

दिल्ली DELHI

S 059346

BEFORE THE SOLE ARBITRATOR UNDER THE
.IN DISPUTE RESOLUTION POLICY

IN THE MATTER OF

Flsmidh A/S

.....The Complainant

Vs.

Dom Mag Strategic Business Services

(I) Pvt. Ltd., St. Xavier's School Road,

Vile Parle (W) Mumbai,

Maharashtra, India

.....The Respondent

THE PARTIES

The Complainant in this proceeding is **FLSmith A/S**, a joint stock company organized under the laws of Denmark.

The complainant's authorized representative in the administrative proceeding is:

Aga Arvind, Corporate Counsel, Legal, FLSmith, FLSmith House, 34, Egatour, Kelambakkam, (Rajiv Gandhi Salai) - Chennai, 603103, India, Telephone: +91 4447485759/ Fax: +91 442470301.

The respondent in this proceeding is Dom MagStrategic Business Services (I) Pvt. Ltd, St. Xavier's School Road, Vile Parle (W), Mumbai, Maharashtra, India, +91.226104170 <anil@stabis.com>

THE DOMAIN NAME, REGISTRAR AND REGISTRANT

The disputed domain name is <**www.flsmith.in**>.

The Registrar for the disputed domain name is Directi Internet Solutions Pvt. Ltd

The Registrant is Dom MagStrategic Business Services (I) Pvt. Ltd St. Xavier's School Road, Vile Parle (W), Mumbai, Maharashtra.

PROCEDURAL HISTORY

I was appointed as the Arbitrator by .In Registry, to adjudicate upon the complaint of the Complainant, regarding the dispute over the domain name <**www.flsmith.in**>.

.In Registry has supplied the copy of the Complaint to me.

On 27.12.2011, I sent an email to the parties informing them about my appointment as an Arbitrator.

Thereafter on 27.12.2011, myself I sent an email to Complainant requesting them to supply the copy of the complaint with annexure to the Respondent and in case if they have already served it, then to provide me with the details of service record.

In accordance with INDRP read with INDRP Rules of Procedure, notice of arbitration was sent to the Respondent on 27.12.2011 with the instructions to file his say latest by 11.01.2012.

On 02.01.2012, I received an email from the Counsels/Representative of the Complainant, informing about the details of the service of the copy of Complaint to the Complainant. According to this mail copy of the complaint was duly sent to the postal address of the



Respondent which was returned as the address of the Respondent was bogus. With the same email the Copy of the Complaint was duly served by the Complainant to the Respondent.

The Respondent failed/neglected to file his say/ reply to the Complaint of the Complainant within the stipulated time. Similarly he has not communicated anything on the complaint till the date of this award and as such the proceedings were conducted.

I feel that enough opportunity has been given to the Respondent and genuine efforts have been made to make him a part of the proceedings. Since he has failed to join the proceedings, or to file any response the present exparte award is passed.

That I have perused the record and Annexure/ documents.

FACTUAL BACKGROUND

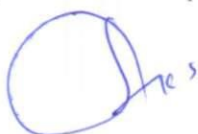
The Complainant has raised, inter-alia, the following important objections to registration of disputed domain name in the name of the Respondent and contended as follows in his complaint:-

The Complainant in the proceedings is FLSmidth A/S ("FLSmidth") which is a global engineering company founded in 1882 that is based in Copenhagen, Denmark. During its 128 year history, the Complainant has grown to become a world leading supplier of equipment and services to the global cement and minerals industries. The Complainant is accessible worldwide through their well known domain www.flsmidth.com and owns the intellectual property of all the worldwide trademark applications and registrations and domain name registrations of the brand name "FLSMIDTH".

The said domain name www.flshiidth.com was registered during 1993 and the associated websites were launched in subsequent years. Every month the Complainant's website www.flsmidth.com reveals about 34000 hits on average daily.

