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ARBITRATION AWARD

INDRP CASE No. 1573

Société des Produits Nestlé S.A. [Complainant] v Nestlé India Lrd [Respondent]

Disputed Domain Name: NESTLENUTRITION.CO.IN
BEFORE THE SOLE ARBITRATOR: VAKUL SHARMA

DATED: August 17, 2022



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ARBITRATION AWARD

In the matter of:

Société des Produits Nestlé S.A.

55 Avenue Nestlé

1800 Vevey

Switzerland

[Complainant]

Disputed Domain Name:

-v-

<nestlenutrition.co.in>

Nestle India Lrd

Haryana

[Respondent]

INDRP CASE No. 1573



1. The Complainant

The Complainant is Société des Produits Nestlé S.A. with its registered office located at 14 rue Royale, 75008 Paris France.

2. The Respondent

The Respondent was until recently identified as Nestle India Ltd., however its present details have been redacted for privacy. However, at the request of the Complainant the Registrar of the domain name made available the Respondent's detail.

3. The Registrar

The Registrar with which the domain name is registered is: GoDaddy.com LLC.

4. Disputed Domain Name

<NESTLENUTRITION.CO.IN>

5. Jurisdiction

The Complainant by filing the Complaint under the aforesaid INDRP Rules of Procedure [Rules] has accepted the subject matter jurisdiction of the .IN Domain Dispute Resolution Policy - .INDRP [Policy].

In view of the above, this domain name dispute is properly within the scope of the Policy. The registration agreement, pursuant to which the disputed domain name was registered, incorporates



the Policy. Disputes between Registrants, as they relate to domain name registrations, are governed by the Policy.

6. Procedural History

- (i) This Arbitration Proceeding is in accordance with the .IN Domain Name Dispute Resolution Policy (the "Policy"), adopted by the National Internet Exchange of India ("NIXI") and the INDRP Rules of Procedure (the "Rules"), which were approved on June 28, 2005 in accordance with the Indian Arbitration and Conciliation Act, 1996. By submitting to the Policy and the Rules, the Complainant agreed to the resolution of the disputes pursuant to the Policy and the Rules.
- (ii) Complaint was filed by the Complainant with NIXI against the Respondent. NIXI verified the Complaint and its annexures for conformity with the requirements of the Policy and the Rules.
- (iii) I submitted the statement of acceptance on June 6, 2022 and subsequently appointed by NIXI as an Arbitrator in the above matter [INDRP No. 1573] on June 6, 2022.
- (iv) Complainant submitted a Copy of the Complaint and Annexures to me as well as to the Respondent's email ID: deathmetal1308@gmail.com from its email ID in accordance with the Rules.



- (v) Complainant has vide email dated June 8, 2022 submitted a proof of dispatch of hard copies of the Complaint and the Annexures to the Respondent.
- (vi) Complainant further vide email dated June 21, 2022 informed that the tracking report mentions: "*Receiver refused delivery. Awaiting instructions from sender.*"
- (vii) In view of the completion of procedures related to Service of Complaint as mandated under the Rules, I issued a Notice dated June 22, 2022 to the Respondent to submit its reply to the above said complaint within 15 days from the date of the Notice failing which the Complaint shall be decided on merit.
- (viii) I issued another notice dated July 8, 2022 informing the parties that in the interest of justice a final opportunity being given to the Respondent to submit its reply within next five days of the notice failing which the Complaint shall be decided *ex-parte* on the merits of the complaint.
- (ix) Despite giving a final opportunity, the Respondent has failed to submit any reply and hence vide notice dated July 14, 2022, I informed both the parties that "*the Respondent right to file Reply stands closed and the Complaint shall now be decided ex-parte on the basis of the merits of the Complaint.*"
- (x) The Arbitration Award is now pronounced on this day, i.e., August 17, 2022 after considering the contentions of the Complainant, evidence on record and the Policy



framework under my signatures. This is an *ex-parte order* as the Respondent has failed to file their Reply despite being given adequate opportunity.

