requirement that domain name has been registered in bad faith will be satisfied only if the complainant proves that registration was done in bad faith and the circumstances of case are such that respondent is continuing to act in bad faith.

In the light of the fact established supra the arbitrator finds that respondent has taken deliberate steps to ensure to take benefit of identity and reputation of the complainant. The respondent got registered a company Gmail Ltd after filing the compliant with .in registry. The respondent transferred the domain name one day after registration to the company during the pendency of the proceeding before the arbitrator. The respondent has failed to furnish any explanation about the adoption of an identical mark. The respondent as per his own admission provide the web services which are similar to those of the complaint. All these indicates that a disputed domain name is got registered and used by respondent in bad faith in respect of the general commercial business activities.

15. The respondent in his response has relied upon a decision of WIPO Arbitration and Mediation Centre passed in Asea Brown Boveri Ltd versus Ozbcoc bearing no. DBIZ2002-00264.

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In the said case the Ld. Arbitrator dismissed the complaint as the respondent was able to establish his legitimate interest in respect of the disputed domain name. The above decision relied upon by the respondent is of no assistance and is not applicable to the facts of the present case.

16) DECISION

In view of my discussion above and for the reasons stated supra, I directed that:

- a) The domain name www.gmail.co.in be transferred to the complainant.
- b) Cost of the proceedings are also awarded to the complainant. Since no details of cost incurred have been given by both the parties, I direct Respondent to pay to the complainant a sum of Rs.50,000/- (Rupees Fifty Thousand Only) as cost.

Award passed on 25th April 2007 at New Delhi


(A.K. Singh)
Arbitrator