



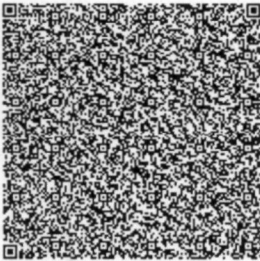
सत्यमेव जयते

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Certificate Issued Date	: 21-Feb-2014 04:45 PM
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Purchased by	: RAJEEV SINGH CHAUHAN
Description of Document	: Article 12 Award
Property Description	: Not Applicable
Consideration Price (Rs.)	: 0 (Zero)
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BEFORE THE SOLE ARBITRATOR UNDER THE .IN DISPUTE RESOLUTION POLICY

IN THE MATTER OF:

GOKUL KALYANASUNDARAM
No.23, 5th CROSS STREET
GURUSAMY NAGAR, ANAKAPUTHUR
CHENNAI 600 070

(Complainant)

Versus

MR. MURUGAN
41, EZHIL NAGAR MAIN ROAD
EZHIL NAGAR, PONDICHERRY-3

(Respondent)

Statutory Alert:

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THE PARTIES:

The Complainant in this proceeding is Gokul Kalyanasundaram, Phone number- +91 9094542776, Email address- contact@shastiaphthapoorthi.com, www.shastiaphthapoorthi.com, known for performing fire worship (homam) on 60th birthdays of devotees of the Thirukadaiyur temple, upon their request. The Complainant is representing himself in this proceeding.

The Respondent in this proceeding is Mr. Murugan, of 41, Ezhil Nagar Main Road, Ezhil Nagar, Pondicherry-3, Phone number- +91 9489483214. The Respondent is representing himself in this proceeding.

THE DOMAIN NAME AND REGISTRAR:

The domain name in dispute is www.shastiaphthapoorthi.in. The Registrar of this domain name is WEBIQ DOMAIN SOLUTIONS PVT. LTD. as per the whois data base.

PROCEDURAL HISTORY:

The Arbitrator was appointed by the .IN Registry, to adjudicate upon the Complaint of the Complainant, regarding the dispute over the domain name www.shastiaphthapoorthi.in.

.In Registry had supplied the copy of the Complaint and the Annexures to the Arbitrator.

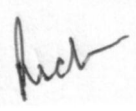
The Complainant and the Respondent have filed various documents as Annexures in support of their contentions.

The Arbitrator has perused the record and annexures / documents.

FACTUAL BACKGROUND:

The following information is derived from the Complaint, the Respondent's Reply, the Complainant's Rejoinder and the Respondent's Reply to the Rejoinder, along with the supporting evidence as submitted by both the parties.

The Complainant has submitted the following in its Complaint:



- The Respondent's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has the rights.
- The Respondent has no rights and legitimate interest in respect of the domain name www.shastiaphthapoorthi.in.
- The Respondent has registered and is using the domain name www.shastiaphthapoorthi.in in bad faith.

The Complaint:

The Complainant in this proceeding is Gokul Kalyanasundaram from Chennai, who purchased the domain name www.shastiaphthapoorthi.com on 3rd January 2009 for his cousin brother Shri TRV Sundaramurthy Gurukkal who does Ayul Shanthi Parihara Homams (Fire worships for Deities) in the Thirukadaiyur temple, located in the Nagapatinam district of Tamil Nadu. The 60th birthday of a person in Sanskrit is called 'Shastiaphthapoorthi' and the Thirukadaiyur temple is historically famous for performing the 60th, 70th and 80th birth anniversaries of the devotees in accordance with their wishes. The Complainant's website guides the devotees as regards the holy fire worships and the related arrangements and gives them first hand information.

The Complainant submits that recently a website with the same domain name has been developed in September 2012, also operating from Thirukadaiyur and providing similar type of services. The Complainant further alleges that the Respondent has copied all the contents, keywords and other information. The Complainant submits that his issue is not the copying of contents, but the fact that the domain name is exactly the same as that of the Complainant's, thus causing confusion among the devotees. This is adversely affecting the Complainant both on the personal and financial front. The Complainant requests that the Respondent be asked to either surrender the domain name or his domain name be cancelled.

The Reply:

The Respondent has stated his contentions in his reply to the Complaint.



