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R 354067

BEFORE SHRI SANJAY KUMAR SINGH ARBITRATOR

IN DOMAIN NAME DISPUTE RESOLUTION POLICY (INDRP)

IN THE MATTER OF:

Times Business Solutions Limited
Times Center (DCPF), FC-6, Ground floor
Sector 16A, Noida 201301

Complainant

Versus

Qian Tag
Akademisches Auslandsamt Unter den Linden 6,
Berlin- D- 10099

Respondent

1. The complainant has submitted this Complaint for decision in accordance with the IN Domain Name Dispute Resolution policy.

2. The complainant has submitted that the Complainant in this administrative proceeding is a company registered under the provisions of the Companies Act, 1956, having its registered office at 10, Daryaganj New Delhi- 110002, India.

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The Complainant's contact details are:

Address: Times Center (DCPF), FC-6, Ground floor
Sector 16A, Noida 201301
Telephone (0120-3302768)
Fax: (020-3302819)
E-mail: info.tbsl@timesgroup.com

3. The complainant has stated that the Complainant's authorized representative in the administrative proceeding is:

HEMANT SINGH
INTTL ADVOCARE
D-22, Panchsheel Enclave
New Delhi- 110017
Phone: 91- 11- 2649-8062/ 63/64
hemant@inttladvocare.com

4. The complainant has submitted that the Complainant's authorized representative's preferred method of communications in the administrative proceeding is: Electronic- Only Material

Method: E-mail

Address: hemant@inttladvocare.com

Contact: Hemant Singh

Material including hardcopy

Address: INTL, ADVOCARE
D-22, Panchshel Endave
New Delhi- 110017
91-11- 2649- 3061
Fax: 91-11-2649-3061
Contact: Hemant Singh

THE RESPONDENT:

5. The complainant has submitted that according to IN WHOIS database the Respondent in this administrative proceeding is Qian Tag at Akademisches Auslandsamt Unter den Linden 6, Berlin Berlin- D-10099.

6. The complainant has submitted that all information known to the Complainant regarding how to contact the Respondent is as follows:

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Address: Qian tag
Akademisches Auslandsamt Unter den Inden 6 Berlin-D-10099
Telephone: + 49209321571
Fax +49. 209321571
Email: vd@live.com

7. The complainant has submitted that this dispute concerns the domain name: "**magicbricks.co.in**"

8. The complainant has submitted that the accredited registrar sponsored by Nixi with whom the domain name is registered is:

Address: A to Z Domains Solutions Pvt. Ltd.
102, OSIA Frindship
51 Gaothan Lane OFF. JP. Road
Opp Ram Mandir Andheri (West) Mumbai, Maharashtra
IN- 400058
Telephone: + 91-223079900

9. BRIEF BACKGROUND:

This arbitral proceeding commenced in accordance with IN Dispute Resolution Policy (INDRP) and rules framed there under.

The complainant submitted his complaint in the registry of NIXI. Shri Sanjay Kumar Singh was appointed as Sole Arbitrator in the matter by NIXI.

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 10-09-2011 to the respondent to send his defence / counter to the complaint along with supportive documents / evidence at his e-mail address within 10 days from receipt. But the respondent did not send his defence or counter to the complaint.

Failing to send the defence / counter by the respondent, the Arbitrator again sent a notice dated 21-09-2011 by giving another opportunity to the respondent to send his defence / counter to the complaint within three

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days with further notice that in default or non-filing or sending of the defence / counter to the complaint, the matter would be proceeded ex-parte and award would be passed ex-parte on merits of the case. It was also stated in the notice that it was last and final opportunity to the respondent and no further opportunity will be granted.

In spite of repeated notices, the respondent has not come forward and has not submitted any reply / defence / counter to the either notice or complaint to the Arbitrator.

Therefore, this matter is being decided on the merits of the case as per law of the land.

BRIEF FACTS OF THE COMPLAINT:

10. The complainant has submitted that the Complainant is a wholly owned subsidiary of Times Internet Limited which in turn is a wholly owned subsidiary of Bennett Coleman and Company Limited, which is the flagship company of the "Times Group" Company Limited, which is the flagship company of the Times Group" Which started 170 years ago with the business of publishing newspapers' journals, magazines and books. The complainant has submitted that the Times Group has emerged as multi- edition, multi- product organization, and a clear leader in the segment it operates. The time Group has more than 45 dailies and periodicals in 3 languages with 108 editions having 11 publishing centers and 15 printing centers across the country providing a combined readership of over 33 million.

