



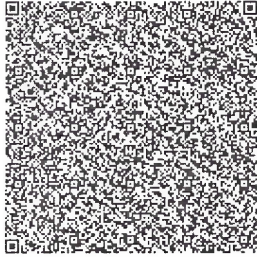
सत्यमेव जयते

INDIA NON JUDICIAL

Government of National Capital Territory of Delhi

e-Stamp

Certificate No. : IN-DL40479556470475Q
Certificate Issued Date : 20-Jun-2018 05:47 PM
Account Reference : IMPACC (IV)/ dl972303/ DELHI/ DL-DLH
Unique Doc. Reference : SUBIN-DL97230384919939946728Q
Purchased by : POOJA DODD
Description of Document : Article Others
Property Description : Not Applicable
Consideration Price (Rs.) : 0
(Zero)
First Party : POOJA DODD
Second Party : Not Applicable
Stamp Duty Paid By : POOJA DODD
Stamp Duty Amount(Rs.) : 100
(One Hundred only)



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ARBITRATION AWARD

.IN REGISTRY - NATIONAL INTERNET EXCHANGE OF INDIA

.IN domain Name Dispute Resolution Policy

INDRP Rules of Procedure

disputed domain name <toter.in>

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Statutory Alert:

1. The authenticity of this Stamp Certificate should be verified at "www.shoilestamp.com". Any discrepancy in the details on this Certificate and as available on the website renders it invalid.
2. The onus of checking the legitimacy is on the users of the certificate.
3. In case of any discrepancy please inform the Competent Authority.

IN THE MATTER OF:

TOTER LLC.

841, Meacham Road, Statesville,

North Carolina 28677, USA

...COMPLAINANT

Versus

WASTE VENTURES

311 & 317 Bachupally, Hyderabad,

Telangana - 500081,

...RESPONDENT

1. The Parties

The Complainant in this arbitration proceeding is Toter LLC, a corporation incorporated the laws of the State of North Carolina, United States of America with registered office at 841, Meacham Road, Statesville, North Carolina 28677, USA. The Complainant is represented by Jyotideep Kaur and G. Rahul of Lall and Sethi, its authorized representatives.

The Respondent is Waste Ventures with office at 311 & 317 Bachupally, Hyderabad, Telangana - 500081, India.

2. Domain Name and Registrar

The disputed domain name is <toter.in> which was registered on August 08, 2016. As per the Whois Database, the Registrant is Waste Ventures, with office at 311 & 317 Bachupally, Hyderabad, Telangana-500081, India. The email address connected with the Registrant is info@wasteventures.com.

RD

The accredited Registrar with whom the disputed domain name is registered is Endurance Domains Technology LLP (R173-AFIN) situated at Unit no. 501, 5th floor and Unit no. 402 4th floor, IT building, NESCO IT park, Nesco complex, western express highway, Goregaon (East), Mumbai, Maharashtra 400063, India.

3. Procedural History

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 by NIXI on June 28, 2005 in accordance with the Indian Arbitration and Conciliation Act, 1996. By registering the disputed domain name with a NIXI accredited Registrar, the Respondent agreed to the resolution of the disputes pursuant to the Policy and the Rules.

As per the information received from NIXI, the history of the proceedings is as follows:

3.1. The Complaint was filed with the .IN Registry, NIXI, against Waste Ventures. NIXI verified the Complainant and its annexures for conformity with the requirements of the Policy and the Rules.

3.2. In accordance with the Rules, Paragraph – 2(a) and 4(a), NIXI formally notified the Respondent of the Complaint and appointed Ms. Pooja Dodd as the Sole Arbitrator for adjudicating upon the dispute in accordance with The Arbitration and Conciliation Act, 1996, the Policy and the Rules.

