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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 464 OF 2013**

Telepathy, Inc.

A corporation organized under the laws of
United States of America and having its address
at P.O. Box 11077, Washington,
District of Columbia 20008, United States of
America

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Petitioner

Versus

1. Directi Internet Solutions Pvt. Ltd. d/b/a
www.publicdomainregistry.com having
its address at DirectiPLEX, Next to Andheri
Subway, Old Nagardas Road, Andheri (East),
Mumbai 400 069.
2. The National Internet Exchange of India,
having its address at Incube Business
Centre, 5th Floor, 18, Nehru Place,
New Delhi 110019.
3. .IN REGISTRY,
C/o. NIXI (The National Internet Exchange
of India), having its address at Incube
Business Centre, 5th Floor, 18, Nehru
Place, New Delhi 110019.
4. ARBITRATOR (Ms. Deepa Gupta) OF NIXI
(The National Internet exchange of India),
having its address at Incube Business
Centre, 5th Floor, 18, Nehru Place,
New Delhi 110019, and at C6/77,
East of Kailash, New Delhi 110065.
5. Flsmidh A/s
Flsmidh House, 34, Egatoor,
Kelambakkam, (Rajiv Gandhi Salai),
Chennai 603 103, India

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Respondents

Mr.Nishad Nadkarni along with Mr. Sumeet Rane i/by Legasis Partners for petitioners.

None for respondents.

CORAM : R.D.DHANUKA J.
RESERVED ON : JANUARY 05, 2015
PRONOUNCED ON : JANUARY 13, 2015

ORAL JUDGMENT :

By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, petitioner has impugned the arbitral award dated 22nd January, 2013 passed by the learned arbitrator holding that the complaint of the respondent no.5 was an attempt to save its domain name from highjacking by the petitioner and in good faith with no intention to harass the petitioner or abuse process of law and the name FLS.CO.IN was thereby transferred to respondent no.5 with immediate effect.

2. Learned counsel for the petitioner states that the respondents are served with the copy of the petition along with annexures. None appears for the respondents though served. No affidavit in reply is filed by the respondents.

3. Some of the relevant facts for the purpose of deciding this petition are as under :

(a) It is the case of the petitioner that the petitioner is a renowned company incorporated under the laws of United States of America carrying on varied business including providing search

engine services, web development services, on line (over the internet) marketing, advertisement and promotions. The petitioner invests in the growth of the commercial internet and develops internet-related businesses. The petitioner is owner of several domain names through which it carries on its aforesaid business.

(b) On 24th March, 2005 petitioner adopted and registered the domain names FLS.CO.IN and FLS.IN with respondent no. 1. The domain name FLS.CO.IN is the subject matter of the present petition. It is the case of the petitioner that the petitioner has been using the said domain name FLS.CO.IN since 24th March, 2005 in relation to the search engine services, advertising services and online marketing. According to the petitioner, the said domain name FLS is an abbreviation of “FIND, LOOKUP, SEARCH”. According to the petitioner, it is a short 3 lettered domain name which is easy to remember.

(c) On 14th July, 2011, petitioner received a cease and desist notice (through email) from respondent no. 5's foreign attorney requiring the petitioner to cease and desist from using the domain names FLS.IN and FLS.CO.IN. By letter dated 14th July, 2011 the petitioner rebutted the said claim of respondent no. 5 in respect of the domain name FLS.CO.IN.

(d) By email dated 15th July, 2011, foreign attorney of the respondent no. 5 proposed settlement with the petitioner.

Petitioner responded to the said email by email dated 16th July, 2011 conveying that the petitioner was open to discussing the settlement. There was further correspondence exchanged between the parties in that regard. The settlement however, did not materialize.

