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Deponent		
Name: C A Brijesh H.No/Floor : Na City/Village : Gurugram Phone : 0	Sector/Ward : 27 District : Gurugram	Landmark : Millenium plaza State : Haryana
		
Purpose : AWARD to be submitted at Others		

BEFORE THE SOLE ARITRATOR C.A. BRIJESH

.IN REGISTRY

C/o NIXI (NATIONAL INFORMATION EXCHANGE OF INDIA)

NEW DELHI, INDIA

eBay Inc.
 2025, Hamilton Avenue
 San Jose, California – 95125
 U.S.A.

... Complainant

Versus

John Methew trading as Cliestra Bestaa
 Col Street, Krista Bell, Difosk,
 Maharashtra, 165012

... Respondent

1. The Parties

The Complainant is eBay Inc., duly incorporated and existing under the laws of Delaware, U.S.A. having its principal office at 2025 Hamilton Avenue, San Jose, California – 95125, U.S.A, through its Authorized Representatives, Ms. Tia Malik and Ms. Ananya Singh of Lall

& Sethi, having office at D-17, South Extension – II, New Delhi, India (hereinafter referred to as **Complainant**).

The Respondent is John Methew trading as Cliestra Bestaa at Col Street, Krista Bell, Difosk, Maharashtra - 165012 (hereinafter referred to as **Respondent**).

2. The Domain Name and Registrar

The disputed domain name is <ebpay.in>. The said domain is registered with 'GoDaddy.com, LLC'.

3. Procedural Timeline

September 06, 2019: The .INRegistry appointed C.A. Brijesh as Sole Arbitrator from its panel as per paragraph 5(b) of INDRP Rules of Procedure.

September 06, 2019: Arbitrator accorded his consent for nomination as Arbitrator and submitted Statement of Acceptance and Declaration of Impartiality and Independence to the .IN Registry

September 12, 2019: Parties to the dispute are informed of the constitution of the Arbitration panel and the effective date of handover i.e. September 12, 2019. NIXI also forwarded the soft copy of the Complaint to both the Arbitrator and the Respondent on this date, by means of the same email.

September 19, 2019: Arbitral Tribunal addressed an email to the Respondent, with a copy marked to the Complainant's Authorized Representative and NIXI, directing the Respondent to file its response, if any, in ten days.



October 4, 2019: Absent a response from the Respondent, the pleadings in the Arbitration proceedings were closed and the Tribunal proceeded to pass an Award on the basis of the material available on record.

The language of the proceedings shall be English.

4. Factual Background

4.1. Complainant's Activities

The Complainant states, *inter alia*, that it was launched in September 1995, under the initial name of The Auction Web by entrepreneur and philanthropist Mr. Pierre Omidyar, as a website “dedicated to bringing together buyers and sellers in an honest and open marketplace” and in September 1997, had changed its name to eBay. The Complainant today claims to have over 182 million active buyers in 190 markets with 1 billion live listings in different categories of goods and services like antiques, art, electronics, books, home & garden, music, etc. The Complainant further states its use of the mark ‘EBAY’ since 1995 in the USA and the variants



and

since 1997 in the USA and subsequent use and registrations in

various countries. The Complainant also owns several domain names comprising the word ‘eBay’ inclusive of ‘ebay.com’ and ‘ebay.in’. The Complainant states that its primary website www.ebay.com is now ranked 38th most visited website in the world and 10th most visited in the United States. The Complainant states to have spent a large sum (approx. USD 1.4 billion in 2018) towards advertising its well known marks. The well-known nature of the Complainant’s mark(s) is further evidenced by several advertisements and newspaper clipping that are marked and labelled as **Annexure K**. Therefore, the Complainant claims the goodwill and reputation associated with the mark/word ‘EBAY’ rests with the Complainant and no one else.

4.2. Complainant's Use of 'EBAY'

The Complainant states that the mark EBAY was first used in the year 1995 and the Complainant has, since secured several registrations in various countries for the mark 'eBay'

and variants in alternating colour combination and lettering style i.e.  and



since 1997 across various countries and in India. In this regard, the Complainant has provided copies of trade mark registration certificates marked as **Annexure F** obtained for the said marks in India and copies of trade mark registration certificates obtained for the said marks in various countries marked as **Annexure G**. A perusal of the list and the corresponding registrations indicate that the mark/name eBay is being used extensively by the Complainant in India since 2000, with the earliest registration in Class 28 under no. 945693. The Complainant has since obtained various registrations in India under different Classes viz. 9, 14, 16, 25, 28, 35, 38, 41, 42 and the same are renewed, valid and subsisting.

