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INDRP ARBITRATION

THE NATIONAL INTERNET EXCHANGE OF INDIA (NIXI)

ADMINISTRATIVE PANEL DECISION

Sole Arbitrator: Neeraj Aarora

Dell Inc. Vs James Jeni

Arbitration Award

Disputed Domain Name: 'dellexclusivestore.co.in'

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INDRP ARBITRATION

THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]

ADMINISTRATIVE PANEL DECISION

SOLE ARBITRATOR: Neeraj Aarora

Arbitration Award

Disputed Domain Name: **DELLEXCLUSIVESTORE.CO.IN**

In the matter of:

Dell Inc.
One Dell Way, Round Rock
Texas, 78682, U.S.A. **....Complainant**

Versus

James Jeni
Laptap Shoppe
Opp CSI Mission Hospital main road
Marthandam, Kanyakumari
Tamil Nadu – 629165, India **.....Respondent**

I. The parties

a. Complainant

Dell Inc.
One Dell Way, Round Rock
Texas, 78682, U.S.A.
Email: akhileshkumar.rai @azbpartners.com

Represented by:

Akhilesh Kumar Rai
AZB & Partners
Plot No. A8, Sector 04
Noida – 201301, U.P. India
Email: akhileshkumar.rai @azbpartners.com
Tel: +91 120 4179999

b. Respondent

James Jeni
Laptap Shoppe,
Opp CSI Mission Hospital main road
Marthandam, Kanyakumari
Tamil Nadu – 629165, India
E-mail: james.jeniservice2020@gmail.com
Tel: +91 7418345059

II. Disputed Domain Name & Registrar

a. Disputed domain name

'dellexclusivestore.co.in'
Date of Registration of Domain name: 27/05/2017

b. Registrar of the domain name:

Good Domain Registry Private Limited

c. The registry is the National Internet Exchange of India (hereinafter referred to as NIXI).

III. Procedural History

a. That the Complainant, through his authorized representative, has submitted the Complaint to the INDRP for arbitration of domain name dispute.

b. Shri Neeraj Aarora was appointed as Sole Arbitrator by NIXI vide email dated 17/02/2021 & Shri Neeraj Aarora has accepted the assignment and also given his statement of acceptance and declaration of impartiality and independence. The NIXI vide email dated 17/02/2021 forwarded the documents/ case to the Arbitrator.

c. That the notice was issued to the respondent on 17/02/2021, directing respondent to submit his reply to complaint by 04/03/2021. The arbitration proceedings are deemed to have been commenced on 17/02/2021.

d. That, no reply to the notice was received from the Respondent till 04/03/2021. However, keeping in view the interest of justice, a further opportunity was provided to the Respondent to submit reply by 15/03/2021. It was specifically mentioned that in the event of failure of the Respondent to submit the reply, the matter will be proceeded ex-parte.

e. That, despite various communication/ opportunities, no reply was received from the Respondent, hence, the proceedings was closed and

vide email dated 16/03/2021, it was informed to the parties including the Respondent, that the matter would be decided on the basis of documents and ex-parte against the Respondent.

IV. Parties Contention

A. Complainant

a. That the Complainant 'Dell Inc.' was established in the year 1984 under the laws of Delaware, United States of America and engaged in the business of phones, tablet, computers etc and the Complainant is the world largest seller of computer systems. The Complainant operates Dell exclusive stores, multiple brand outlets and solution/service centers in India through its Indian subsidiary.

b. That the complainant has been using the mark 'DELL' since a long time. Complainant is the registered proprietor of 'DELL' trademark in various countries including India. Following are some of the registered trademark of the complaint in India:-

S.No	Mark/Name	Reg. No./ App. No.	Date of Registration	Class	Status
1	DELL	575115	05/06/1992	9	Registered
2	www.dell.com	826095	05/11/1998	9	Registered
3	DELL	923915	10/05/2000	9	Registered
4	DELL	1190375	07/04/2003	2	Registered
5	DELL	1190376	07/04/2003	9	Registered
6	DELL	1239350	24/09/2003	37	Registered

7	DELL	1239349	24/09/2003	42	Registered
8	DELL	1335057	28/01/2005	36	Registered
9		3597740	06/10/2016	41	Registered

c. That the Complainant also uses various 'DELL' formative marks like 'DELLPRECISION', 'DELL CHAMPS', 'DELL PROSUPPORT', 'DELL PREMIUMCARE', etc.

d. That the Complainant has been using the trademark 'DELL' since more than 30 years and has built an inevitable reputation in respect of the said mark. The mark 'DELL' is well recognized amongst the general public and is a well-known trademark.

e. That complainant operates its domain name **'www.dell.com'** wherein customers can log in and place orders for laptops and also make payments online. Also, the Complainant has country specific domain names such as www.dell.co.in for India.

