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BEFORE THE NATIONAL INTERNET EXCHANGE OF INDIA

ARBITRATION AWARD

ARBITRATOR: Mr. S. SRIDHARAN

Dated: 24th June 2006

PepsiCo, Inc

: Complainant

Versus

Bijon Chatterji

: Respondent

Sridharan

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PepsiCo, Inc : **Complainant**

Versus

Bijon Chatterji : **Respondent**

1. The Parties

The Complainant is PepsiCo, Inc. a North Carolina Corporation of the address 700 Anderson Hill Road, Purchase, New York - 10577, United States of America, represented by its counsel K&S Partners, at 84-C, C-6 Lane, Off Central Avenue, Sainik Farms, New Delhi -100 062

The Respondent is Bijon Chatterji of Marienstr.8, Hannover, 30171, DE, represented in person.

2. The Domain Names and Registrar

The disputed domain name <pepsico.in> is registered with Key-Systems GmbH.

3. Procedural History

3.1 The Arbitrator received hardcopy of the Complaint along with a soft copy of Annexures on 03.06.2006. Arbitrator issued by email on 06.06.2006 to the Respondent a Notice setting forth the relief claimed in the Complaint and directing him to file his reply to the Complaint within 15 days.

Sridharan

3.2 The Respondent immediately sent his reply. The Respondent was responsive during the entire proceedings. The responses will be discussed later.

3.3 The Arbitrator noticed that the Complaint was filed by the counsel in a representative capacity on behalf of the Complainant. But no document authorizing the counsel to do so was filed.

3.4 The Arbitrator sent a communication by email to the Counsel for the Complainant inter alia directing the counsel to submit a copy of the document authorizing him to undertake activities on behalf of the Complainant to the Arbitrator by postal mail as well as by email within 15 days from the date of communication failing which a finding to this effect will be entered in the award.

3.5 The Arbitrator has not received till date any such document either by email or by postal mail from the counsel for the Complainant, Accordingly the Arbitrator enters his finding that no document authorizing the counsel for the Complainant has been filed.

4. Factual Background

4.1 The Complainant is one of the largest and best known manufacturers and distributors of soft drinks and other products in the world. The term pepsi cola was first used on August 28, 1898. Within a short time, the business and popularity of the Complainant's product, the business and popularity of the Complainant's product begin spreading to various states and countries.

4.2 The word **PEPSI** forms an essential and distinguishing part of the Complainant's corporate name and those of many of its subsidiaries.

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4.3 Since inception, the Complainant has been continuously and extensively using the trade mark PEPSI in relation to its business and products in isolation or various combinations such as Pepsi-Cola, Pepsico, diet Pepsi, Pepsi Max etc with or without logos.

4.4 The Complainant's PEPSI products have been sold on an extensive scale all over the world including India and the PEPSI products have also been extensively advertised through a host of media. The Complainant has and continues to invest millions of dollars into the promotion of its products. Evidence showing the sales turnover and promotional expenses are attached at Annexure 4 & 5.

4.5 The Complainant has filed applications and owns registrations for the PEPSI trade marks in over 150 countries including India under various classes. The Complainant has filed copies of certificates of registration of the mark in select countries across the globe.

4.5 The Complainant has also got registrations of the trade mark PEPSICO in India under classes 29 and 32.

4.7 The Complainant owns and operates a number of websites using global top level domain names such as pepsi.com, pepsico.com, pepsiworld.com, pepsibusiness.com etc. The Complainant obtained registration for pepsi.com and pepsico.com in 1993 itself.

Ordinances

No. of Corrections: 1 (one) at para 4.5,

4.8 The Complainant owns and operates a number of websites using country code top level domain names such as pepsi.co.uk, pepsi.fr, pepsi.go.jp and pepsi.de

4.9 The Complainant itself or through its subsidiaries has also obtained IN domain name registrations such as www.pepsi.co.in, www.pepsi.in

4.10 The Complainant has initiated and succeeded in a number of actions to cancel domain names involving pepsi before the Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO). In a number of these actions, the panelists of the WIPO centre have recognized the Complainant's PEPSI mark as one of the most famous marks in the world.

4.11 The Respondent sent a reply as follows:

I herewith acknowledge the receipt of your complaint, I was not aware of being in breach of the registry rules. There was no intention of harming Pepsico ("as you see I have linked the domain to Pepsico always), because I was formerly with Pepsico and I still love this company that has given me very much.

Anyway, I highly apologize for my lack of knowledge. Today I have sent a cancelling request for the domain pepsico.in to the registrar United Domains AG (see attachment). The domain will be cancelled as soon as possible.

Please acknowledge the receipt of this mail and please acknowledge no further commitments from my side after the cancellation.

Siddhant

As I can not ensure that a postal letter from Germany will reach you within 15 days I ask you whether this e-mail is sufficient. Enclosed you find my cancellation request for pepsico.in that I have made today, including my signature.