The Complainant also operates the website www.ebay.com which provides for extensive information of the activities of the Complainant and an online market place for the sale of wide range of products marked as **Annexure E** and the website can be accessed from anywhere in the world, including India. The Complainant also operates country specific domain names like www.ebay.in for India and a perusal of the WHOIS records marked as **Annexure H** indicate that the domain name has been registered in the Complainant's name since 2005. Further, the Complainant also operates a website www.ebayinc.com marked as **Annexure D** which gives a brief corporate history and significant achievements of the Complainant. These websites operated by the Complainant also provide for details of products, stores, seller and retailers trading through the website. In addition, the Complainant further relies on the successful orders against infringers using the Complainant's marks in various jurisdictions marked as **Annexure**


O and successful orders passed by various arbitral panels in respect of domain name complaints against third parties/cyber squatters marked as **Annexure P** to indicate vigilance in protection of its rights in the trademarks and domain names. The Complainant also relies on the said orders to substantiate its goodwill and fame which is apparent by several infringers attempting to unfairly and illegally exploit the recognition attached to Complainant's trade mark EBAY.

Based on the aforesaid, it is the Complainant's assertion that due to extensive and continuous use of the mark EBAY for several years in India and internationally, the mark EBAY has acquired substantial goodwill and reputation and has acquired inherent distinctive character and recognition to say to be exclusively associated with the business/products/services offered by the Complainant in the global market. Therefore, the Complainant states that it alone has the exclusive right to use the mark EBAY as a domain name, company name or in any other manner.

4.3. Respondent's activities and its use of EBPAY which is deceptively similar to EBAY

The Respondent had registered the domain name <ebpay.in> on October 16, 2018 as is clearly discernable from the WHOIS records as evidenced through **Annexure B**. The Respondent maintains the website www.ebpay.in (not accessible as on date owing to expiry of domain name registration) and claims to be a mobile payment platform that provides for safe, secure and easy financial transactions through simple SMS and Web Portal, as evidenced through a perusal of the cease and desist letter marked as **Annexure S**. Further, the Complainant claims that on the said website, the Respondent uses a deceptively similar mark 'EBPAY' wherein EBAY forms a prominent part. Further, as stated in the cease and desist letter marked as **Annexure S**, the Complainant submits that the Respondent is also using the mark 'EBSHOPY'



in the form of ‘’ which is deceptively similar to the Complainant’s mark



Given that the Respondent has not participated in the present proceedings, no further information is available on its business activities and/or its use of the domain comprising the mark/name EBAY.

5. Contentions of Parties as summarized in the pleadings

5.1. Complainant

a) The domain name(s) is (are) identical or confusingly similar to a trade mark or service mark in which the Complainant has rights.

- i. Complainant submits that the Respondent has registered the disputed domain name on October 16, 2018 as evidenced by WHOIS records marked as **Annexure B** and the disputed domain name ‘ebpay.in’ is virtually identical to the registered well-known mark ‘EBAY’ of the Complainant, except for the addition of the letter ‘P’.
- ii. Further, the Complainant contends that the registration so obtained by the Respondent was subsequent to the Complainant’s adoption, registration and use of the mark ‘EBAY’ and after the mark had acquired ‘well-known’ status. The Complainant further submits that the Respondent cannot claim or show any rights with respect to the disputed domain name, that are superior to that of the Complainant. Significant goodwill and reputation has been acquired in the name of the Complainant, which is evidenced by several annexures filed with this complaint.


b) The Respondent(s) have no rights or legitimate interest in respect of the domain name(s)

- i. It is the contention of the Complainant that owing to the well-known nature of the Complainant's mark EBAY, there is no possible justification for the adoption of the disputed domain name and that the Respondent cannot demonstrate any legitimate interest in the disputed domain name. The Complainant further submits that the disputed domain name was registered subsequent to the Complainant's established rights in 'EBAY' trade marks/trade name by means of extensive use and several registrations obtained in various countries.
- ii. The Complainant further asserts that there is no relationship between the Complainant and the Respondent which permits the Respondent to own or use the disputed domain name that is virtually identical to the Complainant's trade mark. The Complainant further contends that the Respondent is not commonly known by the domain name 'ebpay.in' and is not making any legitimate non-commercial or fair use of the disputed domain name. The Complainant submits that the Respondent is clearly trying to associate itself with the Complainant with the *mala fide* intention to ride upon the immense goodwill and reputation of the Complainant's well-known mark and gain monetary benefit when such adoption is against the Indian Domain Name Dispute Resolution Policy. In light of the above, the Complainant contends that the Respondent cannot be considered to have a legitimate right or interest in the disputed domain name and owing to the same being registered only to make unlawful monetary gains.
- iii. The Complainant further contends that such unauthorized adoption and use of the domain name 'ebpay.in' would confuse the members of trade and public to believe that the services under the domain name arise from the Complainant when such is not the case. Further, it

is contended by the Complainant that such adoption and use would dilute the brand equity of the Complainant.

