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Sl. No. 3802/ Date.:08/05/2010. Rs.:100/-
Sold To : Harani NarayanSwamy
W/o. : B. NarayanSwamy R/o.Hyd
To Whom : Self.

K. RAMA CHANDRAVATHI
STAMP VENDOR (L. No:27/99, RL.No. 16/2008),
6-3-387, Beside Banjara Durbar Hotel, Panjagutta
HYDERABAD - 500 082. Phone. No. 23351799

**BEFORE THE NATIONAL INTERNET EXCHANGE OF INDIA
ARBITRATION AWARD**

In The Matter Between

RPS Infrastructure Limited

Complainant

Versus.

Jayanta Barua

Respondent

Harani NarayanSwamy

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1. The Parties

The Complainant is RPS Infrastructure Limited of Delhi, an Indian Company, represented in these proceedings by M/s Mars & Partners of Delhi.

The Respondent is Jayanta Barua of Delhi.

2. The Domain name, Registrar and Policy

This Arbitration pertains to a dispute regarding the domain name <rps-savana.co.in>. The registrar for the disputed domain name is Directi Internet Solutions Pvt. Ltd dba Public Domain Registry.com.

The Arbitration Proceeding is conducted in accordance with the Arbitration and Conciliation Act of 1996 (India), the current .IN Domain Name Dispute Resolution Policy (the "INDRP Policy"), and the INDRP Rules of Procedure (the "Rules").

3. Procedural History

The sole arbitrator appointed in the case is Mrs. Harini Narayanswamy. The Arbitrator has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, in compliance with the Rules.

The Arbitrator received the hard copy of the Complaint from the .IN Registry on July 25, 2010. On July 27, 2010 the Arbitrator transmitted by email a notification of commencement of the arbitration proceedings to the Respondent under paragraph 5 (c) of the INDRP Rules, and copies by email to other interested parties to the dispute.

The Respondent was given twenty-one days time from the date of the notification to file a Response. The Respondent requested for extension of time to file his response and the response was filed on Aug 28, 2010. The Complainant made further submissions in reply to the Response. The Arbitrator set the date for final submissions to be made by the parties as September 14, 2010. The Respondent



filed his reply to the Complainant's second submissions by his communications dated September 14, 2010. Based on the submissions made by the parties and the documents on record the Arbitrator now proceeds to determine the case on its merits.

Factual Back ground

The Complainant is in the business of real estate and uses the following trademarks in connection with its business. :

TRADEMARK	REGISTRATION NUMBER	CLASS	DATE OF APPLICATION	STATUS
LOGO OF RPS GROUP	1456303	36	May 24, 2006	Registered
DEVICE USED IN RPS GROUP	1456304	36	May 24, 2006	Pending
RPS GROUP	1456305	36	May 24, 2006	Registered
LOGO OF SAVANA	1480898	36	August 23, 2006	Pending

The Complainant also owns copyrights for its group logo and has submitted documents of its copyright registrations.

The Respondent registered the disputed domain name on February 25, 2009.

4. Parties contentions

A. Complainant's Submissions

The Complainant states it is a public limited Company which was incorporated in the year 2005. It is in the real estate business in the National Capital Region (NCR), and its project "Savana-Living with Nature" is located in Faridabad, which is spread over an area of 50 acres. It states it has similar housing projects at other locations and uses the same trademark for its other projects. The Complainant alleges that it is part of a larger business group, and owns other domain names: www.rpsgroupindia.com, is the official website of its group; the other websites dedicated for its specific projects are www.rps-rhythm.com, rps-oxypark.com and www.rps-palms.com. The Complainant states it has copyright for the website content at www.rps-savana.com.

The Complainant alleges its trademark RPS-SAVANA has been extensively publicized in electronic and print media. The Respondent has adopted a name

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and website that is deceptively similar to Complainant's official website and makes unauthorized use of trademarks and copyright material belonging to the Complainant. The Complainant states it has no direct or indirect association with the Respondent except that his wife had booked a unit in its SAVANA project. It had sent a notice regarding the disputed domain name to the Respondent on May 24, 2010. The Respondent replied to the notice and claimed that the disputed domain name is being used for non-commercial and fair use purposes.