4.12 The Arbitrator desired to give, as a matter of natural justice, one more opportunity to the Respondent. The Arbitrator sent a communication by email on 7th June 2006 to the Respondent asking him to send by email a signed scanned letter reflecting his reply so that the Arbitrator would pass an award on merits.

4.13 The Respondent sent a reply on 13.06,2006 stating that the domain cancellation process of pepsico.in was complete and he was sending a scan of his official Setter of confirmation. The attached letter reads as follows:

In the matter of domain arbitration of pepsico.in, I declare officially:

(1) *This letter has been sent via e-mail to the arbitrator, the complainant and the registry office as seen above.*

(2) *The domain pepsico.in was cancelled on June 12th 2006 confirmation in German language see on bottom. The confirmation sent to me via email, says that the registrar(United Domains AG) has received my cancellation request (sent by me already to arbitrator, complainant and registry office as soft copy) and now*

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confirms cancellation. Further more ii is confirmed that the domain name is available now and not any more registered by me,

(3) I confirm having received the hard copy of your complaint on June 2006 and all soft copies via email by the arbitrator. The entire email communication was between Mr.Sridhamn {arbitrator} and me.

(4) Again I want to apologize for my lack of knowledge of having registered pepsico.in against registry files. I did not mean ill at all and have cancelled the domain immediately after having received your complaint. I was always keen to follow your email request as quick as possible. In fact, this willingness was assured by the arbitrator.

5. Parties' Contentions

A. Complainant

5.1 Given the prior adoption, use and fame of the PEPSI marks as detailed above, *PEPSI* is exclusively associated with the Complainant and none else

5.2 Further PEPSICO is the name of the Complainant.

5.3 The Respondent has no legitimate rights or interests in the domain name pepsico.in. The adoption of the disputed domain name by the Respondent is in bad faith and actuated by a mala fide intention to take under advantage of regulation and goodwill of the Complainant in its well known PEPSI mark.

Sridhaman

5.4 The Respondent's entire web site is nothing but a copy and a mirror image of the Complainant's pepsico.com web site. Pertinently the terms of use on the Respondent's site indicate that the same is maintained by the Complainant and that the copyright therein and trade marks featured on the site belong to the Complainant or its subsidiaries. Having no link whatsoever to the Complainant, these acts of the Respondent amount to fraud, blatant misrepresentation as well as and copyright infringement.

5.5 The Respondent has registered the disputed domain name with the sole intention of preventing the Complainant who is the rightful owner of the PEPSI marks from reflecting the same in a corresponding domain name.

5.6 The Respondent's registration of the domain name pepsico.in is bound to cause immense confusion and deception in the market and lead them into believing that the Respondent enjoys endorsement and or originates from the Complainant, since the public identifies the mark PEPSI with the Complainant and thus would rightfully assume that the domain name pepsico.in belongs to the Complainant

5.7 Likelihood Of confusion and deception is further intensified since the Complainant is the registrant of the domain names pepsi.in, pepsi.co.in amongst others.

B. Respondent

5.8 We have already seen the Respondent's contention in detail under para 4 above.

Sudhakar

5.9 In brief, the Respondent was formerly with the Complainant. He had no intention of harming the Complainant. He apologized for his lack of knowledge. He confirmed in writing by email that he cancelled the registration in his name of the disputed domain name immediately on receiving the Complaint

6. Discussion and Findings

A. Identical or Confusingly Similar

The Complainant's marks are registered in India and in other countries. The Complainant is the registered proprietor and owner of numerous trade marks including PEPSICO. The disputed domain name wholly incorporates the Complainant's distinctive mark and is thus identical to it. The suffix ".in" does not contribute to distinguish the disputed domain name from the Complainant's trade mark.

6.2 Therefore, the disputed domain name pe&SKa m is identical with and confusingly similar to the Complainant's marks.

8. Rights or Legitimate Interests

6.3 The Respondent's reply that:

- (a) he was formerly with the Complainant;
- (b) he had linked the web site under the disputed domain name to the Complainant;
- (c) there was no intention of harming the Complainant;

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clearly establishes that the Respondent has no rights or legitimate interests in the disputed domain name pepsico.in

C. Registered and Used in Bad Faith

6.4 The fact that the web site under the disputed domain name is a copy and a mirror image of that Complainant's pepsico.com web site with the indication that the same is maintained by the Complainant clearly establishes that the disputed domain name is registered and used by the Respondent in bad faith.

6.5 The above action of the Respondent in bad faith prevents the Complainant, the registered proprietors of the PEPSI and PEPSICO marks, from reflecting the same in a corresponding domain name.

7. Decision

7.1 For all the foregoing reasons, the Complaint is allowed in terms of prayer (a) of the Complaint.

7.2 It is hereby ordered that the disputed domain name pepsico.in be cancelled.

7.3 The Parties shall bear their own costs.



S.Sridharan

Arbitrator