- iv. The Complainant thus states that, it is clear that the Respondent does not have any legitimate interest or rights of fair use of the disputed domain name. It is further submitted by the Complainant that the Respondent only aims at earning undue monetary gain by means of such illegal adoption and use of the Complainant's trade marks and to create an impression in the minds of members of trade and public of the Respondent being associated/affiliated with the Complainant when such is not the case. Further, the Complainant submits that such use is a deliberate attempt to create an impression on the customers of the Complainant that services from the disputed domain name 'ebpay.in' emanate from the Complainant.
- v. The Complainant relies on the case of *Veuve Clicquot Ponsardin v. The Polygenix Group co.*, WIPO Case No.D2000-0163 (marked as **Annexure Q**) to substantiate that given the fame of the Complainant's trade mark, trade name and domain name, use by the Respondent would constitute infringement of the rights of the Complainant in the mark EBAY and places reliance on the case of *Telstra Corporation Limited v. Nuclear Marshmallows*, case No. WIPO D2000-0003 (marked as **Annexure R**) to state that mere registration by the Respondent of the disputed domain name is further evidence of the Respondent's bad faith. It is contended that the Respondent thus has no rights or legitimate interests in the disputed domain name as prescribed under Paragraph 4(ii) of the INDRP.

c) The domain name(s) was/were registered and is/are being used in bad faith

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- i. The Complainant contends that the bad faith of the Respondent can simply be established owing to the mere registration and adoption of the domain name 'ebpay.in' which is virtually identical to the Complainant's mark EBAY as the Respondent has merely added the letter 'P' in the mark 'ebPay' and such addition does not add distinctiveness to the

Respondent's mark or reduce instances of confusion between the Respondent's mark EBPAY and Complainant's mark EBAY.

- ii. The Complainant further contends that the Respondent has created the website with the sole intention of misleading the members of trade and public into believing that the disputed domain name belongs to and is created by the Complainant. It is submitted by the Complainant that owing to its own country specific domain name 'ebay.in', any consumer of average intelligence and imperfect recollection coming across the Respondent's website under the domain name 'ebpay.in' is bound to get confused that the disputed domain name is in fact, operated by/associated with the Complainant when such is not the case.
- iii. Further, the Complainant states and submits that a perusal of the disputed domain name indicates that the Respondent is also using the mark EBSHOPY in the form of '



, which is virtually identical to the Complainant's mark '



as also stated in the cease and desist letter addressed to the Respondent on March 26, 2019.

- iv. The Complainant places reliance on several judgments marked as **Annexure T** such as the case of *Caravan Club v Mrgsale NAF Decision FA 95314* to assert that registration of a well-known trade mark by a party bearing no connection to the owner of the trade mark and no authorization or legitimate purpose to utilize the mark reveals bad faith. The Complainant also relies on the cases of *Bennett Coleman & Co Ltd v. Steven S. Lalwani* (Case No. D 2000-0014) and *Bennett Coleman & Co. Ltd v. Long Distance Telephone Company* (Case No. 2000-0015) decided by WIPO, wherein the disputed domain name had the addition of 'the' to the domain names of the Complainants and findings of the Administrative Panel which state that the necessary implication is that the domains were

specifically selected in order to take advantage of the Complainant's very considerable reputation in the two titles of its publications by misleading internet users into believing that the respondent's sites came from or were associated with the Complainant. The Complainant also places reliance on the case of *Playboy Enterprises International, Inc. v. Hector Rodriguez* WIPO Case No. D2000-1016 (playboychannel.com and playboynetwork.com), wherein it was said that "People, who manifest an intent to traffic in domain names that incorporate well-known or famous trade marks, as the Respondent does here, simply do not expend their efforts with the sole intention of relinquishing those domain names for just their out-of-pocket registration costs. The goal of their efforts, simply put, is an expectation of receiving an adequate reward, i.e. sufficient profit, from this trafficking."

