

தமிழ்நாடு தமில்நாடு TAMILNADU

39156

5 SEP 2012

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AK 581050
S. SHANMUGA SUNDARAM,
STAMP VENDOR,
L. NO. 84 / 109 / 88
HIGH COURT CAMPUS,
CHENNAI-600 104, TAMIL NADU

BEFORE THE SOLE ARBITRATOR MR.D.SARAVANAN
.IN REGISTRY
(C/o. NATIONAL INTERNET EXCHANGE OF INDIA)

Disputed Domain Name: < biotronik.in>

Biotronik SE & Co. KG.,
Woermannkehre 1, Berlin,
Germany 12359
Represented by Binny Kalra &
Tanvi Misra (Anand And Anand)
(binny@anandandanand.com)
(tanvi@anandandanand.com)

Versus

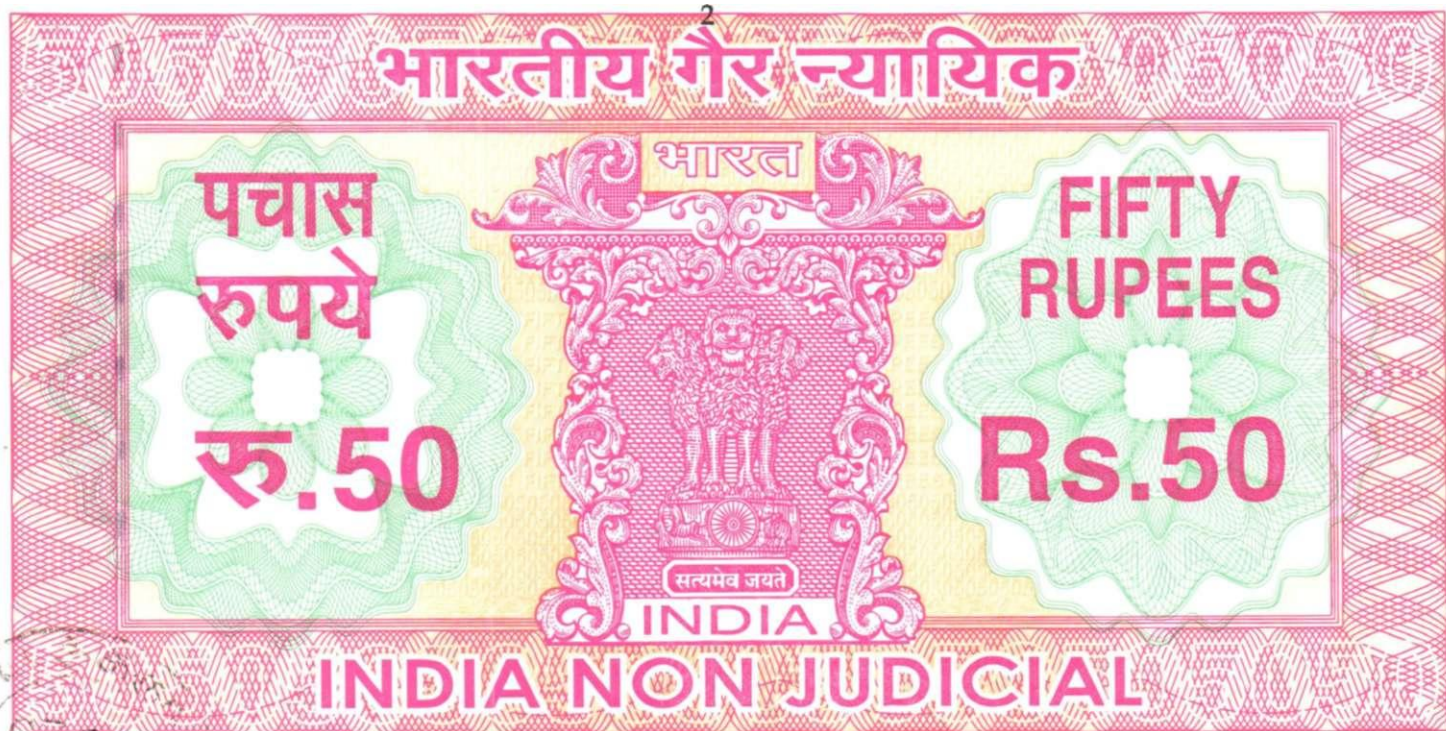
....Complainant

Ding RiGuo,
8F, No.199 Shifu Road,
Taizhou,
Zhejiang- 318000
(7712337983juc@qq.com)