With reference to the allegation that the Respondent's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights:

The Respondent contended that the Complainant has no rights to the name, trademark or service mark as the name 'Shastiaphapoorthi' is a very general and common term in Tamil Nadu which denotes the celebration of 60th birthday of an individual, akin to the renewal of marital vows. The Respondent further maintains that in Thirukkadaiyur, there are more than 25-50 teams doing the same business under similar domain names, as Thirukkadauiyur is a special pilgrimage place for people, for all kinds of 60th, 70th and 80th anniversaries and other homams.

With reference to the Complainant's claim that they are facing personal and financial problems due to confusion caused among devotees, and such confusion could also lead to misrepresentation of the Holy place:

The Respondent contends that personal problems cannot be taken into account and financial problems depend on one's skill and ability to gain customer satisfaction. The Respondent further maintains that there is no confusion among the devotees as they have thousands of satisfied clients. As regards misrepresentation of the spiritual place, the Respondent challenges that one can have a look at their picture gallery and will find no proof of misrepresentation. Therefore, it all comes down to the Complainant's inability to compete in the current competition in the business.

With reference to the allegation that the Registrant has no rights or legitimate interests in respect of the domain name:

The Respondent states that he is offering all kinds of services and packages for 60th, 70th and 80th anniversaries and all other kinds of homams and pariharams and have also uploaded pictures of all kinds of worship in our website. Hence, they not only have legitimate interests in the domain name but they also have satisfied clients and run a successful business.

With reference to the claim that the Registrant's domain name has been registered or is being used in bad faith:

The Respondent rebuts this allegation and states that he provides all genuine information on his site despite the Complainant claiming that the Respondent has copied the contents of the Complainant's website. The contents in the site are common to everyone.

The Rejoinder:

With reference to the allegation that the Respondent's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights:

The Complainant in the Rejoinder claims that the Respondent is not able to understand the nature of the Complaint. The Complainant is not bothered about the word 'Shastiaphapoorthi' being a general and common term, but about the domain name being identical. There are other domain names carrying on similar business from the same place too but they have spelt or worded their domain names differently, hence preventing confusion. It is contended that the Respondent's domain name is visually, conceptually and fully identical to the Complainant's domain name, consequently disrupting the Complainant's business, diluting his rights and exposing him to the risk of fraud.

With reference to Respondent's statement that personal problems cannot be taken into account:

The Complainant argues that personal problems being those which affect an individual can be psychological, emotional or physical, and in this case the Complainant has been emotionally affected on account of this disputed domain name.

With reference to Respondent's statement that financial problems depend on one's ability to gain customer satisfaction and skill level and these problems also cannot be taken into account:

The Complainant concurs with the above statement, further adding that had the Respondent been skillful, he should have created a different domain name, developed it on his own and formed his own clientele rather than encashing on the goodwill of an already established and reputed five year old domain name.

With reference to confusion caused among devotees:



The Complainant contends that the devotees presume that the Complainant's domain name and the Respondent's domain name belong to the same group and do not operate individually. Complainant has received calls from people as well to clarify this doubt, as a Google search gives the result of both these domain names, hence leading to enquiries by the devotees.

The Complainant further alleges that the entire contents, style, pattern, keywords, including the Title head wordings have been copied by the Respondent. The Respondent has further made a Facebook account and added the Complainant's clients to his account, thus clearly exhibiting bad faith.

Reply to Rejoinder:

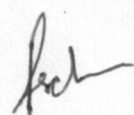
The Respondent contends that the Complainant has no rights on the specific domain name, as according to ICANN/INDRP Rules, it does not matter who bought the domain name and first- consideration is given only to the person who has rights with a trademark or ROC or service mark. The Respondent further states that the Respondent is a government recognized firm named 'Shastiaphapoorthi as they are registered under the Partnership Act. The Respondent claims that they created the domain name as per the keyword that had more searches and correct spelling. The Respondent alleges that the Complainant's file 'Confusion.PDF' is fake, and that the Complainant's claim that their priest is the only senior Priest 8th generation at the temple is false.

DISCUSSIONS AND FINDINGS:

Rule 8 (b) of the INDRP Rules of Procedure provides that "*In all cases, the Arbitrator shall ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case*".

As mentioned above fair opportunity has been given to both the Parties to file their contentions and after perusal, the following Arbitration proceedings have been conducted.