The Complainant requests for the transfer of the disputed domain name on the following grounds:

- (i) The Respondent's domain name is identical and confusingly similar to a name, and mark in which the Complainant has rights. The Complainant has filed an email as evidence of user confusion arising from the Respondent's use of the disputed domain name.
- (ii) The Respondent has no rights and legitimate interest in the disputed domain name as he is not known by the disputed domain name and has not used it as a trademark. The Complainant has not authorized the Respondent to use its trademarks in the disputed domain name or on the website. The Respondent has not given complete contact details while registering the domain name except for an email address. The Respondent is not making legitimate non-commercial fair use of the disputed domain name.
- (iii) The disputed domain name was registered and is used in bad faith as the Respondent has no connection with Complainant and prevents the trademark owner from reflecting its marks in a corresponding domain name. The disputed domain name would cause confusion and deception to trade and public as the marks RPS and SAVANA are associated with the Complainant. Apart from violating its trademark and copyright the Respondent is also defaming and damaging the business of the Complainant. The overall appearance of the Respondent's website can cause confusion to customers and would affect its business. The Complainant argues that although there is a disclaimer on the Respondent's website stating that it is a discussion platform for SAVANA unit holders, the website appears to be a forum to defame the Complainant and it also contains advertisements that show commercial use of the domain name.

The Complainant asserts that the Respondent has an email rps-savana@yahoo.com that is likely to create confusion with its customers about the official email of the Complainant's RPS SAVANA projects and takes advantage of the Complainant's goodwill and credibility. The Complainant submits the Respondent has registered another domain name <savanaonline.com> on February 26, 2010 that also infringes Complainant's rights in its SAVANA mark and its other intellectual property rights. The domain name <savanaonline.com> was redirected to the disputed domain name but the redirection was removed after the Complainant sent a legal notice to the Respondent. The Complainant refers to the provisions of the INDRP Policy and Rules and requests for the relief sought.

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B. Respondent's Submissions

The Respondent states that in September 2009 he had booked an apartment in the Complainant's SAVANA project in the name of his wife Nandita Bayan, where he and his wife are co-applicants for the housing loan for the said apartment. He states that as he has made a direct payment to the Complainant for the apartment he has a right to be concerned about the health and status of the Complainant's SAVANA project.

The Respondent contends that the project was launched in September 2006 with a completion time of three years, but even after four years it is not complete. The lack of transparency and communication from Complainant regarding the project has become a cause for apprehension among customers. The Respondent therefore registered the disputed domain name as a common discussion platform for customers of the SAVANA project.

The Respondent states that his website clearly specifies that it is a personal and non-commercial website and is not affiliated to the Complainant. The website is a discussion forum for members to discuss the updates regarding the project and to voice their concern against the government for lack of infrastructure. He alleges that anyone visiting the website would be able to comprehend that it is not the Complainant's official website.

Since the inception of the website the Respondent states that it has been sending communication to the Complainant, and therefore the Complainant has been aware of the disputed domain name. The Complainant has acknowledged the existence of the forum in an email and had even welcomed the formation of the forum. The Respondent states the objective of registering the disputed domain name was to provide a platform for open discussions, to improve the channels of communication and for obtaining more transparent information from the Complainant, and it is not an association against the Complainant.

The Respondent further states that a generic internet search reveals that several real estate agents who engage in commercial activities are blatantly using the Complainant's logo, its price list and its copyright logo on their websites without any objection from the Complainant and the Complainant has not tried to stop their usage. As stakeholders of the project, the Respondent alleges that it is natural to adopt the name RPS SAVANA.

