



दिल्ली DELHI

BEFORE SHRI SANJAY KUMAR SINGH ARBITRATOR

S 531974

IN DOMAIN NAME DISPUTE RESOLUTION POLICY (INDRP)

IN RE:

Kusuma Foundation
B-5, 2nd Floor, GK- II Enclave,
New Delhi 110048
Through its authorized representative
Vivek Durai, partner, Atman Law partners,
Chennai.

Complainant

VERSUS

Private Registrations Aktien
Gesellschaft
CNR of Granby & Sharpe St
Suite k2134 Kingstown, VC

Respondent

Disputed Domain Name: ***Kusumafoundation.In***

- (1) This Complaint has been submitted for decision in accordance with the.
IN Dispute Resolution policy adopted by National Internet Exchange of
India.

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(2) The parties:

A. The Complainant:

The Complainant in this proceeding is the Kusuma Foundation, a Section-25 Company, incorporated under the Indian Companies Act, 1956 and registered under the Foreign Contribution (Regulation) Act, 1976 with registration number 010230856.

(3) The Complainant's contact details are:

Address: Kusuma Foundation, B-5, 2ND Floor, Gk- 11 Enclave, New Delhi- 110048.

Telephone: + 911141077026

Facsimil: +911141077026

Email: udita.das@Kusumafoundation.co.in

(3) The Complainant's authorized representative in this proceeding is Vivek Durai, Advocate and partner, Atman Law partners.

(4) The preferred method of communications directed to the Complainant in this arbitration proceeding is: Electronic-only material

Method : e-mail

Address: vivekdurai@atmanlaw.com with a copy to udita.das@kusumafoundation.co.in

Contact: Vivek Duraj

Material including hardcopy

Method: fax and courier

Address: 2/644a, ALP House, 1st Cross, 111rd Main Road ,River View Enclave Mnapakam, Chennai- 600116+ 918022341084 Contact: Vivek Durai

5. The Respondent:

According to the results of a database search at <http://www.inregistry.in> whois search/. The Respondent in this arbitration proceeding is private Registrations Aktien Gesellschaft. The results of the database search conducted on November 30.2011 are provided as Annex (2)

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(6) All information known to the Complainant regarding how to contact the Respondent is as follows:

Contact details according to the results of the whois search:

Address: CNR of Granby & Sharpe St, Suite K2134, Kingstown phone: +55.5430545527

Email: domadmin@privateregistrations.ws

(7) This dispute concerns the domain name identified below:
kusumafoundation.in

(8) The domain name identified above is registered with Direct Information pvt Ltd.

"Kusuma Foundation" is a common law trademark of the Complainant. The Complainant is known as kusuma Foundation, Since 20 February 2007, the Complainant has owned the domain name < Kusumafoundation.in> which incorporates the "Kusuma Foundation" mark. The Complainant uses, and intends to continue using, the "Kusuma Foundation" mark and the <Kusumafoundation.in> domain for its activities and projects in India (See Annex) 9) The Complainant has been in continuous use of this mark since 2008. Through extensive and long-standing use of the mark in commerce, Complainant submits that it has established secondary meaning in the mark sufficient to confer common law rights in this mark.

9. Factual and Legal Grounds:

This Complaint is based on the following grounds:

A. The complainant has submitted 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 has submitted that the complainant has rights to the trademark "Kusuma Foundation". The Complainant was in possession of the domain name from 20 February 2007 till 7 March 2011. Annex (3)

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provides screen shots of result from the Internet Archive (<http://web.Archive.Org>) that document the Registrant's use of the domain name before notice to the Registrant of the dispute. Annex (4) shows historical whois records for the domain kusumafoundation.in that clearly show the Complainant's ownership of the domain.

The complainant has submitted that the complainant was incorporated as a section 25 Company in 17 August 2007. Its certificate of incorporation and Memorandum of Association are attached as Annex (5). The Complainant is a non- governmental organization set up in 2008 with the objective of improving educational opportunities and employment prospects for underprivileged children and young people who live in poor and econ and economically challenged districts in India. On 9 October 2009, the Complainant's technical administrator Mr. T K Rao passed away. As a result of this sad event, Complainant was left without any information regarding its domain name. When a new administrator was appointed, the Complainant found that it no longer had control over the domain name (see Annex (8)). A whois search of the domain registry revealed that the domain had been registered to the Respondent. The Complainant is unaware of the circumstances under which control of the domain name passed to the Respondent. But any transfer of ownership of the domain was without the authorization or knowledge of the Complainant. The Complainant suspects that fraudulent means were used to affect the transfer but has no means to verify how this was done.

