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भारत INDIA

INDIA NON JUDICIAL

07 JAN 2020

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FF 203497

INDRP ARBITRATION
THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]

ADMINISTRATIVE PANEL DECISION
SOLE ARBITRATOR: RODNEY D. RYDER

Avast Software s.r.o.
v.
Shashi Kant

INDRP CASE NUMBER - 1196

ARBITRATION AWARD

Disputed Domain Name: www.avast.net.in

The Parties

The Complainant in this arbitration proceeding is Avast Software s.r.o., having its office at Pikrtova 1737/1a, Nusle, 140 00 Prague 4, Czech Republic; represented by Mr Rudolf Leska, Advocate.

The Respondent in this arbitration proceeding is Shashi Kant of 1520 Wilmington, Delaware, 30319, United States of America as per the details given by the WhoIs database maintained by the National Internet Exchange of India [NIXI].

The Domain Name and Registrar

The disputed domain name is www.avast.net.in. The said domain name is registered with GoDaddy.com, LLC.

Details of the disputed domain name

The dispute concerns the domain name www.avast.net.in. The said domain name was registered on December 05, 2018. The particulars of the said domain name are as follows:

Registrant:	Shashi Kant
Registrant Address:	1520 Wilmington, Delaware, 30319, United States of America
Registrant Phone:	+1-8002959347
Registrant Email:	mrkantshashi@yahoo.co.in

Procedural History [Arbitration Proceedings]

This arbitration proceeding is in accordance with the .IN Domain Name Dispute Resolution Policy [INDRP], adopted by the National Internet Exchange of India ["NIXI"]. The INDRP Rules of Procedure [the Rules] were approved by NIXI on 28th June, 2005 in accordance with the Indian Arbitration and Conciliation Act, 1996. By registering the disputed domain name with the NIXI accredited Registrar, the Respondent agreed to the resolution of the disputes pursuant to the IN Dispute Resolution Policy and Rules framed thereunder.

According to the information provided by the National Internet Exchange of India ["NIXI"], the history of this proceeding is as follows:

In accordance with the Rules, 2(a) and 4(a), NIXI formally notified the Respondent of the Complaint, and appointed Rodney D. Ryder as the Sole Arbitrator for adjudicating upon the dispute in accordance with the Arbitration and Conciliation Act, 1996, and the Rules framed thereunder, .IN Domain Name Dispute Resolution Policy and the Rules framed thereunder. The Arbitrator submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by NIXI.

In this matter, the arbitration proceedings commenced on January 29, 2020. The request for submission of a response with a complete set of documents was sent to the Respondent on January 29, 2020 through electronic mail. The complete set of documents was sent to the Respondent through courier as well by the National Internet Exchange of India. The last date

to submit a response was February 14, 2020. The Respondent did not file a response or request for an extension.

Grounds for the administrative proceedings

1. The disputed domain name is identical or confusingly similar to a trademark in which the Complainant[s] has statutory/common law rights.
2. The Respondent has no rights or legitimate interests in respect of the disputed domain name.
3. The disputed domain name has been registered or is/are being used in bad faith.

Parties Contentions

Complainant

The Complainant in its complaint, interalia, contended as follows:

The Respondent's domain name is identical or confusingly similar to a name, trademark or service in which the Complainant has rights.

The Complainant, based on its corporate name, business, common law rights and trademark registrations for the trademark 'AVAST', and based on the use of the said trademark in India and other countries, submitted that it is the lawful owner of the trademark 'AVAST'.

The Complainant submits that as the disputed domain name is <www.avast.net.in>, the disputed domain name is clearly identical/confusingly similar to the Complainant's trademark in which the Complainant has exclusive rights and legitimate interest.

Background of the Complainant and its statutory and common law rights Adoption:

The Complainant is a security software company engaged primarily in the business of assisting clients to fight cyber-attacks. The Complainant has been in this business since 1988 and has a global presence. The Complainant claims to have 400 million users and ranks 7th among antivirus software businesses globally.