As proof of the disputed domain name being a discussion forum for the SAVANA project the Respondent encloses a list of members of the forum with their contact email addresses, phone numbers and tower names in Complainant's project SAVANA. The Respondent further states that all the members joined voluntarily and were aware of the website being a discussion forum to participate in discussions related to the project where members can voice their concerns and grievances against the builder and the government.

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The Respondent denies that the overall appearance of its website is similar to the Complainant's website and states it has a different identity and look, except for the green color background which has been used by the Respondent to match the SAVANA grassland theme. He asserts that he has no intention to malign reputation of the Complainant or to divert customers of the Complainant.

The Respondent states as a gesture of good faith and respecting the copyright concerns of the Complainant he is willing to move the discussion forum to a new domain as the motive of disputed domain name was to take collective action to build a better living society.

Supplemental submissions of the Parties

Complainant

The Complainant filed a reply to the Respondent's Response where it alleges the statements made by the Respondent are merely to justify his unauthorized use of the Complainant's marks. Further, the Respondent ought not to be concerned about others' use of the Complainant's marks. The disputed domain name violates its rights and is used to defame the Complainant. The Complainant disputes that the domain name has been registered for purposes of a non-commercial discussion forum.

Regarding the Respondent's gesture of closing and moving his discussion forum to another site, the Complainant alleges that the Respondent has other domain names such as <myfahdabad.in> and <savane.myfaridabad.in> where a sub domain to the disputed domain name violates the trademark and copyright of the Complainant and for the reasons stated it ought to be granted relief sought for.

Respondent

The Respondent states any unintentional use of trademark or copyright belonging to the Complainant has been removed after being served notice by the Complainant. Further he has placed a disclaimer on the website that shows it is a personal website not associated with Complainant.

The Respondent states the Complainant cannot claim copyright to the word SAVANA, as it is natural to refer to that name as a common point of interest for customers. He reiterates his offer to close and move his discussion forum website to another disputed domain name. The Respondent states the Complainant has filed legal proceedings against him to divert and sidetrack the main issue between the parties, that is of delay in project and to prevent him from raising questions in a discussion forum. The Respondent finally states, "as concerned investors and informed citizens we have every right to publicly discuss the projects of the complainant".

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1. Discussion and Findings

Under the .IN Policy, the Registrant of the domain name is required to submit to a mandatory Arbitration proceeding in the event that a Complaint is filed in the .IN Registry, in compliance with the IN Policy and the INDRP Rules.

The .IN Policy, Paragraph 4 requires the Complainant, to establish the following three elements:

- (i) The domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights, and
- (ii) The Respondent has no rights or legitimate interests in respect of the domain name; and
- (iii) The Respondent's domain name has been registered and is being used in bad faith.

Identical or Confusingly Similar

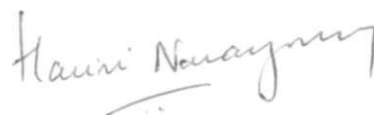
The first element requires the Complainant to prove that the domain name registered by the Respondent is identical or confusingly similar to a mark in which it has rights.

The Arbitrator finds the Complainant has provided evidence of its registered rights in the RPS mark and the details of its pending application for the SAVANA mark. The Arbitrator recognizes the Complainant's registered rights in the RPS marks and the Complainant's unregistered common law rights in the SAVANA mark. The Arbitrator finds the disputed domain name incorporates the Complainant's trademark RPS in its entirety along with the name of its project SAVANA and therefore the composite term "RPS-SAVANA" is distinctive of the Complainant.

A domain name that incorporates the Complainant's mark generally would be considered confusingly similar unless it is accompanied by terms that expressly disclaim any association. See *Lockheed Martin Corporation v. Dan Parisi*, WIPO Case No. D2000-1015. Further, the Complainant has filed an email as evidence of user confusion with the Respondent's domain name.

The Arbitrator finds, the disputed domain name <rps-savana.co.in> is confusingly similar to the Complainant's trademark except for the country code top level domain (cc TLD) ".co.in " identifier. The ccTLD can be disregarded for purposes of assessing similarity of the domain name to the trademark.