The complainant has submitted that the domain name, uses the name of the Complainant in its entirety, in which the Complainant has common law trademark rights, is therefore identical such mark. It is also likely that many users might be deceived into believing that the Respondent's website is actually the website of the Complainant. The complainant has provided as Annex (6A) to this Complaint a screenshot of the homepage of the Complainant's website and Annex (6B) is printout of the home page of the Respondent's website. The Respondent's website contains Keywords relating to charity and non- profit organizations that allow it to earn advertising revenue when users searching for these key words are directed

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to its site and click on these links. The domain name is hosted on a site called parking-page.Net which appears to be promoted by Directi Internet Solutions Pvt. Ltd, a company that appears to be the promoter of the Respondent (http://who.is/name_server/dns1.parking-page.Net).

B. The Respondent has no rights or legitimate interests in respect of the domain name:

The complainant has submitted that the data provided by the Respondent in the whois database indicates that the domain name was registered on behalf of the Complainant. However, the Respondent is not affiliated to the Complainant or authorized in any manner to so register the domain name. The complainant has submitted that the respondent has no known business activity save and except the registration of expired domain and their commercial exploitation through advertising revenues earned from mis-directed Internet requests.

The complainant has submitted that the respondent has gained considerable notoriety in the domain name business for its actions. The complainant has also submitted that there is a large amount of circumstantial evidence indicating that the Respondent is a proxy/ front for an established domain name registration company. The complainant has submitted that this same company also licenses a white- labeled domain registration service platform that could possibly allow its access to information on expiring domain names as well as the demand for such domain names (http://www.theregister.co.uk/2008/09/03/cyber_crime_reports). The entire scope of illegitimate activity may well be outside the scope of this Complaint. However following a review of these annexed materials it would be safe to conclude that the Respondent has no rights of legitimate interests in respect of the domain name.

The complainant has submitted that on the other hand if one were to presume that the Respondent is only a privacy registration service or Service or a proxy service for a domain name registrant that is a legitimate user or the mark, and who does not wish to disclose their

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identity, such a registration would fall foul of the .IN Registry's Terms and Conditions for Registrant which states that "any kind of proxy services are not allowed, and if the data is wrong or masked out by any proxy/privilege protection services, the Registrant shall not be recognized as the owner of the domain name" In such an event the contact information and other identity data may be taken to be fraudulently submitted and constitute a misrepresentation on the part of the Respondent while registering the domain name (Para 3 (a) of the policy).

C. The Registrant's domain name has been registered or is being used in bad faith:

The complainant has submitted that the respondent has secured ownership of the domain name prior to its expiry without the consent of the Complainant through means as yet unknown to the Complainant.

The complainant has submitted that the respondent has exploited the goodwill and reputation associated with the name of the Complainant to obtain commercial gain through click-through advertising revenues.

The complainant has further submitted that the respondent has registered a large number of domain names (in Excess of 28, 000) belonging to trademark owners and blocked them from using their trademarks. Of the domain names that have become the subject matter of dispute, 21 decisions have been rendered against the Respondent in 21 separate disputes in the WIPO Arbitration and Mediation Center and 27 of 28 decisions have been rendered against the respondent in the National Arbitral Forum. In all these decisions, arbitrators have consistently agreed that the domain name were being used by the Respondent in bad faith.

10. A copy of complaint has already been sent to the respondent by the .In Registry through e-mail. Upon receipt of the complaint, the Arbitrator sent a notice dated 27-01-2012 to respondent vide e-mail dated 29-01-2012 whereby the respondent was directed to submit counter affidavit/reply to the complaint of the complainant with

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supportive documents/evidence to the undersigned within **TEN** days positively from the receipt of notice.

11. Despite the above notice the respondent neither filed counter affidavit/reply to the complaint of the complainant nor any supportive documents/evidence in his support.
12. On 16-02-2012, the Arbitrator further directed the respondent to send his defence / counter to the complaint along with supportive documents / evidence at the e-mail address within further 5 (**FIVE**) days positively from the receipt of the notice. But the respondent has not filed/submitted his defence / counter to the complaint till date despite notice that complaint would be decided ex parte on the merits of the complaint. This was also last and final opportunity granted to the respondent. It was made clear that this was last and final opportunity granted to respondent and further time shall not be granted to the respondent.
13. The respondent despite of earlier notices and reminders failed to send his defence / counter to the complaint though the notices were duly served on E-mail ID of the respondent.
14. Therefore, this matter is being decided ex-parte and on the merits of the complaint and as per law of the land.

15. OPINION/FINDING:

The Para no.4 of the IN Domain Dispute Resolution Policy (INDRP) is as follows:-

TYPES OF DISPUTES

Any person who considers that a domain name conflicts with his legitimate rights or interest may file complaint to .IN Registry on following premises:

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- 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."