The Complainant has spent a considerable amount of money promoting its brand "FLSMIDTH" worldwide. The complainant has a huge annual turnover and many millions are spent on advertising and establishing the brand FLSmidth worldwide. The Complainant and its predecessor in title have participated in various events (exhibitions etc), national and international since inception of which some of it were sponsored by them.

The Complainant is also the first to conceive, adopt, use and promote www.flsmidth.com and various other domain names. On account of extensive usage of the mark FLSmidth, the said mark is identified solely and exclusively only with the Complainant and none other. Further, the brand, FLSmidth has gained a huge customer base Internationally and is identified, associated and recognized only with the Complainant. Therefore, adoption and/or usage of



the mark FLSmith by others would amount to not only dilution of the Complainant's rights over the distinct mark but also would result in confusion and deception by any unauthorized usages of others.

PARTIES CONTENTIONS

Complainant:

The Complainant contends as follows:

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.

The Respondent has registered and is using his domain name in bad faith.

Respondent:

The Respondent has not filed any response and submissions to the complaint despite being given an adequate notification and several opportunities by the Arbitrator.

DISCUSSIONS AND FINDINGS

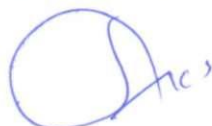
As earlier pointed out; the Respondent has failed to file any reply to the Complainant and has not rebutted the submissions put forth by the Complainant, and the evidence filed by him.

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 the Respondent to file the reply but no response has been received from him. Therefore, the Arbitration proceedings have been conducted ex parte.

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 there under and any law that the Arbitrator deems to be applicable."*

In the present circumstances, the decision of the Arbitrator is based upon the Complainant assertions and evidence and inference drawn from the Respondent's failure to reply.



Having perused and the submissions and documentary evidence placed on record, the Arbitrator is convinced that the Complainant has proved that he has statutory and common law rights in the mark “FLSmith”.

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 Registrant's Domain Name is identical or confusingly similar to a name, trademark or service mark in which the Complaint has rights:

The Complainant has stated **www.flsmith.in** is confusingly similar and identical to his trade mark **FLSmith**. It is also stated by the complainant in his complaint that his mark is very well known and he has statutory and common law rights in it. The Complainant has submitted that his mark **FLSmith** is registered and used in many countries including India where the respondent is located. Thus the Complainant has the right over the name **FLSmith** and Respondents domain is also confusingly similar to it.

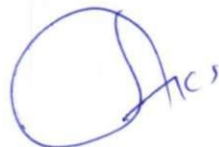
It is further stated that the complainant is the registered proprietor of the “**FLSmith**” trademark in numerous countries in the world including INDIA and has gained significant reputation and its mark can be termed as a well known brand. The complainant is also the registrant and proprietor of various Domain name registration at International and domestic level.

Thus the conclusion is that the domain name of the Respondent is identical and confusingly similar to the Trademark of the Complainant as the above submissions of the Complainant have not been rebutted by Respondent, as such they are deemed to be admitted by him.

Even otherwise the above facts and annexures establish that the domain name of the Respondent is confusingly similar and identical to the mark of the Complainant.

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

It is clear that once a Complainant makes a prima facie case, then the burden shifts to the Respondent to provide evidences to establish rights or legitimate interests in the disputed



domain name, which was held in the award of Croatia Airlines d.d. v. Modern Empire Internet Ltd WIPO case No. D2003-0455.

The Tribunal determines that the Complainant has made positive assertions and concrete evidences making a prima facie case showing that the Respondent does not possess rights or legitimate interests in the subject domain name. Hence, the burden shifts on the Respondent to prove that it has rights or legitimate interests in the subject domain name. Whereas the Respondent has not discharged the onus positively, which had shifted upon him as the Respondent has not responded to any of the allegations raised by the Complainant in its Complaint.