The Complainant has registered numerous domain names consisting of the term 'AVAST' under country code extensions in various countries such as India, China, France, Russia, Denmark, etc.

Statutory rights:

The Complainant is the owner of numerous trademarks relating to the brand 'AVAST' and other related marks in several countries. Specifically, in India, the Complainant has a trademark registration dating back to 2009 for the mark 'AVAST' in class 9.

Respondent

The Respondent failed to reply to the notice regarding the complaint.

Discussion and Findings

The Respondent does not have any relationship with the business of the Complainant or any legitimate interest in the mark/brand 'AVAST'. Moreover, the Complainant has neither given any license nor authorized the Respondent to use the Complainant's mark. The Respondent has never been commonly known by the domain name in question and registered the domain name on December 05, 2018, that is subsequent to Complainant's usage of the trademark 'AVAST'.

The disputed domain name contains the entirety of the Complainant's trademark 'AVAST'. Furthermore, the addition of the top-level domain ".net.in" is irrelevant in determining whether the disputed domain name is confusingly similar to the Complainant's mark. It is well established that the specific top level domain, such as ".com", ".net", ".in", ".co.in", ".org.in", ".net.in" etc. does not affect the domain name for the purpose of determining whether it is identical or confusingly similar [Relevant Decisions: *Magnum Piering, Inc. v. The Mudjackers and Garwood S. Wilson, Sr.,* WIPO Case No. D2000-1525; *Rollerblade, Inc. v. Chris McCrady,* WIPO Case No. D2000-0429; *Aon PLC and Ors. v. Guanrui, INDRP/633*].

It is a well-established principle that once a Complainant makes a prima facie case showing that a Respondent lacks the rights to the domain name at issue, the Respondent must come forward with the proof that it has some legitimate interest in the domain name to rebut this presumption.

The Respondent's Default

The INDRP Rules of Procedure require under Rule 8(b) that the arbitrator must ensure that each party is given a fair opportunity to present its case. Rule 8(b) reads as follows

"In all cases, the Arbitrator shall ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case."

Rule 11(a) empowers the Arbitrator to proceed with an ex parte decision in case any party does not comply with the time limits or fails to reply against the complaint. Rule 11(a) reads as follows:

"In the event that a Party, in the absence of exceptional circumstances as determined by the Arbitrator in its sole discretion, does not comply with any of the time periods established by these Rules of Procedure or the Arbitrator, the Arbitrator shall proceed to decide the Complaint in accordance with law."

The Respondent was given notice of this administrative proceeding in accordance with the Rules. The .IN Registry discharged its responsibility under Rules paragraph 2(a) to employ reasonably available means calculated to achieve actual notice to the Respondent of the Complaint.

As previously indicated; the Respondent failed to file any reply to the Complaint and has not sought to answer the Complainant's assertions, evidence or contentions in any manner. The Panel finds that the Respondent has been given a fair opportunity to present his case.

The 'Rules' under paragraph 12(a) provides that the Arbitrator shall decide the Complaint on the basis of the statements and documents submitted in accordance with the INDRP and any law that the Arbitrator deems fit to be applicable. In accordance with the Rules, paragraph 12, the Arbitrator may draw such inferences as are appropriate from the Respondent's failure to reply to the Complainant's assertions and evidence or to otherwise contest the Complaint. In the circumstances, the Arbitrator's / Panel's decision is based upon the Complainant's assertions and evidence and inferences drawn from the Respondent's failure to reply.

The issues involved in the dispute

The Complainant in its complaint has invoked paragraph 4 of the INDRP which reads:

"Types of Disputes -

Any Person who considers that a registered domain name conflicts with his legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:
(i) the Respondent's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant[s] has rights;
(ii) the Respondent has no rights or legitimate interests in respect of the domain name; and
(iii) the Respondent's domain name has been registered or is being used in bad faith.