(e) The respondent no.5 thereafter filed a complaint against domain name FLS.IN of the petitioner. Petitioner however, was not served with any arbitration proceedings from NIXI/.INREGISTRY as contemplated by the INDRP Rules or procedure. Learned arbitrator in the said proceedings passed an ex parte interim order against the petitioner. Petitioner has impugned the said order by filing Arbitration Petition (Lodging) No. 389 of 2012 under section 9 of the Arbitration and Conciliation Act, 1996. By an order dated 16th March, 2012, this court in Arbitration Petition (L) No. 389 of 2012 stayed the enforcement of the said award. This court also granted ad interim relief to the petitioner restraining the Registrar, NIXI/.INREGISTRY and the arbitrator from transferring the domain name FLS.IN to respondent no. 5. The said ad interim order however, came to be vacated by order dated 27th April, 2012 in view of the petitioner having failed to prove service of the arbitration proceedings on the Registrar/.INREGISTRY/NIXI. Petitioner immediately preferred an appeal before the Division Bench. By an order dated 27th April, 2012, the Division Bench allowed ad interim relief which was granted by the learned Single Judge by order dated 21st March, 2012 until further orders. By an order dated 31st July, 2012, the said appeal was finally allowed by

the Division Bench.

(f) By an order dated 13th August, 2012, this court disposed of the Arbitration Petition No. 342 of 2012 in terms of the ad interim order dated 21st March, 2012 thereby restraining the Registrar/.INREGISTRY/NIXI and the learned arbitrator from transferring the domain name FLS.IN to respondent no. 5 till final hearing of the appeal. On 21st May, 2012 petitioner received an email communication from respondent no. 2 stating that respondent no. 4 had been appointed as an arbitrator in respect of the complaints filed in relation to the domain name FLS.IN.

(g) Petitioner by letter dated 24th May, 2012 to respondent no. 3 informed that the petitioner had not received any communication from the complainant against the domain name FLS.CO.IN and requested for a copy of the complaint and also requested that no proceedings be started until petitioner receives a copy of the complaint. Petitioner also placed on record that the procedure set out under the INDRP rules was not being followed.

(h) Respondent nos. 2 and 3 by email dated 25th May, 2012 called upon respondent no. 5 to forward a copy of the complaint to the petitioner. By email dated 25th May, 2012, respondent no. 5 enclosed a copy of the complaint without annexures to the petitioner. Petitioner in the email dated 29th May, 2012 addressed to respondent no. 5 recorded that petitioner had not at all received the courier allegedly sent by respondent no. 5 and had

not received the exhibits to the complaint. Petitioner received annexures to the complaint thereafter. It is the case of the petitioner that petitioner received for the first time, a copy of the complaint from respondent no. 5, though respondent nos. 2 and 3 had not yet sent official intimation with copy of the complaint to the petitioner as provided under the said rules.

(i) By email dated 4th June, 2012, petitioner confirmed to respondent nos. 2 and 3 that it had received a copy of the complaint and annexures from respondent no. 5 but no official intimation of the complaint had been issued to the petitioner from respondent nos. 2 and 3 as mandated by INDRP rules. Petitioner pointed out the alleged discrepancies in the procedure followed in and set out its concern that fair hearing may not be accorded to the petitioner. Petitioner sent reminder to respondent nos. 2 and 3 and also respondent no. 4 on 8th June, 2012. There was no communication from respondent nos. 2 to 4 to the petitioner as required under the said rules.

(j) It is the case of the petitioner that since no intimation was received by the petitioner from respondent nos. 2 and 3 or learned arbitrator nor any complaint was served on the petitioner by respondent no. 3 as per rules, Petitioner through its attorneys, as and by way of abundant precaution, intimated the learned arbitrator that they would be representing the petitioner, by email on 11th June, 2012. Even in the said email it is recorded that petitioner had neither received official communication of the

complaint from respondent no. 3 nor any intimation from respondent no. 4. Petitioner informed that all the future communications with regard to the complaint should be addressed to the attorneys of the petitioner. Petitioner conveyed that it was desirous of filing response to the complaint. Petitioner sent a reminder on 13th June, 2012 to the learned arbitrator. Petitioner thereafter filed response to the said complaint on 14th June, 2012 and resisted the said complaint on various grounds. Petitioner reserved its right to file further response upon receipt of the official copy of the complaint and notification from respondent no. 4. There was no response to the said correspondence. Petitioner thereafter sent reminders to respondent no. 4 by various letters.