For the reasons discussed, the Arbitrator finds that the Complainant has satisfied the first element under paragraph 4 of the Policy.



Rights and Legitimate Interests

The second element requires the Complainant to make a *prima facie* case that the Respondent has no rights and legitimate interests in the disputed domain name.

The Complainant has asserted that the Respondent is not known by the disputed domain name and has no trademark rights in the name. Further the Complainant has not authorized the Respondent to use its mark in any manner. Under paragraph 7 of the Policy, the registrant's rights can be found from the material on record, if (i) before notice of the dispute, the registrant had used or made demonstrable preparations to use the domain name in connection with a *bona fide* offering of goods or services or (ii) the Registrant (as an individual, business organization) has been commonly known by the domain name, or (iii) The Registrant is making legitimate, non commercial or fair use of the domain name without intent for commercial gain.

The Respondent has argued that he uses the disputed domain name as a non-commercial discussion forum for the Complainant's SAVANA project customers, and is therefore making legitimate non-commercial fair use of the disputed domain name. The Respondent has presented evidence of its use of the website connected to the disputed domain name as a discussion forum.

The question here is whether the Respondent has legitimate rights and interests in using the Complainant's trademark in the disputed domain name that is allegedly being used for non-commercial discussions. There are two main polarized viewpoints on this subject:

One viewpoint states that the right to have a free speech discussion forum does not give the respondent the right to use the complainant's mark without permission of the trademark holder. The other viewpoint suggests that the respondent has legitimate interest in using the trademark as part of the domain name of a criticism site, provided users are not likely to be confused by the domain name and it is found that the website is used for fair and non-commercial purposes.

The underlying principle of the Policy is to curb the practice of registration and using domain names that misleads customers and Internet users. The Policy however balances the interests of trademark owner's rights against reasonable free use of domain names to facilitate freedom of expression. Indeed, paragraph 7 (iii) of the Policy was included for the express purpose of balancing trademark rights with free speech rights. Various views have emerged on this topic some notable aspects are discussed here:

1. The right to discuss or criticize does not extend to registering a domain name that is identical or confusingly similar to the owners registered

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trademark or a domain name that conveys an association with the mark. (Initial interest confusion approach).

2. By using a confusingly similar domain name, as the Respondent is misrepresenting itself as being that entity it is not.
3. The Respondent has a legitimate interest in using the trademark as part of the domain name for a discussion or criticism site, provided the domain name connotes the nature of the Respondent's criticism website by including descriptive term(s) along with the mark. (For instance the domain name could use the term "discussion" or "forum", such as <trademark.discussion.forum.com> to distinguish it from the trademark).
4. The reference made to the trademark in the domain name and on the website should be only be normative use and it should not be used in a trademark sense.
5. The domain name ought not to prevent the trademark holder from exercising its rights to reflect its mark in a corresponding domain name.

Under the "initial interest confusion" approach, the respondent cannot have a legitimate interest in using a domain name that is identical to the complainant's mark, regardless of the content of the respondent's website. While it is recognized that the Respondent does have rights to express his views, which includes the right to start a discussion forum, such right however cannot be exercised by using a confusingly similar domain name that misrepresents his identity to the public.

The Respondent has argued that his website disclaims any affiliation with the Complainant and there is no indication that he is making commercial use of the Complainant's trademark. Further, as a discussion site he is making legitimate non-commercial fair use of the disputed domain name. However, the initial interest confusion test is regarding the domain name being the source of confusion for users before users reach the Respondent's website. The benchmark for initial interest confusion is whether the user is misled by the domain name before he is able to view the disclaimer on the respondent's site. In the present case, the Complainant has provided evidence of such an instance of confusion arising due to the use of the disputed domain name by the Respondent.