7. Contentions of the Complainant

Complainant submits as follows:

- (i) The Complainant is part of Nestlé company founded in 1866 by Henri Nestlé and is wholly owned by Nestlé S.A. Complainant is the registered owner of most of the trademarks of the Nestlé Group.
- (ii) Nestlé Group sells products and services all over the world in various industries, primarily in the food industry, including baby foods, breakfast cereals, chocolate & confectionery, coffee & beverages, bottled water, dairy products, ice cream, prepared foods, food services as well as pet food. Reliance is placed on Annex 3.
- (iii) Nestlé Group has more than 270,000 employees and is present in more than 80 countries with more than 400 production centers worldwide. Complainant is the world's largest food consumer products company in terms of sales.
- (iv) Nestlé Group sales metrics in 2020 were 84.3 billion Swiss Francs (CHF) worldwide, whereas those in 2019 in India were about 122,952.7 million INR.
- (v) In 2021, Nestlé was positioned as the 79th company in the Fortune Global 500 list. Reliance is placed on Annex 5.1. Further, according to Interbrand's annual Best Global Brands ranking for 2020, the trademark NESTLÉ was valued at \$ 10,252 million and represented the 63rd most valuable trademark in the world. Reliance is placed on Annex. 5.2.



- (vi) Nestlé Group has a pan India presence having eight manufacturing units and branch offices in major metropolitan cities.
- (vii) Nestle Group's significant investments in R&D, marketing and sales, the regular use of the sign NESTLÉ for over 140 years, as well as the existence of the impressive client base for all products worldwide, NESTLÉ is undisputedly a well-known trademark worldwide, including in India.
- (viii) In order to further support the protection of the "NESTLÉ" trademark on the Internet, Complainant registered the word "Nestle" and variations thereof as domain name in numerous gTLDs and ccTLDs, including .in, co.in. Reliance is placed on Annex 4.4. Further, Nestlé Group operates the website www.nestle.com as its primary web portal for global promotion, while the website dedicated to India is <https://www.nestle.in> Reliance is placed on Annex 5.3.
- (ix) The disputed domain name was registered on January 4, 2022, well after Complainant's filing and registration of the trademarks cited above, including in India. At the time of drafting of the Complaint, the Domain Name is redirected to a web page featuring several sponsored links, also related to Complainant's trademarks and products and redirecting users to Complainant's official website www.nestlesalute.it and to third parties' commercial websites, where products of Complainant's competitors are offered for sale. Reliance is placed on Annex 6.
- (x) It has sent a cease and desist letter to Respondent on February 18, 2022, requesting the Respondent to immediately cease use of the domain name and transfer it to the Complainant free of charge. The Respondent has failed to respond to this cease-and-desist letter and subsequent reminders. Reliance is placed on Annex 7.1 – 7.6.
- (xi) The Respondent is continuing to use the disputed domain name, confusingly similar to Complainant's registered trademark, by redirecting it to a pay-per-click landing page.



The Complainant has initiated INDRP proceedings after exhausting all the efficacious remedies available to it.

In the context of the above, Complainant in its complaint has made assertions to establish presence of each of the three elements required by paragraph 4 of the Policy.

I. Whether the domain name <nestlenutrition.co.in> registered by the Respondent is confusingly similar to the trademark "NESTLE" of the Complainant?

The Complainant submits that:

- (a) The disputed domain name entirely reproduces Complainant's trademark NESTLE, which has been registered by Complainant in India and several other Countries. Reliance is placed on Annexes 2 and 3.
- (b) The fact that the disputed domain name differs from NESTLÉ by the addition of the non-distinctive suffix "nutrition" followed by the ccTLD .co.in does not affect the confusing similarity. INDRP decisions referred by the Complainant includes *Google Inc. v. Vinit Keshav* [INDRP n. 940] ; *Disney Enterprises Inc. & Anr. v Registrant ID-DI_7305075* [INDRP n. 596]; *Google LLC v Titan Corporation* [INDRP n. 1214].



