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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Decided on: 03.07.2023*

+ O.M.P. (COMM) 188/2019 & I.A. 6764/2019

MICROSOFT CORPORATION

..... Petitioner

Through: Mr. Ashim Sood, Ms. Anditya,
Ms. Jasleen Kaur, Advocates.

versus

ZOAI FOUNDER

..... Respondent

Through: Mr. Vishal Bakshi, Ms.
Kanchan Vashisht, Mr. Pradeep
Shukla, Advocates.

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CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****JUDGMENT**

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner challenges an award dated 18.02.2019, rendered by a learned sole Arbitrator under the "*IN Domain Name Dispute Resolution Policy*" [hereinafter referred to as "the INDRP"]. By the impugned award, the learned Arbitrator has declined the petitioner's claim for transfer of the disputed domain name- <https://zoai.in/> by the respondent to it.

A. Facts:

2. The petitioner claims to have diverse products and services, including computer software, computer services, devices, and other

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technological solutions, for which it is the owner of various trademarks, including the trademark “Zo”. It claims to have launched an artificial intelligence chatbot in December, 2016, named “Zo”.

3. The petitioner, therefore, made a complaint before the National Internet Exchange of India [hereinafter referred to as “NIXI”] against the registration of the disputed domain name by the respondent. The dispute was to be resolved by an arbitrator appointed by NIXI, in terms of the INDRP. By a communication of the NIXI dated 31.12.2018, Mr. Ankur Raheja was appointed as the Arbitrator to adjudicate disputes relating to the disputed domain name-<https://zoai.in/>.

4. The respondent did not enter appearance in the arbitral proceedings, and was set *ex-parte* by the order of the learned Arbitrator dated 24.01.2019. The impugned award records that no personal hearing was requested or held.

5. The learned Arbitrator thereafter made the impugned award, rejecting the petitioner’s claims.

B. Submissions of learned counsel for the parties:

6. At the outset, Mr. Ashim Sood, learned counsel for the petitioner, accepted that the present arbitral proceedings constitute an “*International Commercial Arbitration*”¹, as the petitioner is an entity incorporated outside India. He, therefore, proceeded on the basis that the ground of patent illegality, available under Section 34(2A) of the Act, is not available to the petitioner. He, however, urged the following arguments in support of his contention that the impugned

¹ As defined under Section 2(1)(f) of the Act.



award is liable to be set aside on the grounds enumerated in Section 34(2) of the Act:-

- A. Mr. Sood submitted that the impugned award is vitiated by bias on the part of the learned Arbitrator, for which purpose he referred to a web page entitled “*Hall of Fame*” on the website *www.indrp.com*². Mr. Sood submitted that the aforesaid web page has, in fact, been established, and is maintained by the learned Arbitrator. He drew my attention to the fact that the name of the learned Arbitrator himself appears in the “*Hall of Fame*” in the category of “*Arbitrators who have denied most INDRP complaints: 4(four)*”³. According to Mr. Sood, such a comment by the learned Arbitrator shows a distinct predisposition to deny INDRP complaints, such as the one made by the petitioner. In support of this submission, Mr. Sood cited the judgments of the Supreme Court in *State of West Bengal and Others vs. Shivananda Pathak and Others*⁴, and *Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Limited*⁵.
- B. Mr. Sood referred to paragraphs 7(ii)(E), 7(ii)(F) and 7(ii)(H) of the impugned award to submit that the learned Arbitrator had undertaken independent research, both on factual and legal aspects, to meet the case made out by the petitioner, even in the absence of the respondent. He submitted that these materials were never put to the petitioner, which rendered it effectively

² Refer page No. 368 of the petitioner’s list of documents.

³ *Ibid.*

⁴ (1998) 5 SCC 513 [paragraphs 26, 29 and 30].

⁵ (2017) 4 SCC 665 [paragraph 20].

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unable to present its case, contrary to Section 34(2)(a)(iii) of the Act. On this aspect, Mr. Sood placed reliance upon the judgment of the Supreme Court in *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)*⁶, the judgment of a Division Bench of the Madras High Court in *M/s. Tribol Engineering Pvt. Ltd. vs. Indian Oil Corporation Ltd. & Others*⁷, and of the High Court of Justice, England and Wales, in *Fleetwood Wanderers Limited vs. AFC Fylde Ltd*⁸.