11. The complainant has submitted that the Times Group has 100 offices, over 7000 employees, 45 dailies including two of the largest in the country with approx 4.3 million copies circulated daily, lead magazines reaching 2468 cities and towns, 32 Radio Stations, Television News Channel, 1 Television life Style Channel and Turnover in excess of USD 700 million.

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12. The complainant has also submitted that the Complainant is engaged in the business of assistance and guidance to people through its interactive media, namely internet, by providing innovative platforms to internet users, across the globe, throughout their life and in every aspect of their lives. The Complainant has a strong international presence and offers various services since the year 2003-2004 through various flagship domain names, which are as under:

TIMESJOBS.COM: In November 2003, the complainant conceived and launched the fastest growing and most innovative Indian online recruitment portal, with a mission to reach out to all Indians in the country and abroad to provide them with the best career opportunities available. Its focus was to ensure that the skills of the job aspirants were showcased and matched suitably with the HR requirements of employers from diverse industries, in a time saving and cost- efficient manner, The complainant's online recruitment portal was thus intended to work as a link between recruitment and placement agencies and clients on one hand and job seekers looking for potential job opportunities for better career prospects on the other hand, both having access to each other at the click of a button India's No. 1 recruitment portal in April 2007, with the largest number of active jobseekers and a database of over 10 million candidates with over 20,000 new resumes added every day. TIMESJOBS.COM offer one of the largest database of active jobseekers in India today. In addition, thousands of better paying Jobs available from more than 25,000 TIMESJOBS.COM clients, including blue- chip companies from India and abroad, ensures that the search always yields fruitful results.

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SIMPLY Marry.Com: It is India's premier matrimonial service portal. The Complainant offer a one stop platform for online matchmaking that allows prospective India brides and Indian grooms to meet and communicate regarding matrimony. Has been in operations since December 2006 and adjudged having best practices of any matrimonial site in a study of 121 most popular websites in the country by independent online research firm Juxt Consult.

Ads2Book.com: Has been in operations since 2005 and engaged in the business of "Net of print" publication neutral. And global booking Engine, where users can log on and print classified ads in over 24 media partners with over 40 publications and more than 250 editions.

Magicbricks.Com: The complainant has submitted that the complainant's website magicbricks com has been in operation from August '06' brings together property seekers and sellers in the real estate industry. The Complainant's website magicbricks.Com provides a common platform for all users' and provides a space property buyer &-seller to locate properties of interest and source information about all property related issues in a transparent and unambiguous process.

13. The complainant has submitted that within three months of its lunch' the Complainant's website magicbricks.Com achieved the status of being the No property portal in India. With its revolutionary next-gen services customized specifically to address the real estate industry, it has consolidated its position as the leader in the sector. The Complainant's website magic bricks.Com has been adjudged as among the most user-friendly" websites in the country.

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14. The complainant has submitted that the Complainant's website namely magicbricks com is India's No.1 property portal featuring the largest data base of online properties across 20 cities in the country. The massive database of over 5 lakh properties available on the site ensures the search always yields results. In addition' with over 9 lakh registered users' more than 3 lac buyers and over 25, 000 reputed Builders Developers" Agents and Brokers the Complainant's website magicbricks. Com has proven itself to be the leading real-estate portal in the country. The website Magicbricks.com presently has 75,000 people visiting it every day. The total number of people visiting the Complainant's website and the expenses incurred in the last year is as below:

<u>Year</u>	<u>Total Unique Visitors</u>	<u>Marketing Cost</u>
2010-2011	144 lacs	6,852 lacs

15. The complainant has submitted that the Complainant also realized that people conductor their business over mobile phones. Thus the most valued services pioneered by the Complainant' which further advanced its leadership, were the Mobile & Leads on SMS' and Magic Bricks Mobile: Through the Magic 'SMS' of the Complainant, users can send free SMS through the website to sellers for properties and buyers for requirements that interest them.

The complainant has also submitted that the Complainant website magicbricks. Com also provides developers And real estate agents- property leads on SMS- a Premium service that offers instant SMS updates of new properties listed as per the subscriber's requirements.