- (c) The mere addition of the ccTLD [.co.in] and of the word “nutrition” is not to be considered as a distinguishing feature. It is a well-established in various decision under the Uniform Dispute Domain Name Resolution Policy (UDRP) and INDRP that the presence or absence of spaces, punctuation marks between words or indications for Top Level Domains, such as .com, .us, .in etc. are irrelevant to consideration of identity or confusing similarity between a trademark and a disputed domain name. The “.co.in” suffixes should not be taken into account while comparing the Complainant’s trademark and the disputed domain name.
- (d) In *Trivago N.V. v. Shiv Singh* [INDRP Case No. 1171], a case involving the domain name , the Panel held that the addition of the generic term “holiday” to the trademark TRIVAGO in the domain name, while was not affecting the confusing similarity, “further aggravates the probability of confusion since the word “holiday” has an obvious connection to the business/services being offered by the Complainant”. Similarly, a domain name that incorporates the trademark “NESTLE” and the element “nutrition” is to be considered as confusingly similar to the various trademarks owned by Complainant. This is the more so as Complainant operates various websites incorporating both those words. A potential user who would try to access Complainant’s websites would very well be likely to type the contested domain name as a notion which would bring him or her in contact with Complainant and its business.



- (e) It is thus clear that the Domain Name is confusingly similar to the prior registered trademark in which Complainant has rights pursuant to Paragraph 4(a) of the INDRP.

II. Whether The Respondent has no rights or legitimate interests in respect of the domain name <nestlenutrition.co.in>?

The Complainant submits that:

- (a) The Respondent is not a licensee, an authorized agent of Complainant, or in any other way authorized to use Complainant's trademark NESTLÉ. Merely registering the domain name is not sufficient to establish right or legitimate interests. *Perfetti Van Melle Benelux BV v. Jing Zi Xin* [INDRP Case No. 665]
- (b) The Respondent is neither commonly / popularly known in the public by the Domain Name nor has applied for any registration of the trademark NESTLÉ. Further, the Respondent has failed to provide the Complainant with any evidence of its use of, or demonstrable preparations to use, the disputed domain name in connection with a bona fide offering of goods or services before any notice of the dispute.
- (c) The disputed domain name was in fact intentionally created by the Respondent for commercial gain to misleadingly divert users looking for the Complainant to the website at the disputed Domain Name, consisting of a pay-per-click page featuring several sponsored links, also related to Complainant's trademarks and products – i.e. Meritene – and redirecting to Complainant's official website www.nestlesalute.it and to third parties' commercial websites, where products of Complainant's competitors are offered for sale.



- (d) The Respondent's choice of the disputed domain name is a clear attempt to unfairly capitalize on or otherwise take advantage of the Complainant's trademarks and resulting goodwill, as the respondent's use of the disputed domain name is merely intended to divert costumers to respondent's website, which provides multiple pay-per-click links. *Fiskars Corporation v. Lina / Doublefist Limited* [INDRP/1067]
- (e) It has made out a *prima facie* case that the Respondent has no rights or legitimate interests in the disputed domain name and as such the burden of proof shifts to the Respondent as the Complainant has been able to show a prima facie evidence against the Respondent.
- (f) Therefore, concludes that Respondent has no rights or legitimate interests in respect of the Domain Name according to Paragraph 4(b) of the INDRP.

III. Whether the domain name <nestlenutrition.co.in> was registered or is being used in bad faith?

The Complainant submits that:

- (a) The Respondent was well aware of Complainant's trademark rights at the time of registration and that it has been using the disputed domain Name in bad faith, even after being notified of the infringement of Complainant's rights via Complainant's Cease and Desist letter, first sent on February 18, 2022, and the subsequent reminders addressed to its attention.
- (b) By using the Domain Name, Respondent has intentionally attempted to attract Internet users to its website, by creating a likelihood of confusion with Complainant's trademark as to the source, sponsorship, affiliation or endorsement