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- 3.3. The Sole Arbitrator submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by NIXI to ensure compliance with the Rules (paragraph-6).
- 3.4. NIXI notified the Parties of the Arbitrator's appointment via email on June 15, 2018 and served an electronic copy of the Complaint on the Respondent. The Parties were notified by the Arbitrator about the commencement of arbitration proceedings on June 15, 2018 and the Respondent was directed to submit a Response within ten days.
- 3.5. On June 26, 2018, the Legal Officer of NIXI informed the Arbitrator that the courier containing the Complaint had been returned undelivered. The Legal Officer sought the Arbitrator's advice.
- 3.6. The same day, i.e., June 26, 2018, the Arbitrator notified the Parties that even though the courier containing the Complaint had not been delivered, since the Respondent confirmed receipt of the electronic version of the Complaint, by email dated June 19, 2018, the electronic service of the Complaint can be safely treated as service of the Complaint on the Respondent.
- 3.7. On June 26, 2018 the Arbitrator informed the parties that though no response had been received by the Respondent within the 10-day period that was granted, an additional 5 days will be given to the respondent to file a reply, and that if no reply was filed by July 1, 2018, the award will be passed on merits.

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Since the Respondent failed to submit any response or documents within the stipulated time, and in accordance with the Rules, this Complaint is being decided on merits based on materials submitted by the Complainant and contentions put forth by it.

Grounds for Administrative Proceedings:

- A. The disputed domain name is identical to the Complainant's trade mark, which also forms part of its domain name www.toter.com and corporate name;
- B. The Respondent has no rights or legitimate interest in the disputed domain name; and
- C. The disputed domain name was registered and is being used in bad faith.

4. **Summary of the Complainant's Contentions:**

In support of its case, the Complainant, has made the following submissions:

- 4.1. The Complainant was established in the year 1960 as an automated cart system for curb-side garbage collection and has been continuously using the trade mark TOTER since its inception. The Complainant has been recognized as the leading manufacturer and/or top selling cart brand inter alia of two-wheeled carts for curb-side automated waste, recycling and organics collection by cities, private waste haulers and recyclers.
- 4.2. The Complainant offers parts and kits, such as lid kits and wheel kits; and accessories, including cart liners. In addition, it offers custom services, including cart maintenance, cart assembly and delivery, RFID cart management, and cart recycling. The Complainant's branded products bearing the TOTER mark are used for various applications, such as medical waste, secure document management, and e-waste, as well as for storing birdseed, dog food, sports equipment, and other

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applications. It serves homeowners; waste haulers; municipalities/government; and industrial, commercial, and institutional customers, including universities, manufacturing facilities, shopping centers, restaurants, hospitals, stadiums, and convention centers.

4.3. The Complainant has an extensive presence on the Internet and maintains an active website under its domain name www.toter.com. The said website has extensive information about the Complainant's products and brands and is accessible from all over the world including India. This website was used and applied for registration long before the Respondent's registration of the disputed domain name. The Complainant's trade mark is featured throughout the website, and the Complainant clearly claims ownership of the trade mark TOTER since 1960.

4.4. The Complainant is the registered proprietor of the trade mark TOTER in India, bearing registration No. 3550077 for goods under Classes 20 and 21. The registration is valid, and subsisting. The Complainant's trade mark was used long before the Respondent's registration of the disputed domain name.

4.5. In addition to the aforesaid registration, in order to fully protect its trade mark rights, the Complainant owns trade mark registrations for the TOTER mark in numerous countries throughout the world including but not limited to United States, Great Britain, Peru, Germany, Canada, Switzerland, Italy, Mexico, Argentina and Benelux.

4.6. The Complainant's trade mark TOTER stands registered in the United States, the application for registration of the mark TOTER was made with a user claim since the year 1962 in the United States. The Complainant has invested significant amounts of time, effort and resources in developing, advertising and promoting its

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earlier trade mark TOTER in connection with its said goods and services. In the year 2007, the Complainant joined the Wastequip family, the leading North American manufacturer of waste handling and recycling equipment.

4.7. The Complainant's domain name <http://www.toter.com/> was created on April 15, 1997 and since then the trade mark TOTER has been extensively and continuously used on the said website. The Complainant has established significant fame and goodwill in its trade mark TOTER. The products offered under the earlier trade mark TOTER have received unsolicited media recognition. The earlier trade mark TOTER has been a subject matter of various articles published in magazines and newspapers.