....Respondent

...2





தமிழ்நாடு தமில்நாடு TAMILNADU

39268
5 SEP 2012

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P.S. SHANMUGA SUNDARAN
STAMP VENDOR,
L No B4 / 109 / 88
HIGH COURT CAMPUS,
CHENNAI-600 104 (TAMIL NADU)

1. The Parties:

The Complainant is Biotronik SE & Co. KG, a company organized and existing under the laws of the Federal Republic of Germany having its principle office at Woermannkehre 1, 12359 Berlin, Germany represented by Binny Kalra and Tanvi Misra.

The Respondent is Ding RiGuo having its address at 8F, No.199, Shifu Road, Taizhou, Zhejiang- 318000.

2. The Domain Name and Registrar:

The dispute domain name : <biotronik.in>



The disputed domain name is registered with National Internet Exchange of India (NIXI).

3. Procedural History:

August 23, 2012	The .IN REGISTRY appointed D.SARAVANAN as Sole Arbitrator from its panel as per paragraph 5(b) of INDRP Rules of Procedure.
August 23, 2012	Consent of the Arbitrator was given to the .IN REGISTRY according to the INDRP Rules of Procedure.
August 30, 2012	Notice was sent to the Respondent by e-mail directing him to file his response within 10 days, marking a copy of the same to the Complainant's representative and .IN Registry.
September 09, 2012	Due date for filing response.
September 15, 2012	Notice of default was sent to the respondent notifying his failure in filing the response, a copy of which was marked to the Complainant's representative and .IN Registry.

4. Factual Background

4.1 The Complainant:

The Complainant is Biotronik SE & Co. KG, a company organized and existing under the laws of the Federal Republic of Germany having its principle office at Woermannkehre 1, 12359 Berlin, Germany represented by Binny Kalra and Tanvi Misra.

4.2 Complainant's Activities:

i) Biotronik SE & Co. KG is a privately held multinational biomedical technology company headquartered in Berlin, Germany. The Complainant developed the first German cardiac pacemaker in 1963 and pioneered the creation of



remotely monitored implanted cardiac devices. The complainant has marketed these telemedicine technologies in Europe since 2000, in the USA since 2001, and thereafter their presence has expanded to over fifty countries, focusing on patients' care and the development of innovative solutions ever since.

ii) The Complainant's business is aligned to develop innovative devices for vascular intervention and electrotherapy of the heart. The Complainant has strongly grown to become a market leader, being a global player operating a network of about 5600 employees who are involved in the research, development, production and sale of "**Biotronik**" products and extend invaluable support to their customers on every continent.

iii) The Complainant has been using the corporate name '**Biotronik**' since the year 1963. Since then it has made extensive and prominent use of its trade mark/ corporate name '**Biotronik**' in connection with a wide range of related goods and services, including providing detailed description and latest innovations of its goods and services online through numerous "**Biotronik**" domain names.

iv) The Complainant has spent substantial time, effort and money in advertising and promoting the '**Biotronik**' trade mark throughout the world. In the year 1993, the Complainant expanded its product range with implantable defibrillators. '**Biotronik**' has been the forerunner in this field and the only manufacturer of fractal coated leads. In the year 1995, '**Biotronik**' added vascular intervention devices such as balloon catheters and stents for the treatment of coronary and peripheral vessels to its product range. In the 1990's, the Claimant also added diagnostic and therapeutic catheters as well as a radio- frequency generators for ablation to its product range further developing the work started in the 1970's, and now offers a complete product portfolio for electrotherapy for the heart.