C. Mr. Sood submitted that the impugned award was uploaded by the learned Arbitrator on the site *www.indrp.com* on 20.02.2019⁹, even prior to its publication by NIXI. In this regard, he referred to a communication of NIXI dated 21.02.2019¹⁰, which stated that the award dated 18.02.2019 had been uploaded, but submitted that it had not, in fact, been uploaded at that stage.

D. Mr. Sood submitted that the learned Arbitrator has proceeded directly contrary to a binding judgment of a co-ordinate Bench of this Court in *Stephen Koenig vs. Arbitrator, National Internet Exchange of India (NIXI) & Another*¹¹ on an interpretation of paragraph 4 of the INDRP, which deals with the pre-requisites

⁶ (2019) 15 SCC 131 [paragraph 52].

⁷ (1998) (III) CTC 385 [paragraphs 43-48].

⁸ [2018] EWHC 3318 (COMM).

⁹ Refer page No. 365 of the petitioner's list of documents.

¹⁰ Refer page No. 366 of the petitioner's list of documents.

¹¹ (2012) 186 DLT 43.

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for an action thereunder¹². Mr. Sood submitted that this Court has interpreted paragraph 4 of the INDRP to suggest that satisfaction of paragraph 4(a) is itself sufficient for granting relief to a complainant, whereas the learned Arbitrator has withheld relief on an interpretation that paragraphs 4(a), (b) and (c) thereof must cumulatively be satisfied. He points out that the impugned award contains a finding in favour of the petitioner with regard to paragraph 4(a) of the INDRP.

7. Mr. Vishal Bakshi, learned counsel for the respondent, on the other hand, submitted that none of the grounds raised by the petitioner require setting aside of the award by the Court under Section 34(2) of the Act. On each of the arguments enumerated above, Mr. Bakshi submitted as follows:-

A. Mr. Bakshi submitted that the comments of an arbitrator on a website, which may have been made even after the award was pronounced, cannot justify the setting aside of an award on the ground of bias. He disputed Mr. Sood's characterization of the "Hall of Fame" on the learned Arbitrator's website as evidence of a predisposition or propensity to decide against the petitioner. He relied upon paragraph 30 of the judgement of the Supreme Court in *Shivananda Pathak*¹³ to urge that the aforesaid comment by the learned Arbitrator can, at best, be taken as a

¹² The judgment of the learned Single Judge was sustained by the Division Bench in *Stephen Koeing vs. Arbitrator NIXI & Another* (2015) 224 DLT 407 (DB). The judgment of the Division Bench was carried in appeal in Special Leave Petition (Civil) No 6170/2016, However, the Supreme Court, *vide* an order dated 11.04.2016, declined special leave to appeal.

¹³ *Supra* (note 4).

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general view on law or policy, and does not evidence bias in a given case.

B. Mr. Bakshi submitted that the proceedings in an arbitration are not required to be conducted in the same manner as in Courts, and the reliance of the Arbitrator upon material which was publicly available by means of a Google search ought not to be proscribed. He argued that the petitioner's allegation is based upon findings in the impugned award with regard to the generic nature of the petitioner's mark "Zo", and lack of popularity of the brand in India. These facts were required to establish two elements of the test under Rule 4 of the INDRP, viz. the registrant's legitimate interest in the domain name and the question of bad faith in the registration, the onus of proof on both these points being on the petitioner. According to Mr. Bakshi, even in the petition under Section 34 of the Act, the factual findings of the learned Arbitrator on these points have not been disputed, which makes it clear that the petitioner was, in fact, not prejudiced as the Arbitrator's research had no effect on the outcome of the proceedings. To this extent, Mr. Bakshi distinguished the judgment in *Ssangyong*¹⁴, and instead commended the approach laid down by the Supreme Court in *State of U.P. v. Sudhir Kumar Singh*¹⁵.

C. Mr. Bakshi submitted that the petitioner has failed to establish that the learned Arbitrator had, in fact, uploaded the award prior

¹⁴ Supra (note 6).