4.8. The Complainant's products and services bearing the trade mark TOTER are sold through its network of retailers, sales representatives, and distributors, as well as through online portals. The Complainant's products bearing the Complainant's TOTER mark are available for sale in various countries through distributors and e-commerce portals. In the year 1990, the Complainant started selling the TOTER branded product in Japan and other Asian countries through exclusive distributors. The Complainant's use of their well-known and prior trade mark has been extensive, exclusive and continuous all across the world. The Complainant's TOTER branded products are available in India through e-commerce portals such as www.amazon.com and www.ebay.in

4.9. The Complainant has also been very active virtually over all of the popular social media platforms. The Complainant engages with its customers and prospective clients on various social media platforms such as Facebook, LinkedIn and Twitter in various markets, and uses these engagements to build customer goodwill and recognition of the brand TOTER.

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4.10. As a result of the Complainant's marketing and promotion of its goods under its trade mark TOTER, the mark has gained worldwide recognition and goodwill and has become very well-known. Moreover, the Complainant's trade mark has firmly been associated with the Complainant prior to the Respondent's registration of the disputed domain name.

4.11. The disputed domain name toter.in is identical to the Complainant's trade mark and domain name www.toter.com. The dominant and distinctive feature of the disputed domain name is the incorporation of the Complainant's trade mark, with the addition of only the top-level country code domain for India-.in. The Respondent's domain name contains the Complainant's earlier and well-known trade mark TOTER in its entirety, thereby violating the Complainant's rights. Additionally, the Respondent is using the disputed domain name for offering services pertaining to garbage collection and recycling in India which utilize and are highly related to the products sold by the Complainant worldwide. Such adoption and use of the disputed domain name with respect to nearly identical industry or business is likely to dilute the brand equity of the Complainant.

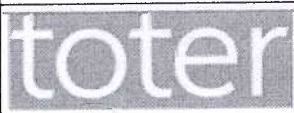
4.12. The Complainant upon learning about the disputed domain name, conducted a search on the WHOIS record and found that the Registrant of the disputed domain name is one Mr. Robert Whiting who is a resident of Atlanta, Georgia, United States of America. Mr. Robert Whiting is the Co-Founder and Director of Respondent. This finding demonstrated that the Respondent had actual knowledge of the Complainant's prior trade mark rights and had intentionally sought to violate, and benefit from the enormous goodwill generated by the Complainant's earlier trade mark TOTER.

4.13. Concerned by these findings, the Complainant sent a cease and desist notice dated April 15, 2017 to the said Respondent calling upon them to immediately cease and desist from rendering any services under the impugned mark TOTER and to immediately transfer the disputed domain name toter.in. As no response was received by the Respondent, on May 08, 2017, the Complainant's counsel Lall & Sethi sent a reminder letter to the Respondent.

4.14. On May 30, 2017, the Complainant received a response from the Respondent wherein the Respondent refused to comply with the requisitions of the Complainant and further refused to transfer the disputed domain name to the Complainant. However, the Respondent informed the Complainant that they are willing to settle the matter and further requested to send them terms of Settlement.

4.15. The Complainant in order to settle the matter amicably, through their legal counsels addressed a settlement proposal letter dated August 03, 2017 to the Respondent. Vide the said letter the Complainant provided time till October 2017, to the Respondent to transfer the Dispute Domain name. However, the Respondent vide letter dated September 07, 2017 refused to comply with the requisitions.