Rule 12 (a) of the INDRP Rules of Procedure provided that "*An Arbitrator shall decide a Complaint on the basis of the statements and documents*



submitted to it and in accordance with the Arbitration and Conciliation Act, 1996, Dispute Resolution Policy, the Rules of Procedure and any bye-laws, rules and guidelines framed thereunder and any law that the Arbitrator deems to be applicable”

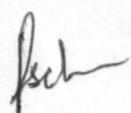
In the present circumstances, the decision of the Arbitrator is based upon the contentions and evidence filed by both the parties respectively and conclusion is drawn from the same.

Having perused the submissions and documentary evidence placed on record, the Complainant has proved that he has common law rights in the domain name 'www.shastiaphthapoorthi.in' and the assertion by the Respondents that they have registered a generic domain name which was open and available for registration does not hold much ground as it is understood that the Respondents ought to have conducted reasonable due diligence before registering the disputed domain name and a man of ordinary prudence having knowledge of using the world wide web would have surely come across the registration of an identical domain name.

The Complainants' rights as a prior user of the name "shastiaphthapoorthi" have also been established beyond doubt and the Arbitrator in light of the evidence produced notes that the Respondent must have known or was aware of the rights of the Complainant.

Further, the Arbitrator is of the view that the Complainant has satisfied all the three conditions outlined in the paragraph 4 of .IN Domain Name Dispute Resolution Policy, viz.

- (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.



BASIS OF FINDINGS:

The Domain Name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights- -

(Policy, para. 4 (i); Rules, paras. 3 (b) (vi) (1))

The Complainant is the registered proprietor of the domain name www.shastiaphapoorthi.com since 03.01.09. The Hon'ble Supreme Court in its judgment titled as *Satyam Infoway Ltd. vs. Sifynet Solutions Pvt. Ltd.* (AIR 2004 SC 3540), held that :

"The use of the same or similar domain name may lead to a diversion of users which could result from such user's mistakenly accessing one domain name instead of another. This may occur in e- commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar web site which offers no such services. Such users could well conclude that the first domain name owner had mis-represented its goods or services through its promotional activities and the first domain owner would thereby lose their custom. It is apparent therefore that a domain name may have all the characteristics of a trademark and could found an action for passing off."

In *Rediff Communication Limited vs. Cyberbooth & another*, [AIR 2000 Bom 27], it was held that there can be no doubt that two marks/domain names, "REDIFF" of the plaintiff and "RADIFF" of the defendants are almost similar. When both the domain names are considered it is clearly seen that two names being almost similar in nature there is every possibility of Internet user being confused and deceived in believing that domain names belong to one common source and connection although belong to two different persons.

In *Myspace, Inc vs. Junghu Kang*, FA 672160 (National Arbitration Forum, June 19, 2006), where it was held that the disputed domain name "myspce.com", was confusingly similar to the mark "MYSPACE", and that a slight difference in spelling between the Mark and the disputed domain name does not reduce the confusing similarity.



Further, at the time of registration of the disputed domain name www.shastiaphthapoorthi.in, the Complainant had already been using the mark "shastiaphthapoorthi" as its domain name with firmly established rights in the same. There is no doubt that the disputed domain name is identical to the Complainant domain name (www.shastiaphthapoorthi.com) for which Complainant has prior registration.

The word 'shastiaphthapoorthi' might be a generic word but the prior usage of it by the complainant has made the case of the complainant stronger.

Moreover, it is a well-established principle that mere addition of a generic or country code top-level domain names to the disputed domain name does not avoid confusing similarity. In this case, however, the answer to the question of confusing similarity is even more obvious as the domain name registered subsequently could not have been be more identical to the Complainant's domain name.

Thus, the Respondent has failed to show any rights superior to that of the Complainant in the domain name. The only logic behind getting an identical mark registered in such a case is in the reason that the Respondent got the disputed domain name registered with the intention to trade upon the name of the Complainant's domain name in violation of para 4 (b) of the Policy. Internet users are highly likely to believe that the disputed domain name is related to, associated with or authorized by the Complainant.

Thus, from the above facts and circumstances of the case, the Arbitrator is of the view that the Complainant is successful in its first contention that the disputed domain name is confusingly similar to its mark "Shastiaphthapoorthi" in which it has prior user rights.