The Para no.6 of the IN Domain Dispute Resolution Policy (INDRP) is as follows:

16. EVIDENCE OF REGISTRATION AND USE OF DOMAIN NAME IN BAD FAITH :

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
- ii) by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other online location, by creating a likelihood of confusion with the complainant's name or

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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."

The Para no.7 of the IN Domain Dispute Resolution Policy (INDRP) is as follows:-

17. REGISTRANT'S RIGHTS TO AND LEGITIMATE INTERESTS 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 interests 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 demonstratable preparations to use, the domain name or a name corresponding to the domain name in connection with a bonafide offering of goods or services;
- ii) the Registrants (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."

18. OPINION AND FINDINGS ON MERITS:

A) Whether the domain name is identical or confusingly similar to a trademark in which complainant has right.

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It has been held in Indian decision **M/s Satyam Infoway Ltd. Vs. M/s Sifynet Solution (P) Ltd. JT. 2004 (5) SC 541**, that Domain name has all characteristics of trademark. As such principles applicable to trademark are applicable to domain names also. In the said case the words, 'Sify' & 'Siffy' were held to be phonetically similar and addition of word 'net' in one of them would not make them dissimilar.

It is held in Indian case **JT.2004 (5) SC 541**, that in modern times domain name is accessible by all internet users and thus there is need to maintain it as an exclusive symbol. It is also held that it can lead to confusion of source or it may lead a user to a service, which he is not searching.

Thus conclusion is that domain name and trademark, which may be used in different manner and different business or field, or sphere, can still be confusingly similar or identical.

Thus the conclusion is that the domain name of respondent is identical and confusingly similar to the trademark of complainant.

Now the other important aspect that needs consideration is, as to whether the complainant has right in the trademark. It is important to mention here that as per the claim of the complainant the respondent has no trademark right on the said domain name.

This principle is settled in many Indian cases referred herein above. The complainant has made submission that he has legitimate trademark.

Thus the conclusion is that the domain name 'Kusumafoundation.In' is identical and confusingly similar to the trademark of complainant 'Kusuma Foundation' and the complainant has established that the complainant has right in the trademark.

B) Whether the respondent has no right or legitimate interest in the domain name got registered by him

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It is pertinent to mention here that paragraph 4 (ii) of INDRP is to be read with paragraph no.7.

As already stated that paragraph 4 (ii) and 7 of INDRP are to be read together. Their combined effect is that, onus to prove the ingredients of these paras are prima facie on complainant. The onus is not very weak and prima facie, but it heavily shifts on respondent. Respondent can discharge the onus by direct cogent and positive evidence which are in his special knowledge and power. The complainant has made positive assertions that respondent has no legitimate right in domain name and the respondent has no trademark on the domain name. The complainant has made positive assertions regarding the fact that respondent has got registered the disputed domain name in the .IN Registry for which the respondent has no right or trademark. As such in above circumstance it is clear that the complainant has prima facie discharged the initial onus cast upon him by virtue of paragraph 4(ii) and 7 of INDRP.

The respondent on other hand has not filed any reply / counter or to provide any positive, cogent and specific evidence in spite of repeated notices. The respondent has failed to show that it is known or recognized by the impugned domain name in the present complaint. The respondent has neither put forth the reply/counter to the complaint nor has provided any evidence in its support.

Thus the conclusion is that respondent has no right or legitimate interest in the domain name.

C. Whether the respondent's domain name has been registered or is being used in bad faith:

It is to be seen as to whether the domain name has been got registered in bad faith. The paragraph no.4 (iii) and 6 are relevant and as already stated; the onus is primarily upon complainant.

Keeping in view the above facts and circumstances and Indian cases referred herein above it is thus clear that the

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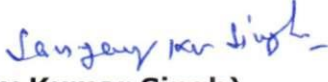
respondent has registered the disputed domain name and in spite of repeated notices, he has neither come forward and nor provided any substantial evidence in his support.

Thus, the conclusion is that the respondent has got registered his domain name "***Kusumafoundation.In***" in bad faith.

RELIEF

The respondent has no right and legitimate interest in the domain name '***Kusumafoundation.In***' and that the respondent has illegally and wrongfully adopted the word *Kusuma Foundation* of the complainant with the sole intention to create an impression of an association with the complainant. The domain name of the respondent is identical and confusingly similar to trademark of complainant. The respondent also does not have right or legitimate interest in the domain name. He has got it registered in bad faith; as such he is not entitled to retain the domain name. The complainant is entitled for transfer of domain name "***Kusumafoundation.In***" to him, as he has established his bonafide rights in trademark in view of facts of the case and as per law discussed above. Hence I direct that the Domain name be transferred to the complainant by registry on payment of requisite fee to the registry.

No order as to costs.


(Sanjay Kumar Singh)
Arbitrator

Date: 17-03-2012.