¹⁵ 2020 SCC OnLine SC 847 [paragraph 36, 37 and 39]



to its publication by NIXI. He submitted that the award was sent to the parties on 18.02.2019 itself.

D. With regard to Mr. Sood's submission on the interpretation of Clause 4 of the INDRP, Mr. Bakshi submitted that such an error does not meet the threshold for challenge of an award in an international commercial arbitration. He pointed out that the misinterpretation of the Rules would, at best, constitute an illegality in the award, which is not capable of challenge under Section 34(2) of the Act.

8. In rejoinder, Mr. Sood submitted that the test of prejudice cannot be a precondition in the face of Section 18 of the Act, which incorporates a statutory mandate that parties must be given a reasonable opportunity of hearing. It is that statutory mandate which, according to Mr. Sood, has been upheld in *Ssangyong*¹⁶. Mr. Sood also cited the decision of the Supreme Court in *T. Takano v. SEBI*¹⁷ to submit that, in such circumstances, the test to be applied is as to whether the material discovered by the learned arbitrator was relevant to his adjudication, rather than a test of prejudice alone.

C. Analysis:

1. Re: Challenge on the ground of bias:

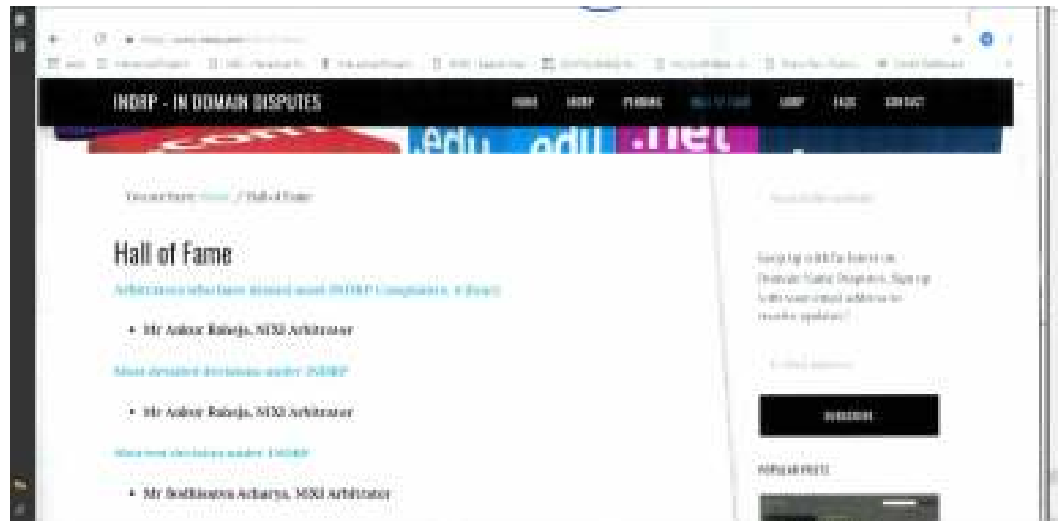
9. The assertion of the petitioner is that impugned award is vitiated by bias, as revealed by the insertion of the learned Arbitrator's name

¹⁶ Supra (note 6).

¹⁷ (2022) 8 SCC 162.



in the “*Hall of Fame*” on the website *www.indrp.com*. This is evident from the following screenshot:-



10. As there was some ambiguity as to the petitioner’s assertion with regard to the learned Arbitrator’s links with this website, by an order dated 16.01.2023, notice was issued to the learned Arbitrator to state as to whether he is, or was, at any point of time, associated with the said website. The learned Arbitrator has filed an affidavit dated 10.02.2023, in which he has categorically stated that the domain name “*www.indrp.com*” is owned by him since the time before he was empaneled as an arbitrator with NIXI. He has stated the reasons for which he developed the said website in his affidavit, but those are not relevant to the present dispute. Although the learned Arbitrator has filed a 20-page affidavit, which is not confined to the questions indicated in the order dated 16.01.2023, he has not dealt with the allegation of bias premised upon the “*Hall of Fame*”. As the learned Arbitrator has himself accepted his ownership of the website, it is not necessary to deal with the documents placed on record for this purpose

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by the petitioner, and I proceed on the basis that the learned Arbitrator's authorship of the contents of the website are established.