The Registrant has no rights or legitimate interests in the respect of the domain name- (Policy, para. 4 (ii); Rules, paras. 3 (b) (vi) (2))

It is clear that once a Complainant makes a prima facie case, then the burden shifts to the Respondent to provide evidence to establish his right or legitimate interest in the disputed domain name.

This proposition was also upheld in the following cases:



1. *Croatia Airlines d.d. vs. Modern Empire Internet Ltd*, WIPO case No. D2003-0455, where it was held that the Complainant is required to make out a prima facie case that the Respondent lacks rights or legitimate interests. Once such prima facie case is made, Respondent carries the burden of proving rights or legitimate interests in the domain name. If the Respondent fails to do so, a Complainant is deemed to have satisfied paragraph 4 (a) (ii) of UDRP.

2. *Hanna- Barbera Productions, Inc. vs. Entertainment Commentaries*, FA 741828 (National Arbitration Forum, September 25, 2006), where it was held that the Complainant must first make a prima facie case showing that the Respondent does not have rights or legitimate interest in the subject domain name. If the Complainant satisfies its burden, then the burden shifts to the Respondent to show that it does have rights or legitimate interests in the subject domain name.

The Tribunal determines that the Complainant has made positive assertions and adduced evidence establishing a prima facie case. Hence, the burden shifts on the Respondent to prove that it has legitimate right or interests in the disputed domain name. Whereas the Respondent has not discharged the onus positively, which had shifted upon him as the Respondent did not put forth such evidence, except the fact that he only made assertions that the word "Shastiaphapoorthi" is a generic name and that dictionary meaning of the words 'shasthi' + 'aptha' + 'poorthi' can be ascertained if the words are seen independently:

According to the paragraph 7 of the .IN Dispute Resolution Policy, the following circumstances show registrant rights or legitimate interest 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 demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;*
- ii). *the registrant (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 Complainant's domain name is well established and recognized and it has gained rights purely based upon prior use and registration of the domain name, that there can be no legitimate use by the Respondent. Therefore, the use of the disputed domain name without any permission from the Complainant is an act done in bad faith, in itself.

Moreover, the Respondent is also not making a legitimate non-commercial use of the disputed domain name.

Furthermore, there exists no relationship between the Complainant and the Respondent that would give rise to any license, permission or authorization by which the Respondent could own or use the Disputed Domain Name which is identical to that of the Complainant.

The Complainant has stated that Respondent is neither commonly known by the disputed name, nor is it a personal name. It is a general name, the use of which should first be granted to the Complainant who had registered his domain name five years before the domain name of the Respondent even came into existence, and the Complainant has been operating successfully under that domain name ever since.

The Arbitrator agrees with the contention of the complainant.

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

According to the Complainant, the disputed domain name has been only adopted by the Respondent for commercial gain, by inducing the clients of the Complainant to avail the Respondent's services. The domain name acts as the address of the business enterprise on the internet and it is evident that the Respondent is quite aware of this fact. Further, the Respondent registered the disputed domain name almost five years after the registration of the Complainant. This itself shows prima facie evidence of *malafide* intention and bad faith.

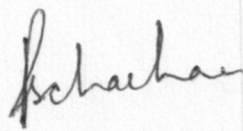
The facts make it clear that the Respondent was taking advantage of the goodwill and fame of the Complainant's well-established domain name for its own substantial commercial profit and gain, as is evident from the fact that even the formatting and the layout of the contents of the Respondent's domain are the same as that of the Complainant's. Further, the Respondent even tried to mislead the clients of the Complainant by adding them to his Facebook account.

Therefore, the Arbitrator agrees with the contention of the complainant that the dispute domain name is registered and used in bad faith.

DECISION:

The Tribunal is of the view that as per the facts and circumstances it is clear that the complainant is successful providing its case.

.IN Registry of the NIXI is hereby directed to transfer the domain name of the Respondent i.e. www.shastiaphthapoorthi.in to the Complainant. In the facts and circumstances of the case, no cost or penalty is imposed upon the Respondent. The parties are to bear their own costs. The Award is accordingly passed on this 25th day of March, 2014.



Rajeev Singh Chauhan

Sole Arbitrator

Date: 25th March, 2014