In the Arbitrator view, the registration of a domain name identical with the Complainant's mark does lead to a high degree of initial interest confusion and association with the Complainant. Particularly as the Respondent has not used any other terms such as "forum" or "discussion forum" along with the Complainant's mark, but has merely used the Complainant's trademark in its entirety along with the name of the Complainant's project. Had the Respondent's domain name indicated to a user that it is a discussion forum, the use of the Complainant's mark in the domain name would have been considered normative fair use under paragraph 7 (iii) of the Policy. Clearly, in the present case, the

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disputed domain name does not indicate to the user that it is a discussion forum and therefore it is likely to result in user confusion.

The Arbitrator therefore finds that although there is evidence to show that the Respondent is making legitimate non-commercial fair use of the website linked to the disputed domain name, due to the confusing nature of the disputed domain name, users and the public are likely to be misled by the disputed domain name as referring to the Complainant. Further, the Respondent's offer to close and move his discussion forum website to another domain also indicates his awareness of his lack of rights in the disputed domain name.

The Arbitrator finds that the Complainant has satisfied the second element under paragraph 4 of the Policy and has made out a *prima facie* case that the Respondent lacks rights and legitimate interests in the disputed domain name.

Bad Faith

Under the INDRP Policy the Complainant is required to prove that the domain name was registered in bad faith or that it is being used in bad faith.

Bad Faith Use

The Respondent has argued that he has used the disputed domain name to set up a discussion forum and the evidence on record does not show that he has intentionally tried to gain business by diverting Complainant's customers to his website. On the contrary there is evidence that the Respondent has forwarded an email enquiry to the Complainant, which the Arbitrator recognizes as consistent with his arguments that he has not used the disputed domain name in bad faith. Neither is there any indication that the Respondent has tried to exploit the fame of the Complainant's mark. Further, the Complainant's allegations that the Respondent's website appears to be a forum to defame the Complainant is without merit. Any remedy that the Complainant may have for defamation falls outside the scope of the Policy See *Building Society v. Britannia Fraud Prevention*, WIPO Case D2001-0505.

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Further the Arbitrator notes the Respondent's good faith offer to close the discussion forum website linked to the disputed domain name and move his discussion forum to another domain. The Arbitrator finds that the material on record does not suggest that the Respondent has used the domain name with the intention of attracting Internet users to its website. The Respondent's conduct therefore does not indicate bad faith use as contemplated under the Policy.

Bad Faith Registration

The Respondent however ought to have been aware when he registered the disputed domain name that such registration would impede the use of the domain name by the legitimate owner of the trademark, which is recognized as evidence of bad faith registration under paragraph 6 (ii) of the Policy. Registration

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of a domain name that prevents the owner of the trademark from reflecting its mark in a corresponding domain is considered bad faith registration¹. Also See *Ferrai S.p.A v. Beryhold Buehler*, WIPO Case No.D2003-0981. Further, the Policy makes reference to circumstances indicating bad faith registration of a domain name where the respondent engages in a pattern of registration of such domain names. The Arbitrator finds the evidence on record shows the Respondent has registered other domain names using the Complainant's SAVANA mark. Given these facts and circumstances the registration of the disputed domain name constitutes bad faith registration under paragraph 6 (ii) of the Policy.


The Arbitrator finds the Respondent has registered the disputed domain name in disregard to the fact that it would impede the use of a corresponding domain name by the owner of the mark which is recognized as bad faith registration under the Policy. The INDRP Policy states that the Complainant is required to prove either bad faith registration or bad faith use of the disputed domain name.

The Arbitrator finds that the Complainant has satisfied the third element under paragraph 4 of the Policy and has established that the disputed domain name has been registered in bad faith.

6. Decision

For all the reasons discussed above the Arbitrator orders that the domain name <rps-savana.co.in> be transferred to the Complainant.

No costs are awarded to the Complainant.


Harini Narayanswamy
Arbitrator
Date: September 30, 2010

¹ INDRP POLICY Paragraph 6 (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; at <http://www.registry.in/> (last visited on September 30, 2010)