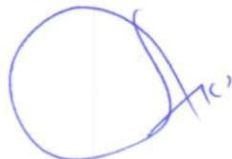
According to the paragraph 7 of the .IN Dispute Resolution Policy, the following circumstances show Registrants rights or legitimate interest in the domain for the purpose of paragraph 4(ii)

- 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.*

- a. While considering paragraph 7 (i) of the .IN Dispute Resolution Policy, "*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* ", the Complainant has contended that Respondent has no intentions or purpose to use the disputed domain name for bona fide offering of goods and services in relation to it.

The Tribunal is of the view that the Respondent has neither responded nor has put forth or provided any evidence to show that the Respondent is engaged in or demonstrably prepared to engage in offering any bonafide goods or services in the name of the disputed domain name.

This proposition was also upheld in "Pfizer Inc. Vs. Deep Soni and Ashok Soni. (Case No. D2000-0782)," it was held that the respondent to prove his right or legitimate interest in domain name, must show that he is using the domain name for offering of



goods and services or that he is making a demonstrable preparation to use the domain name for offering goods and services.

- b. While considering paragraph 7 (ii) of the .IN Dispute Resolution Policy, "*the Registrant (as an individual, business, or other organization) has been commonly known by the domain name, even if the Registrant has acquired no service mark rights*", the Complainant has stated that Respondent is neither commonly known by the disputed name, nor it is a personal name. The Complainant has further contended that Respondent is not engaged in any business or commerce under the domain name. The Tribunal concludes that the Respondent has not shown or given any evidences to prove that it is commonly known by the disputed domain name and hence does not have any right or legitimate interest in the disputed domain name.

For this submission the Tribunal relies upon the award of Morgan Stanley v. Keep Guessing, INDRP/024 (June 27, 2007), where it was held that Respondent has failed to show that he has a right or legitimate interest in the domain name, as he is neither known by the domain name, nor is it his personal name.

- c. While considering paragraph 7 (iii) of the .IN Dispute Resolution Policy, "*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 has contended that Respondent is not making a legitimate non commercial or fair use of the domain name.

According to Complainant, disputed domain name has been only adopted by the Respondent for commercial gain. The sole purpose of the Respondent is to divert Internet users to its web site.

The Tribunal concludes that the above submission of the Complainant has not been rebutted by Respondent, as such they are deemed to be admitted by him. Even otherwise the above facts and annexure establish that the Respondent has no right or legitimate interest in the disputed domain name under INDRP paragraph 4(ii).

The Registrant domain name has been registered or is being used in bad faith:

The Complainant argues that the Respondent was aware of the Complainant's brand and tried to create a likelihood of confusion by registering domain name that is identical to the trademark in which the Complainant has rights.

The Complainant further alleges that the Respondent has registered the domain name only with the intention to create confusion in the mind of the internet users and to attract them to its impugned domain name. The Complainant has contended that the Respondent has the full

knowledge and has intentionally attempted to divert the users from the domain name/website of the Complainant and also to deceive the consumers into believing that there is a connection or association between the Complainant and Respondents website.


The Complainant has finally stated that to the best of his knowledge, Respondent did not use or register the mark or name Flsmidth or any variation thereof prior to the date upon which the disputed domain name was registered

The Tribunal is of the view that the above submission of the Complainant has not been rebutted by Respondent, as such they are deemed to be admitted by him. Even otherwise the above facts and annexures establish that the Respondent has registered the disputed domain name in bad faith under INDRP paragraph 4(ii).

DECISION

In the view of the above facts and circumstances it is clear that the Complainant has succeeded in his complaint. In the facts and circumstances of the case it can be presumed that the only purpose for the registration of the disputed domain name was to capitalize on the fame and reputation of Complainant and to make monetary benefit.

The Respondent has got registered and used the disputed domain name in bad faith .IN Registry of the NIXI is hereby directed to transfer the domain name of the Respondent i.e. <www.flsmidth.in> to the Complainant. In the facts and circumstances of the case no cost or penalty is imposed upon the Respondent. The Award is accordingly passed on this 14th January, 2012.


Ashok Kumar Singh (A.K. Singh)
Sole Arbitrator

Date: 14th January, 2012.