of Respondent's website or the products and services promoted through Respondent's website, according to Rule 7 (c) of INDRP Policy. Moreover, the disputed domain name has been (and still is) redirected to a web page featuring several sponsored links also related to Complainant's trademarks and products, which cannot be considered, by any means, a bona fide use, since Respondent has been (and is) clearly attempting to gain revenues through the pay-per-click system, free riding the well-known character of the trademark NESTLÉ. In other words, the Registrant has been making money illegally by using the name and fame, of the Complainant [*Perfetti Van Melle Benelux BV v. Jing Zi Xin* (supra), *L'Oréal, Biotherm, Lancôme Parfums et Beauté & Cie v. Unasi, Inc.*, [WIPO Case No. D2005-0623] and *Deloitte Touche Tohmatsu v. Henry Chan*, WIPO Case No. D2003-0584].

- (c) In light of the Respondent's presumed knowledge of the complainant's rights, it is reasonable to infer that the respondent registered the disputed domain name without any intention of using it for genuine business or commercial activities.
- (d) The Respondent has used a misspelled version of the name of Complainant's affiliated company in India ("Nestle India Lrd" instead of "Nestlé India Ltd") as Registrant Organization for in the public Whois records. Moreover, since MX records are set for the Domain Name (Annex 9), the Domain Name might be also used for email communication. Therefore, not only Respondent clearly engaged in impersonation of a Nestlé company, but it cannot also be excluded that the disputed domain name might have been used by Respondent for fraudulent purposes, possibly also via the sending of unauthorized email communications purportedly sent in the name of the Complainant's affiliated company in India.
- (e) In view of the above, it is clear that the disputed domain name was registered and is being used by Respondent in bad faith according to Paragraph 4(c) of the INDRP.



8. Respondent's Contentions

Despite given adequate opportunities, Respondent has failed to submit any Reply.

9. Discussion and Findings

The Respondent has not filed any Reply to the Complaint. However, the Respondent's default does not automatically result in a decision in favour of the Complainant. The Complainant has to still establish each of the three elements required by Paragraph 4 of the Policy:

Under the Paragraph 4 clauses (a) – (c) of the Policy, the Complainant must prove that:

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

The Complaint has to be decided on the basis of the provisions of INDRP, pleadings, including documentary evidence presented before me. The Complainant in order to succeed must satisfy the conditions laid down in Paragraph 4, clauses (a) – (c) of the Policy.



I have considered the Complainant's pleadings, documentary evidence, conditions as laid down in the aforesaid Policy alongwith the relevant case law. My opinion is as follows:

(a) Whether the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights?

The Complainant has placed on record details of its 'NESTLE' under different classes of trademark worldwide [Annex 3.1 – 3.4], including India [Annex 2.1 – 2.6] as documentary evidence to highlight that 'NESTLE' is undisputedly a well-known trademark world-wide, including India. From the documentary evidence as placed before me, it is quite evident that NESTLE, a well-known trademark is incorporated in its entirety by the Respondent in the disputed domain name <nestlenutrition.co.in>, which in my view is sufficient to establish that the Respondent's disputed domain name is identical or confusingly similar to Complainant's registered trademark. Its portfolio of domain names [ccTLDs and gTLDs] contains hundreds of domain names with NESTLE as prefix [Annex 4.4] demonstrate that the Complainant's interest in the disputed domain name is legitimate and is necessary to maintain and protect its exclusive and proprietary hold over its trademark.

I consider that there is a force in the arguments of the Complainant that the disputed domain name <nestlenutrition.co.in> is confusingly similar to the Complainant's registered trademark, more so, when one would consider a combination of words "nestle" and "nutrition" as part of a domain string. First thing any consumer would assume after coming



across such a domain name string is there exists a proximate association/affiliation with the Nestle group. Since, the word "nutrition" is part and parcel of product lexicon of the Complainant's products in the food, confectionary and beverages area, a consumer would be definitely drawn to such disputed domain name believing it to be from the stable of the Nestle group. A potential consumer who would try to access Complainant's websites would very well be likely to type the contested domain name as a notion which would bring him or her in contact with Complainant and its business.