The Respondent is required to submit to a mandatory Arbitration proceeding in the event that a Complainant files a complaint to the .IN Registry, in compliance with this Policy and Rules thereunder."

According to paragraph 4 of the INDRP, there are 3 essential elements of a domain name dispute which are being discussed hereunder in the light of the facts and circumstances of this case.

The Respondent's domain name is identical and confusingly similar to a name, trademark or service in which the Complainant has rights.

It has been proved by the Complainant that it has intellectual property, particularly trademark rights, and other rights in the mark 'AVAST' by submitting substantial documents. The disputed domain name contains the Complainant's 'AVAST' trademark in its entirety.

It has been previously decided under the INDRP that incorporating a trademark in its entirety is sufficient to establish the identical and confusingly similar nature of the disputed domain name.

According to paragraph 3 of the INDRP it is the responsibility of the Respondent to find out before registration that the domain name he is going to register does not violate the rights of any proprietor/brand owner.

Paragraph 3 of the INDRP is reproduced below:

"The Respondent's Representations -

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

- *the statements that the Respondent made in the Respondent's Application Form for Registration of Domain Name are complete and accurate;*
- *to the Respondent's knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party;*
- *the Respondent is not registering the domain name for an unlawful purpose; and*
- *the Respondent will not knowingly use the domain name in violation of any applicable laws or regulations.*

It is the Respondent's responsibility to determine whether the Respondent's domain name registration infringes or violates someone else's rights."

The Respondent has failed in his responsibility discussed above and in the light of the pleadings and documents filed by the Complainant; the Panel has come to the conclusion that the disputed domain name is identical with or deceptively similar to the Complainant's trademark 'AVAST'. Accordingly, the Panel concludes that the Complainant has satisfied the first element required by Paragraph 4 of the INDRP. [Relevant Decisions: *Magnum Piering, Inc. v. The Mudjackers and Garwood S. Wilson, Sr.,* WIPO Case No. D2000-1525; *Aon PLC and Ors. v. Gangadhar Mahesh, INDRP/632; Wells Fargo & Co. and Anr. v. DeepDas Kumar, INDRP/628; Natures Basket Limited & Ors. v. Dipti Singla, INDRP/683; General Motors India Pvt. Ltd. & Anr. v. Anish Sharma, INDRP/799; Havells India Limited and Anr. v. Whois Foundation, WIPO Case No. D2016-1775; Santa Fe Transport International Limited and Santa Fe Moving Services Private Limited v. Santa fe Packers, Packers Movers WIPO Case No. D2017-0754; Santa Fe Transport International Limited and Santa Fe Moving Services Private Limited v. Achyut Khare, INDRP/886; TransferWise Ltd. vs. Normand Clavet, INDRP/1150]*

The Respondent has no rights or legitimate interests in respect of the disputed domain name

The second element that the Complainant needs to prove and as is required by paragraph 4(ii) of the INDRP is that the Respondent has no legitimate rights or interests in the disputed domain name.

The Complainant has never assigned, granted or in any way authorised the Respondent to register or use the AVAST trademark or any other related mark. The Complainant has been using the 'AVAST' mark for a bonafide purpose in relation to its business.

Moreover, the burden of proof on the Complainant regarding this element of the domain name dispute lies most directly within the Respondent's knowledge. Once the Complainant has made a prima facie case showing that the Respondent does not have any rights or legitimate interest in the domain name, the evidentiary burden shifts to the Respondent to rebut the contention by providing evidence of its rights or interests in the domain name.

The Respondent has not rebutted the contentions of the Complainant and has not produced any documents or submissions to show his interest in protecting his own right and interest in the domain name.

Further, the Respondent has not used the domain name or a name corresponding to the disputed domain name in connection with a bonafide offering of goods or services. The Respondent is not commonly known by the disputed domain name and has not made any legitimate non-commercial or fair use of the disputed domain name, without intent for commercial gain. The Respondent is thus misleading consumers by using the Complainant's mark 'AVAST' in the disputed domain name.