4.16. The Respondent herein has filed applications for identical mark TOTER in the Trade Marks Registry

Trademark	Number	Class	Date
	3545852	39	May 10, 2017
TOTER	3562827	39	June 3, 2017

toter	3562828	39	June 3, 2017
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4.17. In order to protect its statutory rights in the earlier and well-known trade mark, the Complainant has opposed the said applications of the Respondent. It is further submitted that the Trade Marks Registry passed an order of Abandonment with respect to the Respondent's impugned application No. 3562827, due to lack of prosecution. Hence the impugned application for the mark TOTER bearing No. 3562827 stands abandoned. The Applications for the mark TOTER (stylized) bearing No. 3545852 and No. 3562828 stand Opposed and are pending before the Trade Marks Registry. The Respondent filed the aforesaid applications subsequent to the Complainant's cease & desist notice dated April 15, 2017, despite being put on notice of the Complainant's prior rights in the trade mark TOTER. The malafide intentions of the Respondent is evident because it wrongfully claimed proprietorship over the mark TOTER. that despite being put on notice.

4.18. It was also submitted that the Respondent had recently changed the registrant of the disputed domain name from Mr. Robert Whiting to Waste Ventures.

4.19. In support of the contention the Complainant has furnished copies of the following documentation:

A	A copy of the INDRP and the Rules
B	Copies of database queries related to the domain name, www.toter.in
C	A list of Accredited Registrars on the .IN Registry website

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D	Copies of webpages on the Complainant's website www.toter.com evidencing that the Complainant is in the business of manufacturing and/or top selling cart brand inter alia of two-wheeled carts for curb-side automated waste, recycling and organics collection by cities, private waste haulers and recyclers.
E	Copies of webpages documenting some of Respondent's TOTER branded products
F	Copies of webpages from the Complainant's website evidencing the use of the trade mark TOTER
G	A copy of "About us" webpage taken from the Complainant's website
H	A copy of the registration certificate for trademark No. 3550077, dated May 12, 2017
I	Copies of foreign Registration Certificates belonging to the Complainant
J	A copy of the relevant extract of the US registration for TOTER from the official website of United States of Patent & Trademark Office
K	Copies of webpages taken from the Complainant's website and its associated company's website
L	A copy of the www.whois.com webpage evidencing the prior registration of the Complainant's domain name http://www.toter.com/
M	Copies of articles from magazines evidencing the use of the Complainant's mark TOTER
N	Copies of webpages demonstrating that the Complainant's TOTER branded products are available in India through e-commerce portals
O	Copies of the press release showing the use of the mark TOTER by the Complainant
P	Copies of the Complainant's various social media pages
Q	A copy of the webpage extract from the www.whois.com taken on April 04, 2017 evidencing that the domain name was initially in the name of Mr. Robert Whiting
R	Copies of documents evidencing Mr. Robert Whiting's role in Waste Ventures
S	A copy of the cease and desist letter dated April 15, 2017 sent to the said Respondent

T	A copy of the said abandonment order for Respondent's impugned application No. 3562827
U	Copies of webpages of the Complainant's website
V	Copies of all the cited cases mentioned in the Complaint

5. **The Respondent and his default**

Though the Respondent acknowledged receipt of the electronic service of the Complaint, the Respondent has not filed any response to the Complaint. 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 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 submit a response against the Complaint.

As previously indicated; the Arbitrator gave the Respondent 10 days and an additional 5 days to respond to the Complaint but the Respondent failed to file any reply to the Complaint and has sought not to answer the Complainant's assertions, evidence or contentions in any manner. The Arbitrator finds that the Respondent has been given a fair opportunity to present its case.

The Rules in 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 paragraph 12 of the Rules, 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 decision is based upon the Complainant's assertions and evidence and inferences drawn from the Respondent's failure to reply despite having been given an opportunity to submit a response.

6. Discussions and Findings

The submissions and documents provided by Complainant lead to the conclusion that Complainant has prior rights in and to the TOTER mark and that the Respondent does not have any relationship with the business of the Complainant or any legitimate interest in the TOTER mark. Moreover, the Complainant has not authorized the Respondent to use the TOTER mark.

It's a well-established principle that that once a Complainant makes a prima facie case showing that a Respondent lacks 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.