I am of the opinion that the Respondent has been able to create a perfect illusion in the minds of the potential consumers while registering the disputed domain name <nestlenutrition.co.in>.

Furthermore, the Respondent has failed to observe the legal obligations as laid down in Paragraph 3 [Registrant's Representations] of the INDRP, which provides:

By applying to register a domain name, or by asking a Registrar to maintain or renew a domain name registration, the Registrant hereby represents and warrants that:

- (a) the credentials furnished by the Registrant for registration of Domain Name are complete and accurate;*
- (b) to the knowledge of registrant, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party;*
- (c) the Registrant is not registering the domain name for an unlawful and malafide purpose; and*
- (d) the Registrant will not knowingly use the domain name in violation or abuse of any applicable laws or regulations.*



In my opinion, the Respondent has knowingly registered the Complainant's trademark in the form of virtual confusingly similar name <NESTLENUTRITION>, which is followed by a suffix, CO.IN [ccTLD] to complete the domain name string <NESTLENUTRITION.CO.IN>. I am inclined to accept the Complainant's submission that the Respondent's registration of domain name <NESTLENUTRITION.CO.IN> confusingly similar to the Complainant's trademark with the sole purpose of unlawful gains. It only suggests that the Respondent was aware of the brand value of NESTLE when it registered the disputed domain name <NESTLENUTRITION.CO.IN>. I believe that it is an attempt on the part of the Respondent to attract potential consumers to monetize web traffic to a web-page linked to <NESTLENUTRITION.CO.IN>. It is to be noted that the Respondent has failed to deny the said evidence relied upon by the Complainant despite being given ample opportunities. I am of the opinion that the benefit under the circumstances lies with the Complainant. It is thus very clear that the Respondent violated the conditions as laid down in the Paragraph 3(a) – (d) of the policy as mentioned above. In view of the above, the requirement of the Policy as stated in Paragraph 4(a) is satisfied.

(b) Whether the Registrant has no rights or legitimate interests in respect of the domain name?

There is nothing on record to suggest that Respondent is either licensee or authorised agent of the Complainant. In other words, the Respondent has no legal right or legitimate interests in the disputed domain name. I am of the view that the Complainant has been able to demonstrate clearly that the composition of the disputed domain name constitutes clear evidence that the Respondent has been successful in diverting users looking for the Complainant to the website at the disputed domain name, consisting of a pay-per-click page featuring several sponsored links, also related to Complainant's trademarks and



products – i.e. Meritene – and redirecting to Complainant's official website <www.nestlesalute.it> and to third parties' commercial websites, where products of Complainant's competitors are offered for sale. In order to achieve this, there is a likelihood that the Respondent has embedded a software program/ code in its web-page/website <NESTLENUTRITION.CO.IN> which redirects the potential customers to the Complainant's official website. This amounts to an unauthorise access to the Complainant's official website and hence amounts to fraud, therefore, such composition cannot constitute fair use, further demonstrating a lack of legitimate interests regarding said domain name.

Also, Paragraph 6 of the INDRP provides:

6. Registrant's Rights 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 purposes of Clause 4 (b) :

(a) before any notice to the Registrant of the dispute, the Registrant's use of, or demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;

(b) the Registrant (as an individual, business, or other organization) has been commonly known by the domain name, even if the Registrant has acquired no trademark or service mark rights; or

(c) 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.