11. In adjudicating a claim of bias against an arbitrator, the Court must tread carefully. The independence and impartiality of the arbitrator is undoubtedly central to the very integrity of the arbitral process, but claims of bias must be carefully scrutinised to avoid misuse at the hands of an unsuccessful litigant. The following principles provide guidance as to the approach to be employed to determine such a challenge: -

- A. The inviolable requirement of independence and impartiality in arbitral decision making have been emphasised by the Supreme Court *inter alia* in *Voestalpine*¹⁸ and *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales & Suppliers*¹⁹.
- B. In several judgments, the Supreme Court has also held that this is an aspect of "*public policy*"²⁰.
- C. The Supreme Court has drawn a distinction between the "*actual bias*" test and "*apparent bias*" test in *Ranjit Thakur vs. Union of India*²¹, in the following terms:

*"17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."*²²

¹⁸ Supra (note 5) (paragraphs 20, 21 at page Nos. 687-688).

¹⁹ 2021 SCC OnLine SC 730 (paragraph 17).

²⁰ For example, *Ranjit Thakur vs. Union of India* (1987) 4 SCC 611 (paragraphs 17 and 18) and *State of Punjab vs. Davinder Pal Singh Bhullar* (2011) 14 SCC 770 (paragraph 31).

²¹ (1987) 4 SCC 611.

²² Emphasis supplied.

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D. This has been explained further by the Supreme Court in Govt. of *T.N. vs. Munuswamy Mudaliar*²³, in the following terms:

“12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, Commercial Arbitration 1982 Edn., p. 214. Halsbury's Laws of England, 4th Edn., Vol. 2, para 551, p. 282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias.”²⁴

E. In *Bihar State Mineral Development Corporation vs. Encon Builders(I)(P) Limited*²⁵, the Supreme Court held that actual bias would arise “where the decision-maker is shown to have an interest in the outcome of the case.”²⁶ The Court cited the following extracts from *Russell on Arbitration*, 22nd Edition:

“4.030. Actual and apparent bias.—A distinction is made between actual bias and apparent bias. Actual bias is rarely established, but clearly provides grounds for removal. More often there is a suspicion of bias which has been variously described as apparent or unconscious or imputed bias. In such majority of cases, it is often emphasized that the challenger does not go so far as to suggest that the arbitrator is actually biased, rather that some form of the objective apprehension of bias exists.

4.032. Pecuniary interest.—There is an automatic disqualification for an arbitrator who has a direct pecuniary interest in one of the parties or is otherwise so closely connected with the party that can truly be said to be a judge in his own cause.

5.052. Impartial.—Section 33(1) of the Arbitration Act, 1996 states that the tribunal must act ‘impartially’. An arbitrator must also

²³ 1988 Supp SCC 651.

²⁴ Emphasis supplied.

²⁵ (2003) 7 SCC 418.

²⁶ *Ibid* (paragraph 18 at page Nos. 423-424).

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*appear impartial and if there are justifiable doubts as to his impartiality this will provide a ground for his removal by the court under Section 24(1)(a) of the Arbitration Act, 1996 or may mean that the award can be challenged.*²⁷

F. In *Vinod Bhaiyalal Jain vs. Wadhwani Parmeshwari Cold Storage (P) Limited*²⁸, the Supreme Court held as follows:-

“9. In the ultimate analysis since we are not adverting to the merits of the claim and in that regard since, we have not adverted to the finding recorded by the learned arbitrator on the merits of claim we would not venture to examine with regard to the ultimate conclusion on the claim as to whether it is justified or not. However, in the above background, what is to be seen is that there has been a reasonable basis for the appellants to make a claim that in the present circumstance the learned arbitrator would not be fair to them even if not biased. It could no doubt be only a perception of the appellants herein. Be it so, no room should be given for even such a feeling more particularly when in the matter of arbitration the very basis is that the parties get the opportunity of nominating a Judge of their choice in whom they have trust and faith unlike in a normal course of litigation where they do not have such choice.”²⁹

12. In the course of arguments, Mr. Bakshi emphasized the distinction between a predisposition to a particular legal view in a matter, and a finding of bias. For this purpose, he drew my attention to the judgments of the Supreme Court in *Shivananda Pathak*³⁰ and *N.K. Bajpai vs. Union of India*³¹. In the judgment in *Shivananda Pathak*³², the Supreme Court held *inter alia* as follows:

²⁷ Emphasis supplied.