The complainant has also submitted that Magic Bricks Mobile application enables users to search for properties by type, budget and city on their GPRS enabled cell -phone. Through this service users can instantly contact the concerned person by SMS or phone call.

16. The complainant has submitted that the Complainant's research wing namely "Brix Research" constantly monitor the property and real state

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market in the country providing insights, impact assessment reports ,official forms ,legal and taxation expertise and realty rates to magicbricks.Com users. With such offerings, it is evident that the Complainant's Website magicbricks.Com retains its leadership position in the segment it deals in.

17. The complainant has further submitted that the Complainant's also conducts property Fairs, branded as magicbricks.com property Bazaars", Which serve as a one- stop- shop for property -seekers to interact face-to face with developers, agent and housing financing institutions, all at a single venue. These fairs are conducted in 4 different formats like Locality -Centric (e. g. property Fair in Bangalore for properties in that city), Income-Centric (e.g. Luxury properties for HNSs- by invitation only) Regional Showcase (e.g. Goa properties fair in Delhi) and International Fairs (e. g. Indian properties showcased to NRIs and PIOs in Singapore, Dubai, Kuwait & London) So far, the Complainant has conducted over 100 domestic and 30 international property fairs.

18. The complainant has further submitted that the trade mark magicbricks.com has come to be inextricably associated with the Complainant, and connotes and denotes the services originating from the Complainant and none else, which is evident from the revenues earned by the Complainant from its magicbricks.com division are detailed as below:

STATEMENT OF ANNUAL SALES

Financial year Annual	Revenues
2007- 2008	1,996
2008- 2009	2,332
2009-2010	2,036
2010- 2011	3,060

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19. The complainant has submitted that in order to gain statutory right in the trade mark MAGIC BRICKS, the Complainant predecessor namely Bennett, Coleman and Co, filed trade mark application with the Indian Trade Mark Registry, which are as under:

<u>Trade Mark</u>	<u>Class</u>	<u>Appl. No./</u>	<u>Goods</u>
		<u>Dated</u>	
<u>Magicbricks</u>	<u>16</u>	<u>01453295</u>	Paper and paper articles Printed matter, Newspapers and periodicals, books periodicals books binding materials photographs stationery adhesives materials (stationery) office requisites (other than furniture) advertising publications
<u>MAGICBRICKS</u>	<u>09</u>	<u>01453296</u>	Scientific, nautical, surveying and electric apparatus instruments (including wireless) photographic cinematographic, signal checking (supervision), Calculating machines; data processing equipment and computers, TV serials Net Web casting, internet, Radio Broadcasting, Audio & Video Cassettes, CD, DVD& VCDS
<u>MAGICBRICKS</u>	<u>36</u>	<u>01453294</u>	Insurance, financial Monetary affairs; real estate affairs.

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Subsequently and pursuant to the Hon'ble Bombay High Court order dated 25th January 2007, vide which the scheme of arrangement between the Bennett, Coleman and Co. and the Complainant was approved. The Complainant has already filed TM-16 for amending the name and address of the Applicant of the abovementioned trade marks applications from Bennett, Coleman and Co. to Times Business Solutions Ltd (Complainant) The order of the Registrar of Trade Marks on TM-16 is awaited.

LEGAL GROUNDS:

20. The complainant has submitted the present Complaint is based on the following grounds:

A. The complainant has submitted that the impugned domain name is identical to the Complainant's highly distinctive trade mark Magic bricks phonetically visually and conceptually:

- i. As a cumulative result of prior and fide use of the trade mark Magic bricks in relation to services offered by the Complainant, the extensive and continuous use and the resultant accrual of reputation and goodwill, the Complainant has acquired common law rights in the undisturbed and exclusive use of the said trade mark Thus the adoption of the impugned domain name which is identical to the Complainant trade MAGIC BRICKS is misappropriation of the Complainant's goodwill and reputation and constitutes acts of misrepresentation to the members of public at large that the Respondent's business is associated or approved by the Complainant;
- ii. The complainant has submitted that the Respondent's unwanted registration of the impugned domain name

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with NIXI, being identical to the Complainant's domain name/ trade mark Magic Bricks.Com is clear an offence under the laws of India;

iii. The complainant has submitted that the Respondent's conduct also constitutes criminal offence of "falsification" and "false trade description" under the provisions of Sections 102 and 103 of The Trade Marks Act 1999.