I have evaluated the evidence on record and came to a conclusion that none of the aforesaid limbs as highlighted in the Paragraph 6 of the Policy above have been present to give the Respondent/Registrant any rights and legitimate interests in the disputed domain name. The Complainant has never authorized or licensed the Respondent to use the NESTLE trademark in any way or for any purpose. The Respondent does not have any association or affiliation with the Complainant and neither the Complainant has any past dealing or commercial understanding with the Respondent. I accept the Complainant's contention that the registration of the disputed domain name by the Respondent lacks bonafide. Complainant has been able to establish a *prime facie* case of Respondent's lack of legitimate rights and interests in the domain name thus shifting the burden on the Respondent to show rights or legitimate interests [*Bulgari S.p.A. v DomainBook* [INDRP/1002], *Croatia Airlines d.d. v. Modern Empire Internet Ltd.* WIPO Case No. D2003-0455, *Belupo d.d. v. WACHEM d.o.o.* WIPO Case No. D2004-0110, *Sampo plc v. Tom Staver* WIPO Case No. D2006-1135, *Audi AG v. Dr. Alireza Fahimipour* WIPO Case No. DIR2006-0003.]. There is not an *iota of evidence* to show that NESTLE trademark is exclusive and proprietary to the Respondent. It is to be noted that the Respondent has failed to counter or deny assertion made by the Complainant. I am of the opinion that the *malafide* intent of the Respondent is quite evident from webpage/website hosted by the Respondent resolving commercial links relating to the Complainant's competitive products and thus clearly establishing the fact that the Respondent actions are neither *bonafide* nor fall in the category of legitimate non-commercial or fair use of domain name. This existence of a rogue webpage/website bearing NESTLE trademark may never be called a legitimate activity on the part of the Respondent. In view of the above, the requirement of the Policy as stated in Paragraph 4 (b) is satisfied.



(c) Whether the Registrant's domain name has been registered or is being used in bad faith?

In the absence of any documentary evidence showing any legal arrangement with the Complainant, any use of the disputed domain name by the Respondent, when it has no legal rights to register the disputed domain name proves *malafide* intent on the part of the Respondent.

Further, Paragraph 7 of the policy provides:

7. Evidence of Registration and use of Domain Name in Bad Faith

For the purposes of Clause 4(c), 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:

(a) 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

(b) 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

(c) 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.

The documentary evidence placed on record by the Complainant clearly shows that the Respondent has indeed taken advantage of the Complainant's reputation and goodwill by registering the disputed domain name <NESTLENUTRITION.CO.IN>. The *malafide* intent is clear from the webpage/website supporting <NESTLENUTRITION.CO.IN> resolving into competitive product offerings. The documentary evidence [Annex 6] in the form of screenshots/webpages placed on record exhibits the Respondent's attempt to build an association/affiliation with the Complainant. There is no denial of said webpages/website [Annex 6] on the part of the Respondent. I agree with the assertion made by the Complainant that the webpage resolving into clickable links underlines the Respondent's intention to abusively benefit from Complainant's reputation and particularly from the latter's trademark NESTLE to obtain commercial gains. The Respondent is taking unfair advantage of the Complainant's rights. The Complainant has been able to demonstrate that the NESTLE trademark is only associated with the Complainant. The Respondent/Registrant has been making money illegally by using the name and fame, of the Complainant.

I am also in agreement with the assertion made by the Complainant that a misspelled version of the name of Complainant's affiliated company in India ("Nestle India Lrd" instead of "Nestlé India Ltd") has been indicated as Registrant Organization for in the public Whois records. Moreover, since MX records are set for the Domain Name (Annex 9), the Domain Name might be also used for email communication. Therefore, it seems that the Respondent is clearly engaged in impersonation of a Nestlé group company.



In view of the above factual legal matrix, I agree that the adoption of the said mark by the Respondent is dishonest and in bad faith.

Accordingly, having regard to the circumstances of this particular case, I hold that the Complainant has been able to prove that the Registrant's registered the disputed domain name in bad faith. In view of the above, the requirement of the Policy as stated in Paragraph 4 (c) is satisfied.

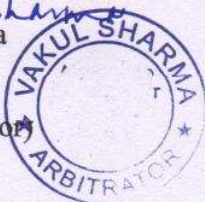
10. Decision

For the foregoing reasons, in accordance with the Policy and Rules, I direct NIXI to transfer the disputed domain name <NESTLENUTRITION.CO.IN> to the Complainant.

There is no order as to costs.

The original copy of the Award is being sent alongwith the records of the proceedings to the National Internet Exchange of India (NIXI) for its record and a copy of the Award are being sent to both the parties thru email for their information and record.


Vakul Sharma
(Sole Arbitrator)



Dated: August 17, 2022