B. Respondent

a. The Respondent despite giving sufficient opportunities did not submitted any reply.

V. Findings

A. Applicable Law and Rules

a. The present dispute is being decided as per .IN Dispute Resolution Policy (INDRP) comprising of **The .IN Domain Name Dispute Resolution Policy (INDRP)** and **INDRP Rules of Procedure**. It is mentioned in **Para 5** of **The .IN Domain Name Dispute Resolution Policy (INDRP)** that *"The Arbitrator shall conduct the Arbitration Proceedings in accordance with the Arbitration & Conciliation Act, 1996 amended as per the Arbitration & Conciliation (Amendment) Act, 2015 read with the Arbitration & Conciliation Rules as well as the INDRP Policy and Rules, as amended from time to time."*

b. In terms of Para 4 of **The .IN Domain Name Dispute Resolution Policy (INDRP),** three premises are to be taken into consideration for deciding the dispute:

"(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; and

(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."

B. The Respondent's Default

a. That the Respondent was served notices twice on his registered email id but consciously chosen not to reply despite being given various opportunities.

b. The Rule 12 of INDRP Rules of Procedure provides as follows:

"12. Default by Parties

In event any party breaches the provisions of INDRP rules and/or directions of the Arbitrator, the matter can be decided ex-parte by the Arbitrator and such arbitral award shall be binding in accordance to law."

c. In view of the intentional conduct of the Respondent in not filing the reply to the complaint, Respondent is proceeded **'ex-parte'**.

C. Identical/ Confusingly Similar

a. The domain name used by the Respondent is **'dellexclusivestore.co.in'** while the Complainant is using domain name **'www.dell.com'** and **'www.dell.co.in'** and also have registered trade names/ trademarks consisting of '**DELL**' in India and also in various countries .

b. The plain test to identify whether the domain name is identical or confusingly similar is the side by side comparison of the domain name. As also referred in the **WIPO Jurisprudential Overview 3.0:**

"The standing or threshold test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. This test typically involves a side-by-side comparison of the domain name and the textual components of the relevant trademark to assess whether the mark is recognizable within the disputed domain name.

While each case is judged on its own merits, in cases where a domain name incorporates the entirety of a trademark, or where at least a dominant feature of the relevant mark is recognizable in the domain name, the domain name will normally be considered confusingly similar to that mark for purposes of UDRP standing."

c. The domain name **'dellexclusivestore.co.in'** substantially incorporates the Complainant's brand **'DELL'** and incorporates generic word 'exclusivestore' which clearly refers to a key element of the Complainant business i.e. 'DELL' exclusive stores and a bare reading of the domain name of the Respondent creates an impression about the Complainant's exclusive store and thus mislead the general public. Therefore, this domain is identical / confusingly similar to the Complainant's 'DELL' brand. In the similar scenario it was observed by the Hon'ble High Court of Delhi in the matter of **Thoughtworks Inc. Vs Super Software Pvt Ltd & Ors (MANU/DE/0064/2017)**

"With the domain name taking up the entire name of the Petitioner, there could be no doubt that the use of such domain name by the Respondent would be deceptively confusing and erroneously indicate a connection of Respondent No 1 with the Petitioner where there is none".

d. The registration and use of a identical/ confusingly similar domain name as that of trademark of the Complainant is a direct infringement and it was also observed in the matter of **F Hoffman-La Roche AG Vs Relish Enterprises (WIPO) D2007-1629:**

"If the Complainant owns a registered trademark, then it satisfies the threshold requirement of having the trademark rights and the domain name is confusingly similar to Complainant's trademark because the disputed domain name looks and reads like Complainant's trademark.

e. In case of trademarks with well-built goodwill, reputation & vide spread presence on internet, any re-arrangement with substantial similarity was to encash the goodwill of the reputed trademarks by creating closer imitation. It was observed in the matter of **Forest**

Laboratories Inc Vs Natural Products Solutions LLC Case No. D2011-1032.; Forest Laboratories Inc. Vs Clark Grace Case No. D2011-1006 (WIPO):

"Typosquatting involves the intentional rearrangement or change of a few letters in the mark to make a nonsensical but close imitation deliberately intended to catch a tired or careless typist's search for the mark wonder's website. Usually, the added or substituted letter or addition involves a character immediately adjacent to the replaced one" - [Eg. Amazon.com Vs Steven Newman Aka Jill Waserstein AKA Pluto Newman (WIPO)]"

f. In terms of **Para 3** of **.IN Domain Name Dispute Resolution Policy (INDRP)**, it is the obligation of the Respondent to ensure that the domain name registered by him does not violate upon the Right of any other person. **Para 3** provides as follows:

"3. Registrant's Representations

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."

g. In the facts and circumstances of the present case, where the trademark/ trade name '**DELL**' of the Complainant is registered across the globe and enjoy a wide reputation and goodwill & as such, the Respondent fails to discharge its obligation in terms of **Para 3(b)** referred above and hence this tribunal is of the view that the disputed domain name is confusingly similar to Complainant's Mark.