iv. The complainant has submitted that the blatant and malafide adoption by the Respondent will also inevitably lead to dilution and erosion of the uniqueness and exclusively associated with the Complainant's trade mark by reducing its capacity to identify and distinguish the services as originating from a particular source, regardless of the presence or absence of likelihood of confusion, mistake or deception. In other words, the unauthorized and indiscriminate use by the Respondent is bound to result in the whittling away of the selling power, distinctive quality and value of the Complainant's famous trade mark MAGIC BRICKS;

B. The complainant has submitted that the Respondent has no rights or legitimate interest in the Domain name, for the following reasons:-

i. The complainant has submitted that the impugned domain name was registered by the Respondent on 27th May, 2010 at this time Complainant had a very considerable reputation in the trade mark MAGIC BRICKS in India, Complainant had common law trade mark rights in the name, which it has been accruing since 2006"

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ii The Respondent is not or has never been known by name MAGIC BRICKS com or by any confusingly similar name;

iii. The complainant has submitted that the Respondent's registration and use of the impugned domain name is a clear case of cyber-swatting, whose intention is to take advantage of the Complainant's substantial reputation and its prominent presence on the Internet in order to confuse the public to the detriment of the Complainant;

iv. The complainant has submitted that the registration of the impugned domain name is likely to lead the public to believe that the Respondent/ Registrant and the website to which the impugned domain name directs is sponsored by or affiliated to or associated with the Complainant, which will lead to confusion the minds of the public.

C. Domain Name was registered, has been used and continues to be used in bad faith, for the following reasons:-

i. The Respondent has got the registration of the impugned domain name done primarily for purpose of selling renting of otherwise transferring the domain name registration to the Complainant who is the proprietor of the trade mark or to a competitor of the Complainant, for valuable consideration and/ or for deriving undue benefit. Currently the impugned domain name is parked with company namely Sedo GmbH, Germany. The Respondent is offering the complainant to purchase the impugned domain name at an extremely high price.

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ii. The complainant has submitted that the Respondent has registered, the domain name in order to prevent the owner of the trade mark or service mark from reflecting the mark in a corresponding domain name;

iii. The Respondent has attempted to attract Internet users to the Respondent's website or other online location, by creating a likelihood of confusion with the Complainant name or mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website or service on the Respondent's website or location;

iv. The complainant has not authorized, licensed or otherwise consented to the Respondent's use of the impugned domain name;

v. The Respondent will have no doubt been aware that prior to its registration of the Domain Name, that there was substantial reputation and goodwill associated with the mark: MAGIC BRICKS com which inures and continues to inure to the Complainant.

The Para no.6 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:

- "i) the Registrant's domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights;

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- 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:

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

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- iii) 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 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:-

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."

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The other fact, which is to be dealt with before going into merit, is, that, as to whether, the cases decided by WIPO- Administrative Panel could be considered, while deciding the present controversy. These cases throw light upon various important aspects of controversy. As such they would be considered, while deciding the present controversy, in so far as they do not conflict with INDRP.

OPINION AND FINDINGS ON MERITS

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

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' & 'Sify' 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

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here that as per the claim of the complainant that the respondent has no trademark right on the said domain name.

This principle is settled in many above Indian cases and referred cases **JT 2004(5) SC 541 and 2004(5) SCC 287**. The complainant has made submission that he has legitimate trademark.

Thus the conclusion is that the domain name "**magicbricks.co.in**" is identical and confusingly similar to the trademark of complainant '**MAGIC BRICKS**' and the complainant has established that he has right in the trademark.

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

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 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 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.

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The respondent on other hand has not come forward inspite of repeated notices to file any reply / counter or to provide any positive, cogent and specific evidence that it is known or recognized by domain name. The respondent has neither put forth and has nor provided such evidence.

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

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

Keeping in view above facts and circumstances it is thus clear that the respondent has registered the disputed domain name and in spite of repeated notices, he has not come forward and has neither provided any substantial evidence in its support.

Thus the conclusion is that the respondent has got registered his domain name "**magicbricks.co.in**" in bad faith.


9. CONCLUSION:

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 to transfer of domain name "**magicbricks.co.in**" to him, as he has established his bonafide rights in trademark as per law discussed above. Hence I direct that the Domain name be transferred to the complainant by registry.

No order as to costs.

Delhi

Date: 11-11-2011.


(Sanjay Kumar Singh)
Arbitrator