- v. The Complainant also relies on the case of *Satyam Infoway Ltd. v. SifyNet Solutions Pvt. Ltd.*, (2004 Supp (2) SCR 465) specifically paragraphs 11, 12, 16 and 18 in order to emphasize on the importance of domain name as a business identifier and "*an instrument on commercial enterprise because it facilitates the ability of consumers to navigate the Internet to find websites they are looking for*" and its distinction from a trade mark. Relevant extract as stated in the Complaint is reproduced as follows: "*The use of the same or similar domain name may lead to a diversion of users which could result from such users 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 misrepresented 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 or passing off.”

- vi. The Complainant submits that the activities of Respondent would qualify as bad faith owing to usurpation of the recognition and fame of the Complainant's mark to benefit the Respondent financially and in violation of the applicable trade mark and unfair competition laws. The Complainant also states that these activities would suffice as evidence of bad faith registration and use of the domain name 'ebpay.in' as specified in Paragraph 6 of the INDRP Policy and thus, the Complainant submits to have satisfied the requirement of clause 4(iii) of the INDRP Policy.

5.2. Respondent

As per the INDRP Rules of Procedure, the Complainant forwarded a copy of the Complaint alongwith all annexures to the Respondent on September 12 and 13, 2019 under the directions of this Arbitral Tribunal. This Tribunal issued a notice on September 19, 2019 to the Respondent directing it to file a response within ten days. Absent response from the Respondent thereto, the matter has proceeded *ex parte*.

6. Discussion and Findings

As per paragraph 4 of the .IN Domain Name Dispute Resolution Policy (INDRP), any person who considers that a registered domain name conflicts with his legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

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


Based upon the pleadings, it is required to be examined as to whether the parties have been able to justify/rebut the aforesaid premises:

6.1. Identical or confusingly similar trade/service mark

As per the WHOIS records, the Respondent registered the disputed domain name 'ebpay.in' on October 16, 2018.

The Complainant is the proprietor of the registered trade mark EBAY and its variants in several classes viz. 9, 14, 16, 25, 28, 35, 38, 41, 42 and has obtained registrations in respect of the same with the earliest registration dating back to the year 2000. In order to substantiate the aforesaid, the Complainant has relied on registration certificates for the trade mark EBAY and its variants. It claims to have been substantially and continuously using the mark/name EBAY in relation to its business/products/services.

The disputed domain name incorporates the mark EBAY in its entirety, with the only variant from the Complainant's mark EBAY being the mere addition of the letter P. It has been held in *Inter-Continental Hotels Corporation vs. Abdul Hameed* (INDRP/278) as well as in *Indian Hotels Company Limited vs. Mr. Sanjay Jha* (INDRP/148) that when a disputed domain name incorporates a mark in entirety, it is adequate to prove that the disputed domain name is either identical or confusingly similar to the mark. Similarly, in case of *Farouk Systems Inc. vs. Yishi*, WIPO Case No. D2010-006, it has been held that the domain name wholly incorporating a Complainant's registered mark may be sufficient to establish identity or confusing similarity, despite the additions or deletions of other words to such marks.



As seen from above, the Complainant has registered trademarks in India since the year 2000 and is doing/operating business/website thereunder. The Respondent on the other hand registered the domain 'ebpay.in' much subsequent to the Complainant i.e. October 16, 2018.

In the view of the foregoing discussions, the Complainant has satisfied this Tribunal that:

- i. The domain name in question 'ebpay.in' is phonetically as well as visually identical to the Complainant's prior registered trade mark EBAY; and
- ii. It has both prior statutory and proprietary rights in respect of the mark EBAY.

6.2 Rights and legitimate interests

The Complainant has asserted that the Respondent has no rights or legitimate interests in the disputed domain name. Paragraph 7 of the INDRP enumerates three circumstances (in particular but without limitation) and if the Arbitrator finds that the Registrant has proved any of the said circumstances, shall demonstrate its rights to or legitimate interest in the disputed domain name. The said paragraph is reproduced herein under:

“Registrant's Rights to and Legitimate Interest in the Domain Name- Any of the following circumstances, in particular but without limitation, if found by the Arbitrator to be proved based on its evaluation of all evidence presented, shall demonstrate the Registrant's rights to or legitimate interest in the domain name for the purposes 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 with a bona fide offering of goods or services;
- ii. The Registrant (as an individual, business, or other organisation) 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 Respondent has not filed any response in this case. In the absence of a response thereof, there is nothing on record to suggest that the Respondent has used or made demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with *bonafide* offering of goods/services; or is commonly known by the disputed domain name; or has made fair use of the domain name.