²⁸ (2020) 15 SCC 726.

²⁹ Emphasis supplied.

³⁰ Supra (note 4) (paragraph 30 at page No. 525).

³¹ (2012) 4 SCC 653 (paragraph 48 and 50).

³² Supra (note 4).

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“30. These remarks imply a distinction between prejudging of facts specifically relating to a party, as against preconceptions or predispositions about general questions of law, policy or discretion. The implication is that though in the former case, a judge would disqualify himself, in the latter case, he may not. But this question does not arise here and is left as it is.

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33. Bias, as pointed out earlier, is a condition of mind and, therefore, it may not always be possible to furnish actual proof of bias. But the courts, for this reason, cannot be said to be in a crippled state. There are many ways to discover bias; for example, by evaluating the facts and circumstances of the case or applying the tests of “real likelihood of bias” or “reasonable suspicion of bias”. de Smith in Judicial Review of Administrative Action, 1980 Edn., pp. 262, 264, has explained that “reasonable suspicion” test looks mainly to outward appearances while “real likelihood” test focuses on the court's own evaluation of the probabilities.”

In the judgment in *N.K. Bajpai*³³, the Supreme Court applied the “*real danger test*” in the following terms:

“48 Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories i.e. suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further examination of action with reference to the facts and circumstances of a given case. The correct test would be to examine whether there appears to be a real danger of bias or whether there is only a probability or even a preponderance of probability of such bias, in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial chastisement but if it falls in the latter, it would hardly affect the decision, much less adversely.

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50. The element of bias by itself may not always necessarily vitiate an action. The court would have to examine the facts of a given

³³ Supra (note 31)(It is stated in the reported judgment that paragraph 48 of the judgment was corrected *vide* Official Corrigendum No. F.3/Ed.B.J./22/2012 dated 26-3-2012.)

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case. Reverting to the facts of the present case, despite their absence from the object and reasons for the amendment of Section 129(6) of the Customs Act it cannot be held that the element of bias was presumptuous or without any basis or object. It may be one of the relevant factors which probably would have weighed in the mind of the legislature. When you have been a member of a tribunal over a long period, and other members have been your co-members whether judicial or technical, it is difficult to hold that there would be no possibility of bias or no real danger of bias. Even if we rule out this possibility, still, it will always be better advised and in the institutional interest that restrictions are enforced. Then alone will the mind of the litigant be free from a lurking doubt of likelihood of bias and this would enhance the image of the tribunal. The restriction, as already discussed, leaves the entire field of legal profession wide open for the appellants and all persons situated alike except to practise before CESTAT.”

13. It emerges from these decisions that an award can be set aside on grounds of “*apparent*” bias, or propensity to decide one way rather than the other. While the test has been formulated in different ways in the judgments, it is clear that the apprehension of bias has to be tested on the yardstick of reasonableness, as seen from the perspective of the affected party. Any doubt regarding the arbitrator’s fairness or neutrality must be justifiable, not whimsical or fanciful, and must give rise to a real danger of bias or partiality.

14. Having regard to the above principles, I am of the view that the arbitrator’s inclusion of his own name in a “*Hall of Fame*”, based on his decisions against the complainants in four INDRP disputes, does give rise to such a justifiable apprehension as to his neutrality.

15. The judgment of the Supreme Court in *Shivananda Pathak*³⁴, even while upholding the test of predisposition, prejudice and bias, noted that the pre-conceptions about general questions of policy and

³⁴ Supra (note 4).



discretion may not be sufficient to invalidate a judicial adjudication. Although the question has not been conclusively decided in the said judgement, even from this perspective, in my view, the present case crosses the permissible latitude available to an arbitrator. The inclusion of the name of the learned Arbitrator in the “*Hall of Fame*” is based upon the fact that he has denied the maximum number of INDRP complaints. This is not a general comment on applicable law or policy, but a specific indication on how such cases should be finally decided. The learned Arbitrator has expressed a view that denial of INDRP complaints is *per se* a positive achievement, without reference to the applicable law, policy, or evidence. The very least that a litigant is entitled to expect is that an arbitrator would be agnostic to the result of the arbitral proceedings, whatever his or her predisposition may be on particular points which arise for adjudication.