(k) On 31st January, 2013 petitioner received email intimation from respondent nos. 2 and 3 intimating that the complaint had been decided by the learned arbitrator and that the decision was pronounced on 22nd January, 2013 by the learned arbitrator which was available for access on the website of respondent no. 3. By the said award dated 22nd January, 2013 passed by the learned arbitrator, learned arbitrator ordered transfer of the said domain name to respondent no. 5. It is the case of the petitioner that neither the petitioner nor its attorneys received any notification of the alleged award from the learned arbitrator.

(l) Petitioner therefore, filed this petition under section 34 of the Arbitration and Conciliation Act, 1996 for impugning the arbitral award dated 22nd January, 2013 on various grounds. By order dated

11th June, 2013 this court admitted this petition. None had appeared for the respondents even at that stage though served.

4. Learned counsel for the petitioner submits that the petitioner had neither received a copy of the complaint from respondent nos. 2 and 3 nor received arbitral award from the learned arbitrator. It is submitted that the same was in violation of the INDRP rules. The entire proceedings thus were vitiated on that ground alone.

5. It is submitted by the learned counsel for the petitioner that petitioner was unable to present its case as contemplated by section 34, since no proper opportunity was rendered to the petitioner of being heard. The proceedings adopted by the learned arbitrator had not been carried out in accordance with the said INDRP rules. It is submitted by the learned counsel that the impugned award directing transfer of domain name FLS.CO.IN to respondent no. 5 is contrary to the public policy and award suffers from patent illegality.

6. Learned counsel submits that though respondent no. 5 had failed to prove any of the grounds set out in Rule 4 of the said rules, learned arbitrator has granted reliefs in favour of respondent no. 5. Learned counsel submits that admittedly the respondent no. 5 had no trade mark rights in FLS.IN when the petitioner acquired impugned domain name FLS.CO.IN. Respondent no. 5 has not been using the mark FLS.IN till date and have no goodwill and/or reputation in relation to the same. Though respondent no. 5 failed to prove that the petitioner had no legitimate interest in the impugned domain name and though respondent no. 5 failed to prove any bad faith of

the petitioner contrary to and in violation of the said rules, learned arbitrator has allowed the claim of respondent no. 5. Since the learned arbitrator has decided contrary to the terms of the rules which were mandatory and binding not only on the parties but also to the learned arbitrator, the award is in conflict with the public policy.

7. Learned counsel submits that even according to respondent no. 5 they were not making commercial use of the mark FLS.IN when the petitioner acquired the said domain name FLS.CO.IN nor respondent no. 5 had any presence in the consumer market at that time in India. The complaint came to be filed after six years of the acquisition of the said domain name by the petitioner. Learned arbitrator ought to have rejected the complaint on that ground itself.

8. Learned counsel invited my attention to the detailed reply filed by the petitioner before the learned arbitrator and also to the complaint filed by respondent no. 5 and would submit that the entire award is totally one sided. None of the submissions raised by the petitioner in response to the complaint have been considered at all in the impugned award. The award suffers from violation of principles of natural justice on this ground also.

9. Learned counsel submits that the learned arbitrator has erroneously held that respondent no. 5 has registered FLS for its various business at different places all over the world though admittedly respondent no. 5 had no registration in India at the time when the petitioner had already registered domain name FLS.CO in India.

10. It is submitted by the learned counsel that various findings rendered by the learned arbitrator against the petitioner are totally perverse and ignoring the response filed by the petitioner in toto.

11. Perusal of .IN Domain Name Dispute Resolution Policy (INDRP) provides as to types of disputes which if arise between the parties, complaint to the .IN Registry can be filed by the person aggrieved. Rule 4 and 5 of the said INDRP rules which are heavily relied upon by the learned counsel for the petitioner are extracted as under :

“4. 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 Registrant's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights;

(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 Registrant 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.

5. Procedure of Dispute Resolution : The .IN Registry shall appoint an Arbitrator out of the list of arbitrators maintained by the Registry.