Further, as observed by the panel, in the case of *Inter-Continental Hotels v. Abdul Hameed* (INDRP/278), it is well established, that trade mark registration is recognized as prima facie evidence of rights in a mark. Complainant, in the instant case, is the owner of the registered trademark EBAY in various jurisdictions in the world including India and has sufficiently demonstrated its rights in the trade mark EBAY.

It is a settled position that if the Respondent does not have trade mark right in the word corresponding to the disputed domain name and in the absence of evidence that the Respondent was commonly known by the disputed domain name, the Respondent can have no right of legitimate interest. [See *Shulton Inc. v. Mr. Bhaskar*, (INDRP/483)]

At any rate, factors such as representing itself to be “India’s largest mobile payment platform”

and the use of the mark  , which is deceptively similar to the

Complainant’s mark  and that too in similar business/services as that of the Complainant clearly evidences that the registration of the dispute domain name and the

operation of the corresponding website was done for commercial gain and to mislead customers to tarnish the trade/service mark of the Complainant; to commercially exploit the deceptively similarity with the Complainant and free ride on the goodwill and reputation of the Complainant or to be mistaken to be associated with the Complainant.

In view of the foregoing, it is evident that Respondent has no rights or legitimate interests in the disputed domain name.

6.3 Bad faith

Paragraph 6 of the INDRP enumerates the circumstances evidencing registration and use of domain name in bad faith. The said paragraph is reproduced herein under:

“Evidence of Registration and use of Domain Name in Bad Faith: For the purposes of Paragraph 4(iii), the following circumstances, in particular but without limitation, if found by the Arbitrator to be present, shall be evidence of the registration and use of a domain name in bad faith:

- i. Circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant, who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's 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 the Registrant has 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's website or other on-line location, by creating a likelihood of confusion

with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location."

It appears that by registering the impugned domain name, the Respondent has attempted to attract internet users by creating likelihood of confusion with the Complainant's mark/source of origin. [See *Colgate – Palmolive Company and Colgate Palmolive (India) Ltd. v. Zhaxia*, (INDRP/887)]. Thus, it can be inferred that the Respondent has registered the dispute domain name in bad faith to tarnish the trade mark and cause confusion in the minds of the public.

Further, it is crystal clear that the Respondent is misrepresenting itself to be an authorized service provider. Such misrepresentation tantamount to bad faith. As observed in the case of *Adams and Remers LLP v. Michael Hallier/Whois Agent, Whois Privacy Protection Service, Inc.*, WIPO Case No. DME2015-0005, "A use intended to attract, for commercial gain, Internet users to the Complainant's online address thereby creating confusion with the Complainant's mark as to the service being offered at that location is clearly fraudulent and in bad faith".

It is also evident that the objective of registering the domain name was aimed at preventing the legitimate owner of the trade mark from reflecting the same in a corresponding domain name.

Substantial number of precedents establish that registration of a domain name that is confusingly similar to a famous trademark by any entity that has no relationship to that mark is itself sufficient evidence of bad faith registration and use. [See *Pepperdine University v. BDC Partners, Inc.*, WIPO Case No. D2006-1003; *Veuve Clicquot Ponsardin, Maison Fondee en 1772 v. The Polygenix Group Co.*, WIPO Case No. D2000-0163, *Mastercard International Incorporated v. Total Card Inc.*, WIPO Case No. 2000 – 1411].

Considering that the current status of the webpage corresponding to the domain name 'ebpay.in' is non-operational/inaccessible on account of expiry of registration but a perusal of WHOIS records do not indicate the domain being available for sale, this would constitute passive/parked holding of the website, which also contributes to bad faith. [See: *HSBC Holdings plc v. Hooman Esmail Zadeh* (INDRP/032), *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. D2000-0003].

In view of the foregoing, the panel is of the view that Respondent has registered the domain name 'ebpay.in' in bad faith.

7. Award

From the foregoing findings, it is established beyond doubt that (1) the domain name is confusingly similar to the mark EBAY which is proprietary to the Complainant, (2) the Respondent has no rights or legitimate interests in respect of the disputed domain name, and (3) the domain name is registered in bad faith.

Thus, in accordance with the Policy and Rules, this Arbitral Tribunal directs the Respondent to immediately transfer the disputed domain name 'ebpay.in' to the Complainant.

The parties shall bear their own cost.

Dated: 12/11/2019



C.A. Brijesh
Sole Arbitrator