v) The Complainant was nominated for the "Deutscher Zukunftspreis" an award conferred by the German Federal President for achievements in technology and innovation.



vi) The Complainant began doing its business in India in 1991. '**Biotronik**' is the pioneer in remote monitoring technologies for patients with cardiac devices. '**Biotronik**' has now established commercial headquarters in India for both its Cardiac Rhythm Management and Vascular Intervention businesses. The Complainant has a highly successful presence in India in respect of its product and services. In India, the Complainant has created "Unique Technology for the needs of Indian Patients". '**Biotronik**' has launched a new technology in the field of cardiovascular diseases, a drug eluting balloon that has been introduced in India recently, which is touted as truly being the new age technology. With its launch, it has opened whole new possibilities for high- end treatment for cardio patients along with many other scalable usages in medical care.

4.3 Complainant's Trading Name:

- i) The Complainant adopted and commenced use of the trademark '**Biotronik**' in the year 1963 and has been using it continuously and extensively, not only as a trademark but also as its corporate name.
- ii) The Complainant has also applied in India for the registration of '**Biotronik**'. The Trademark Application No.1574382 was filed on 29th June 2007 and is pending before the Trademark Registry. The Complainant also has registered its mark '**Biotronik**' in various other jurisdictions. The trade mark '**Biotronik**' has become a distinctive and famous trade mark throughout the world as a symbol of the high quality standards that the Complainant maintains for its products and related services. It is pertinent to note that the Complainant at present owns over thirty eight domain names several of which contain the trademark '**Biotronik**'.

5. Respondent's Identity and activities:

The Respondent is Ding RiGuo having its address at 8F, No.199, Shifu Road, Taizhou, Zhejiang- 318000.

6. Dispute

The dispute arose when the respondent in the present dispute registered the domain <biotronik.in>, thereby misappropriating illegally and without authority, the



trademark '**Biotronik**' which is the exclusive property of the Complainant. The respondent has registered the said domain name <biotronik.in> in complete bad faith primarily for the purpose of selling, renting or otherwise transferring the said domain name or has done so as to harass the complainant into purchasing the same from the respondent. The respondent has no connection with the complainant and the respondent cannot demonstrate or establish any legitimate interest in the said domain name <biotronik.in>.

7. Parties contentions:

A. Complainant:

(a) The Domain Name is identical to a Trademark or service mark of the Complainant in which the Complainant has rights:

- i. The Complainant states that the domain name <biotronik.in> wholly contains and is identical and confusingly similar as a whole to the well known and registered trade mark '**biotronik**' and the domain name www.biotronik.com in which the complainant has statutory rights as well as in common law, by virtue of a long and continuous user and being its registered proprietor thereof.
- ii. The use of the word '**Biotronik**' in the domain name would be understood as a reference to the complainant thus perpetuating confusion among consumers who wish to access the complainant's web page.
- iii. The complainant also states that they use its famous and distinctive trade mark '**Biotronik**' throughout India and, maintains a separate web page for India at www.biotronik.de/en/in/home for **Biotronik** products and services available in India, the Respondent's addition of the geographic term ".in" to the trade mark '**Biotronik**' only solidifies confusion among Internet users rather than dissipating it.



(b) Respondent has no rights or legitimate interests in respect of the domain name:

- i. The Complainant states that the respondent has registered the disputed domain name with the sole purpose of selling, renting or otherwise transferring the said domain name.
- ii. The only intention of the respondent is to misappropriate the reputation associated with the complainant's well known trade mark 'Biotronik' to unfairly benefit from the goodwill attached to the complainant's trade mark/corporate name.
- iii. The complainant cites **HSBC Holdings Pic v/s Hooman Esmail Zadeh, M-Commerce Ag, INDRP/032; Nike Inc. v/s B.B. de Boer, Case No. D2000- 1397 (WIPO Dec. 21, 2000); Victoria's Secret, et. al. v/s Atchinson Investments LTD., FA 096496.**
- iv. The complainant further states that neither has the complainant authorized nor licensed the respondent to register or use the impugned domain name incorporating its trademarks or authorized or licensed the respondent to register or use the disputed domain name or any trademark forming part of it.
- v. The complainant states that the respondent is trading on the fame and recognition of the complainant's well known trademark in order to cause initial interest, confusion and bait internet users.
- vi. The complainant submits that the respondent is using the disputed domain with the sole motive to gain monetarily by selling the domain name to the complainant or others.
- vii. In fact by acquiring the domain name <biotronik.in> the respondent has shown crass opportunism in encashing the popularity of the complainant's reputation.
- viii. In this regard, the complainant has cited following judgements: **MSNBC Cable, LLC v/s Tsysys.com Case No. D2000- 1204 and Veuve Clicquot**