The List of the Arbitrators shall be published on line by the .IN Registry on its website at www.registry.in.

The Arbitrator shall conduct the Arbitration Proceedings in accordance with the Arbitration & Conciliation Act, 1996 as amended from time to time and also in accordance with this Policy and rules provided thereunder.”

12. Perusal of the record clearly indicates that though petitioner had repeatedly called upon respondent nos. 2 and 3 to furnish copy of the complaint with annexures officially to the petitioner which was filed by respondent no. 5 admittedly, no copy of such complaint with annexures came to be served by respondent nos.2 and 3 upon the petitioner as required under the said INDRP Rules. Under the INDRP rules or procedure annexed at Exh. B to the petition, .IN Registry is under obligation to ensure to employ reasonably available means to serve notice of complaint to the Respondents. The complaint has to be sent in electronic form (including annexes to the extent available in that form) by the Registry. Reliance in support of this submission is placed on rule 2 and 3 of the INDRP Rules or procedure. Perusal of the said INDRP rules or procedure indicates that .IN Registry has to forward the complaint to the respondents within three working days on receipt of the prescribed fees in accordance with the Dispute Resolution Policy and Rules of Procedure. Under Rule 4(c) the date of commencement of the arbitration proceeding shall be the date on which the Arbitrator issues notice to the Respondent as stipulated under Paragraph 5(c) of the said Rules of Procedure. Perusal of the record indicates that no such notice to the respondent (petitioner herein) came to be issued by the learned arbitrator as was mandatory under the rules 4 and 5 of the INDRP Rules of Procedure.

13. Under rule 8 of the said rules, the arbitrator is required to conduct the arbitration proceedings in accordance with the provisions of Arbitration and Conciliation Act,1996, Dispute Resolution Policy, the Rules of Procedure and any bye-laws, rules and guidelines framed thereunder. Perusal of the record indicates that the learned arbitrator has not conducted the proceedings in accordance with the provisions of the Arbitration and

Conciliation Act, 1996 and also Dispute Resolution Policy, Rules of Procedure and bye-laws.

14. Perusal of the record clearly indicates that the entire award of the learned arbitrator is totally one sided. None of the submissions/contentions raised by the petitioner in response to the complaint has at all been considered by the learned arbitrator.

15. In my view, the learned arbitrator has rendered the impugned award in gross violation of the principles of natural justice. Learned arbitrator was bound to consider the issues and submissions raised by the petitioner in response to the complaint which was admittedly on record before the learned arbitrator. In my view, the learned arbitrator has not treated both the parties equally.

16. Since the impugned award is rendered without considering the submissions urged by the petitioner and is in violation of the INDRP rules and also provisions of the Arbitration and Conciliation Act, 1996, the award in my view is in conflict with the public policy and deserves to be set aside.

17. Since none appears for the respondents, averments made in the petition are deemed to have been admitted. Though it was undisputed position that the complaint was filed by the respondent no. 5 after six years of the petitioner having obtained domain name in question, the learned arbitrator did not consider this crucial aspect in the entire award. Learned arbitrator also did not consider the admitted fact that respondent no. 5 had not obtained any registration of the said domain name in India prior to the

petitioner having obtained the said domain name and having it registered. In my view the award demonstrates patent illegality and deserves to be set aside.

18. Though the petitioner had called upon respondent nos. 2 and 3 to comply with the terms and conditions of the rules by effecting service of the complaint along with annexures upon the petitioner in accordance with said rules, respondent nos. 2 and 3 did not comply with the said mandatory provisions and did not furnish copy of the complaint along with annexures. Learned Arbitrator therefore, could not have proceeded with the arbitration proceedings till such time the mandatory procedure of service and intimation of the complaint along with annexures was duly complied with by respondent nos. 2 and 3. Learned arbitrator also did not issue any notice and/or intimation to the petitioner. The entire award is thus vitiated on this ground also.

19. I, therefore, pass the following order :-

- (a) Arbitration Petition is made absolute in terms of prayer clause (a).
- (b) There shall be no order as to costs.

(R.D.DHANUKA, J.)