6.1. The issues involved in the dispute

The Complainant invokes paragraph 4 of the Policy in its Complaint which determines the elements for a domain name dispute, which are,

- 1) whether the domain name in question is identical or confusingly similar to a trademark,
- 2) why the Respondent cannot claim any legitimate interest in the trademark and
- 3) why it must be considered that the domain name in question is registered in bad faith.

These elements are discussed below in tandem with the facts and circumstances of

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this case:

Element 1 - The Respondent's domain name is identical / confusingly similar to a name, Trade Mark or service in which the Complainant has rights: The Arbitrator is of the view that the Complainant has submitted enough documentary evidence to prove its rights in and to the ownership of the TOTER mark. The TOTER mark has been extensively used by the Complainant to identify its business and goods.

Paragraph 3 of the INDRP confers the burden on the Respondent to determine whether the Respondent's domain name registration infringes or violates someone else's rights before applying for registration of the domain name, and the Respondent has failed this responsibility. A cursory glance at the disputed domain name < totter.in> makes it obvious that the disputed domain name is identical to the Complainant's TOTER mark, because the disputed domain name contains the Complainant's TOTER mark in its entirety. In addition, the disputed domain name resolved to a website which offers services pertaining to garbage collection and recycling in India, which are highly related to the products sold by the Complainant worldwide. Since the Respondent has adopted an identical mark and provides services that can be considered related to the products of the Complainant, the use of the Complainant's TOTER mark in the disputed domain name will inevitably lead consumers to believe that the disputed domain name is affiliated to the Complainant. Hence the first element is satisfied.

Element 2 - The Respondent has no rights or legitimate interests in respect of the disputed domain name: The Complainant has, in its submissions established that it has never assigned, granted, licensed, sold, transferred or in any way authorized the Respondent to register or use its TOTER marks. The burden of proof to establish any legitimate interests over the disputed domain name falls on the Respondent, and by not responding to the Complaint, the Respondent has failed to establish legitimacy of use of TOTER by it.

For these reasons, the Arbitrator finds that the Respondent has no rights or legitimate interests in the disputed domain name.

Element 3 - The disputed domain name has been registered or is being used in bad faith:

Paragraph 6 of the INDRP determines what constitutes bad faith. It includes circumstances where the Respondent is using a domain name despite being aware that it is willfully infringing on a proprietor's trademark.

The Complainant's TOTER trademark is arbitrary for thrash collection services, and the adoption of an identical mark demonstrates that it is highly likely, that the Respondent registered the disputed domain name in bad faith. In order to protect its TOTER trademark against infringement and dilution, the Complainant sent the Respondent Cease and Desist Letters. While the Respondent has not annexed the response to the Cease and Desist letters, where it alleges that the Respondent requested the Complainant to send the terms of settlement, it is evident that the Respondent filed for TOTER trademarks in bad faith because the Respondent applied for them after the first Cease and Desist letter was issued. Moreover, the identical adoption of the highly distinctive and arbitrary TOTER trademark would create a likelihood of confusion and deception amongst the members of trade and public, that the services from the website that resolves at www.toter.in originate from the Complainant. Such adoption and unjustified use of the Complainant's TOTER mark is likely to dilute the brand equity of the Complainant.

It appears beyond doubt that the Respondent adopted a domain name that is identical to the trademark of the Complainant without authorization for commercial gain and therefore, allowing the disputed domain name to continue to operate, is likely to cause significant harm to the public and to the Complainant.

The above leads to the conclusion that adoption by the Respondent of the disputed domain

name shows opportunistic bad faith.

7. **Decision:**

In view of the foregoing, I am convinced that the Complainant has a legitimate right to the disputed domain name; the Respondent has no rights or legitimate interests in respect of the disputed domain name; and the Respondent's registration and use of the disputed domain name is in bad faith. In accordance with the Policy and Rules, I direct that the disputed domain name be transferred to the Complainant with immediate effect.

The parties are to bear their own costs.

Dated: August 7, 2018

A handwritten signature in black ink, appearing to read 'Pooja Dodd', written over a horizontal line.

Pooja Dodd
Sole Arbitrator