Moreover, the Respondent's use of the disputed domain name cannot be considered bona fide or legitimate since the Respondent has not made any use of the same since its registration. In addition to this, the very fact that the disputed domain name was registered by the Respondent years after the Complainant's use of the mark 'AVAST' clearly establishes that the Respondent must have registered the domain name with mala fide intentions.

For these reasons, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name. [Relevant Decisions: *Aon PLC and Ors. v. Guanrui, INDRP/633; Wells Fargo & Co. and Anr. v. SreeDas Kumar, INDRP/666; QRG Enterprises Limited & Anr. v. Zhang Mi, INDRP/852; Santa Fe Transport International Limited and Santa Fe Moving Services Private Limited v. Santa fe Packers, Packers Movers WIPO Case No. D2017-0754; Havells India Limited and Anr. v. Whois Foundation, WIPO Case No. D2016-1775; Mahendra Singh Dhoni and Anr. v. David Hanley, WIPO Case No. D2016-1692*]

The disputed domain name has been registered or is being used in bad faith.

It has been contended by the Complainant that the Respondent has registered and has used the disputed domain name in bad faith. The language of the INDRP paragraph 4(iii) is clear enough, and requires that either bad faith registration or bad faith use be proved.

Paragraph 6 of the INDRP provides that the following circumstances are deemed to be evidence that a Respondent has registered and used a domain name in bad faith:

"Circumstances indicating that the Respondent has registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant who is the owner of the trademark or service mark or

to a competitor of the Complainant, for valuable consideration in excess of its documented out-of-pocket costs directly related to the domain name; or

the Respondent 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 Respondent has engaged in a pattern of such conduct; or

by using the domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its Website or other on-line location, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of its Website or location or of a product or service on its Website or location."

From the circumstances of the case and from the evidences put before the Panel by the Complainant, the Panel is of the opinion that the Respondent had no previous connection with the disputed domain name or the mark 'AVAST' and any use of the disputed domain name by the Respondent, would result in confusion and deception of the trade, consumers and public, who would assume a connection or association between the Complainant and the Respondent's website or other online locations of the Respondent or product/services on the Respondent's website and otherwise, due to the use by Respondent of the Complainant's trademark 'AVAST' in the disputed domain name, which trademark has been widely used by the Complainant and which trademark is associated exclusively with the Complainant.

The Panel is prepared to accept the Complainant's contention that its mark and the corresponding business is famous. With regard to famous names, successive UDRP panels have found bad faith registration because Complainant's name was famous at the time of registration: *WIPO/D2000-0310 [choyongpil.net]*.

Based on the submissions and evidences put forth before the Panel, the Panel is of the belief that the Respondent would have definitely known about the Complainant's mark 'AVAST' and its reputation at the time of registering the disputed domain name.

The domain name is deceptively similar to the trademark of the Complainant and will lead to confusion with the Complainant's mark 'AVAST' as to the source, sponsorship, affiliation or endorsement of the Respondent's business by the Complainant. Further, the absence of any website on the disputed domain name amounts to passive holding of the domain name by the Respondent. This further indicates bad faith of the Respondent under the present circumstances. [Relevant Decision: *Telstra Corporation Limited v. Nuclear Marshmallows Case No. D2000-0003]*.

On bad faith registration and use [generally], panels have noted: "Registration of a well-known trademark by a party with no connection to the owner of the trademark and no

authorization and no legitimate purpose to utilize the mark reveals bad faith": *NAF/FA95314 [thecaravanclub.com], WIPO/D2000-0808* [very use of domain name by Respondent who had no connection whatsoever with Complainant's mark and product suggests opportunistic bad faith - *4icq.com*]; "Registration of a domain name that is confusingly similar or identical to a famous trademark....is itself sufficient evidence of bad faith registration and use" [*Wells Fargo & Co. and Anr. v. Krishna Reddy, INDRP/581; QRG Enterprises Limited & Anr. v. Zhang Mi, INDRP/852].*

Thus, all the three conditions given in paragraph 6 of the INDRP are proved in the circumstances of this case and thus the registration of the impugned domain name by the Respondent/Registrant is a registration in bad faith.