D. Rights and Legitimate Interest

a. The Respondent is required to prove any of the circumstances provided under **Clause 6** of **INDRP (Policy)** in order to prove legitimate interests:

   i. 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;

   ii. 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

   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.

b. That this requirement to be proved by the Complainant is the negative one and as such the Complainant is required to establish a prima facie case in respect of lack of right or legitimate interest of the Respondent

in the disputed domain name and thereafter the burden of proof will shift to the Respondent.

c. The Complainant is able to prove its rights and legitimate interest in the trademark **'DELL'** and has also produced the evidence of its registration across the globe, while the Respondent choose not to reply despite giving various opportunities.

d. The Respondent does not come forward to show that the Respondent has any right or legitimate interest in the disputed domain name which incorporates the **'DELL'** mark. A mark in which the Complainant has the substantial and exclusive right.

e. There is no material to show that the Respondent is using the disputed domain name in relation to bona fide offering of goods and services. Further, the fact that the Respondent on its website has not disclosed the Respondent relationship with the Complainant and therefore, such suppression of relationship may falsely mislead general Internet user to believe that the Complainant owns the domain name.

f. In the facts and circumstances of the case, when the trademark of the Complainant is well known, enjoys international reputation and trade name is known across the globe and the Respondent creates a deceptive domain name, the Respondent cannot be said to have a right or legitimate interest. It was also observed in the matter of **Wockhardt**

Ltd vs Kishore Tarachandani:(INDRP Dispute Case no: INDRP/382)

"The Respondent cannot have a right or legitimate interest in the disputed domain name when it incorporates the entire mark of the Complainant - Clear case of abusive registration of a well-known mark."

g. That in the fact and circumstances, this Tribunal is of the view that Respondent does not have legitimate rights and interest in the domain name.

E. Registered or Use in Bad Faith

a. That in order to prove that the Respondent has 'Registered or used in bad faith' the impugned domain name, Complainant has to prove one of the conditions provided under clause 7 of INDRP which are as follows:

"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."

b. That the Respondent represent itself as the service center providing repair and maintenance service for DELL laptops and also offers sale of laptop, desktop, storages, batteries, adapters uses the word mark 'DELL' on the website 'dellexclusivestore.co.in' while as per Complainant, the Complainant has not granted any right to the Respondent to use its trademark or tradename 'DELL'.

c. That as the trademarks/ trade names of the Complainant is so famous & also distinctive that the Respondent must have had actual knowledge of the trademark prior to registering the disputed domain name. There cannot be any doubt from the evidence put before this Arbitral Tribunal that the Complainant's marks are well known and that the Respondent intended to capitalize on this confusion. By registering the disputed domain name with actual knowledge of the Complainant's trademark, the Respondent acted in bad faith by breaching its service agreement with the Registrar because the Respondent registered a domain name that infringes upon the intellectual property rights of another entity.

d. That the disputed domain **'dellexclusivestore.co.in'** is built in such a way that it will lead the average internet user to believe that the disputed domain name is owned by the Complainant and the Respondent tries to create false impression among the internet users that disputed domain name **'dellexclusivestore.co.in'** belongs to the Complainant and Respondent is misleading potential customers to their website.

e. That it was held in the matter of **Viacom International Inc& MTV Networks Europe vs Web Master (Case No. D2005-0321-WIPO)**

"Given long and widespread reputation of the Complainant's mark, the compelling conclusion is that the Respondent, by choosing to register and use a domain name which is not only confusingly similar to the Complainant's widely known and distinctive mark but identical thereto, intended to ride on the goodwill of the Complainant's trademark in an attempt to exploit, for commercial gain, Internet traffic destined for the complainant. Potential partners and end users are led to believe that the website is either the Complainant's site, especially made up for bearings, or the site of the official authorized partners of the Complainant, while, in fact, it is neither of these."

f. That the Hon'ble High Court in the matter of **ITC Ltd vs Travel India(Case No, L-2/5/R4 OF 2008 - NIXI):**

"Registration of domain name which is identical to trademark, with actual knowledge of the trademark holder's rights is strong evidence that the domain name was registered in bad faith. "

g. Therefore the entire facts and circumstances lead to irrefutable conclusion that the disputed domain name has been registered by the Respondent in bad faith.

Decision

In view of the aforesaid facts and reasons, the Complainant has proved its case and therefore this Arbitral Tribunal directs that the disputed domain name 'dellexclusivestore.co.in' is to be transferred to the Complainant.

Neeraj Aarora

Sole Arbitrator

Date: 16/03/2021