Ponsardin, Maison Fondée en 1772 v/s The Polygenix Group Co. Case No. D2000- 0163

(c) Respondent has registered and is using the domain name in bad faith:

- i. The Complainant states that the respondent is seeking illegal commercial gain through its opportunistic bad faith registration of the disputed domain name. The respondent has offered the domain name <biotronik.in> for sale by stating so clearly on the site.
- ii. The complainant cites **Veuve Clicquot Ponsardin, Maison Fondée en 1772 v/s The Polygenix Group Co. Case No. D2000- 0163** in which it was held by the Administrative Panel that < veuvecliquot.org> was so obviously connected with such a well known product that its very use by someone with no connection with the product suggests opportunistic bad faith.
- iii. The complainant states that the respondent is presumed to have had knowledge of the complainant's trademark/ corporate name/ service mark at the time it registered the identical domain name based on the complainant's prior use and world- wide registration of the mark. Thus, this is prima facie evidence of the respondent's bad faith use and registration. Registration of a well- known trademark/ corporate name/ service mark without legitimate commercial interests in the same is prima facie evidence that the respondent was well aware of the reputation and goodwill attached to the complainant's trademark/ corporate name/ service mark. Furthermore, the respondent has clearly put up the disputed domain name up for sale, stating on its websites, showing the obvious malafide intention to gain commercially from selling the domain name to the complainant or others.
- iv. The general proposition that the registration of a domain name incorporating a well- known trademark of the complainant is bad faith has been upheld by numerous UDRP decisions. In *Marie Claire Album v/s Marie Claire Apparel, Inc* (Case No. D2003 0767), **Veuve Clicquot Ponsardin, Maison Fondée en 1772 v/s The Polygenix Group Co. (Case No. D2000- 0776)** and **Adidas-**



Saloman AG v/s Domain Locations (Case No. D2003 0489) it was held that registration of a well known trademark of which the respondent must reasonably have been aware in itself sufficient to amount to bad faith.

B. Respondent:

The Respondent did not submit any response.

8. Discussion and Findings:

It has to be asserted as to whether the Constitution of Arbitral Tribunal was proper? and whether the Respondent has received the notice of this Arbitral Tribunal?

Having gone through the procedural history, this Tribunal comes to the irresistible conclusion that the Arbitral Tribunal was properly constituted and Respondent has been notified of the complaint of the Complainant. However, the Respondent did not choose to submit any response and that non-submission of the Response by the Respondent had also been notified to the Respondent on 15.09.2012.

Under paragraph 4 of the IN Domain Name Dispute Resolution Policy (INDRP), the Complainant must prove each of the following three elements of its case:

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

(a) Identical or confusing similarity:

(i) The Arbitral Tribunal finds that the Complainant has provided evidences that the complainant possesses and uses its famous and distinctive trade mark 'Biotronik' throughout India and, maintains a separate web page for India at www.biotronik.de/en/in/home for Biotronik products and services available in



India. The Respondent's domain name < biotronik.in>, consists of entirely complainant's trademark and has an addition of the geographic term ".in" to the trade mark 'Biotronik' only solidifies confusion among Internet users rather than dissipating it. It is well established that the mere addition of generic terms does not create a different trademark. Thus, this Arbitral Tribunal comes to the irresistible conclusion that the disputed domain name <biotronik.in> is confusingly similar or identical to the Complainant's marks.