Decision

The Respondent has failed to comply with Para 3 of the INDRP which requires that it is the responsibility of the Respondent to ensure before the registration of the impugned domain name by him that the domain name registration does not infringe or violate someone else's rights.

The Complainant has given sufficient evidence to prove extensive trademark rights over the disputed domain name. Further, the Respondent's adoption and registration of the disputed domain name is dishonest and malafide.

While the overall burden of proof rests with the Complainant, panels have recognized that this could result in the often impossible task of proving a negative, requiring information that is often primarily within the knowledge of the Respondent. Therefore, a Complainant is required to make out a *prima facie* case that the Respondent lacks rights or legitimate interests. Once such *prima facie* case is made, the Respondent carries the burden of demonstrating rights or legitimate interests in the domain name. Thus, it is clear that the Respondent is using the disputed domain name in bad faith and has registered the domain name to cash-in on the reputation of the Complainant's mark and to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name.

[Relevant Decisions: *Lego Juris AS v. Robert Martin* INDRP/125; *Societe Air France v. DNS Admin* INDRP/075; *Kelemata SPA v. Mr Bassarab Dungaciu WIPO D2003-0849; Croatia Airlines d.d. v. Modern Empire Internet Ltd.* WIPO D2003-0455; *Uniroyal Engineered Products , Inc. v. Nauga Network Services WIPO D2000-0503; Microsoft Corporation v. Chun Man Kam INDRP/119; AB Electrolux v. Liheng, INDRP/700; Equitas Holding Limited v. Sivadas K P, INDRP/724; BearingPoint IP Holdings B.V. v. Deborah R. Heacock, INDRP/822; Dell Inc. v. Jack Sun, INDRP/312; HID Global Corporation v. Zhaxia, INDRP/652; McDonald's Corporation v. Ravinder, INDRP/746; MontBlanc-Simplo G.M.B.H. v. M S Mohamed Salihu, INDRP/678; Orica Australia Proprietary Limited v. Bev Gran, D N Solutions, INDRP/237; Sopra Steria Group v. Xu Xiantao, INDRP/796; Panasonic Corporation v. Sun Wei, INDRP/527; Wal-Mart Stores, Inc. v. Machang, INDRP/539; PJS International S.A. v. Xiangwang, INDRP/616; Aon*

PLC and Ors. v. Gangadhar Mahesh, INDRP/632; Aon PLC and Ors. v. Guanrui, INDRP/633; Wells Fargo & Co. and Anr. v. Krishna Reddy, INDRP/581; Wells Fargo & Co. and Anr. v. SreeDas Kumar, INDRP/666; Wells Fargo & Co. and Anr. v. DeepDas Kumar, INDRP/628; Natures Basket Limited & Ors. v. Dipti Singla, INDRP/683; General Motors India Pvt. Ltd. & Anr. v. Anish Sharma, INDRP/799; QRG Enterprises Limited & Anr. v. Zhang Mi, INDRP/852; Santa Fe Transport International Limited and Santa Fe Moving Services Private Limited v. Santa fe Packers, Packers Movers WIPO Case No. D2017-0754; Santa Fe Transport International Limited and Santa Fe Moving Services Private Limited v. Achyut Khare, INDRP/886]

The Respondent's registration and use of the domain name [www.avast.net.in] is abusive and in bad faith. The Respondent has no rights or legitimate interests in respect of the domain name. In accordance with Policy and Rules, the Panel directs that the disputed domain name [www.avast.net.in] be transferred from the Respondent to the Complainant; with a request to NIXI to monitor the transfer.

Rodney D. Ryder
Sole Arbitrator

Date: February 24, 2020