(ii) The Arbitral Tribunal concludes that the Complainant has established paragraph 4(i) of the IN Domain Name Dispute Resolution Policy.

(b) Respondent's Rights or Legitimate Interests:

(i) The Complainant contends that the Respondent has no legitimate interest in the disputed domain name. Paragraph 7 of the IN Dispute Resolution Policy sets out three elements, any of which shall demonstrate the Respondent's rights or legitimate interests in the disputed domain name for the purposes of paragraph 4(ii) of the Policy. The Respondent had been given the opportunity to respond and to present evidence in support of the elements in paragraph 7 of the INDRP. The Respondent has not chosen to do so and has not filed any response in these proceedings to establish any circumstances that could assist it in demonstrating, any rights or legitimate interests in the disputed domain name. Although, the Complainant is not entitled to relief simply by default of the Respondent to submit a Response, the Arbitral Tribunal can however and does draw evidentiary inferences from the failure of the Respondent to respond. The Complainant has established a prima facie case of lack of rights and legitimate interest and the Respondent has failed to rebut the presumption of absence of rights or legitimate interests.

(ii) Based on the record, the Respondent does not have rights or legitimate interests in the disputed domain name as the Respondent's current use is neither an example of a bona fide offering of goods or services as required under



paragraph 7(i) of the Policy nor is there any legitimate non-commercial or fair use of the disputed domain name and as such there is no evidence that paragraphs 7(ii) or 7(iii) of the Policy apply. The Complainant asserts that they have not licensed or otherwise authorized the Respondent to use their trademark.

(iii) The Arbitral Tribunal is satisfied that the Respondent has no rights or legitimate interests in respect of the disputed domain name and, accordingly paragraph 4(ii) of the Policy is satisfied.

(c) Registration and Use in Bad faith:

(i) Paragraph 6 of the Policy provides the circumstances evidencing registration and use of a domain name in bad faith are that, by using the same, the Respondent has engaged in a pattern of such conduct and the Respondent has intentionally attempted to attract, for commercial gain, internet users to the Respondent's web site or other online locations, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website or location or of a product or service on the Respondent's web site or location. It is the specific case of the Complainant that the respondent's modus operandi is by creation of the website under the registered **BIOTRONIK** mark with generic/descriptive suffix, is seeking illegal commercial gain through its opportunistic bad faith registration of the disputed domain name and offered the domain name <biotronik.in> for sale by stating so clearly on the site. As a proof of the misdeeds committed by the respondent, the Complainant has provided various documentary evidences which are marked as Annexure H, J and K.

(ii) The Respondent has registered the domain name which appears to have been selected precisely for the reason that it is identical or confusingly similar to registered trademarks and trade names of the Complainant. The Respondent has no affiliation with the Complainant. Registration of a domain name that is confusingly similar or identical to a famous trademark by any entity, which has no



relationship to that mark, is itself sufficient evidence of bad faith registration and use.

(iii) In view of the submitted evidence and in the specific circumstances of this case, this Arbitral Tribunal draws the legal inference that Respondent's purpose of registering the domain name was in bad faith within the meaning of the Policy. The Respondent has no legitimate rights or interests in the disputed domain name and there was a malafide intent for registering the disputed domain name other than for commercial gains, and that the intention of the Respondent was simply to generate revenue, either by using the domain name for its own commercial purpose or through the sale of the disputed domain name to a competitor or any other person that has the potential to cause damage to the ability of the Complainant to have peaceful usage of the Complainant's legitimate interest in using their own trade names.

In the light of the above, this Arbitral Tribunal finds that the Complainant has established that the disputed domain name was registered and is being used in bad faith.

9. Decision:

For all the foregoing reasons, in accordance with paragraph 10 of the Policy, the Arbitral Tribunal orders that the disputed domain name <biotronik.in> be transferred to the Complainant.

Dated at Chennai (India) on this 21st September, 2012.


(D.SARAVANAN)
Sole Arbitrator