16. Mr. Bakshi drew my attention to an assertion in the learned Arbitrator’s affidavit dated 10.02.2023, that he has, in fact, decided 23 out of 29 arbitration cases in favour of complainants³⁵. This, however, does not persuade me to a contrary view. The fact that the learned Arbitrator has decided cases in favour of complainants does not find mention on the website established by him. It appears to me quite evident that, in the opinion of the learned Arbitrator, denying complaints is a more laudable achievement.

17. Similarly, I am unable to accept Mr. Bakshi’s submission that certain developments subsequent to the publication of the award cannot vitiate it. It may be that facts relating to an arbitrator’s status or

³⁵ Paragraph 6 of the Arbitrator’s affidavit dated 10.02.2023.



conduct, for example conflict of interests, relationship with one of the parties, or even evidence of fraud or misconduct, are discovered after the award has been passed. In a given case, it may be that such information was deliberately withheld from the aggrieved party. No universal rule can be laid down that an award cannot be challenged on grounds which were discovered after it was made.

II. Re: Challenge on the ground of the Arbitrator's reliance on his own research:

18. In connection with this challenge, Mr. Sood referred to the following extracts of the arbitral award in Section III(ii)³⁶;

“(ii) Rights or Legitimate Interests in the Domain Name [Para 4(ii) of INDRP Policy]

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D. That it seems the services rendered by the Respondent are also by means of 'Artificial Intelligence' (AI) technology, which is generally defined to mean "the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages". The only conclusion it can lead to is that, the choice of words Zo.Ai may be incidental on the disputed domain and mainly to indicate AI technology, rather than Complainant's product. Further, the AI (Artificial Intelligence) technology is not something that has been patented by the Complainant or exclusively belongs to the Complainant Company, therefore no third party is restricted from using AI technology in providing any kind of services, given the weak nature of the mark.

E. Most importantly, mark ZO is not a strong mark and doesn't seem to have gained that much popularity within few months of Trademark registration in India, which is the location of the Respondent, as per WHOIS information for the disputed domain name. Further, 'ZO' can mean numerous things and has numerous end users, that is, there are limitless potential uses of the

³⁶ Page No. 35 of the petitioner's list of documents.



term "ZO", which is a common acronym. A Google search for the exact term "ZO" yielded some 61,60,00,000 results and it has different meanings elaborated on AcronymFinder.com. In the matter of Electronic Arts Inc. v. Abstract Holdings International LTD/Sherene Blackett, NAF Case, FA1111001415905 (Jan. 4, 2012) it was held that "The domain name, <ssx.com>, is comprised of common or generic letters. Complainant clearly does not have an exclusive monopoly on the term. The number of other persons or entities holding identical if non-competing marks and the number of other users with rights in the name are clear evidence of the limited ownership claims of the Complainant. Respondent has established rights or legitimate interests in the disputed domain name pursuant to Policy para 4(a)(ii)". Further, in Juraj Kralik-ZAJO v. Deep Frontier, Jay Dove [Case No. 02015-1377; www.zajo.com], "a four letter.com domain names have inherent value and the disputed domain name was registered for use, development, and investment. Thus, it may reasonably be concluded that the disputed domain name incorporates a generic or descriptive word. Returning to the question of rights or legitimate interests in the disputed domain name, in the absence of proven bad faith, the Panel finds that the Complainant, which retains the ultimate burden of proof notwithstanding the provisions of paragraph 4(c) of the Policy, has failed to prove that the Respondent does not have rights or legitimate interests in the disputed domain name."

F. A Simple Google search for mark 'ZO' throws numerous results from few dictionary websites, Youtube as to ZO!, ZOskinhealth.com (2007), few business locations and then to Complainant's website as on date. In the matter of Canned Foods Inc v. Ult. Search Inc. (FA 96320 National Arb. Forum dated 13 Feb 2001) it was held "a Trademark that equally describes businesses conducted by many other people is not a protectable term". The same proves that even as on date Complainant mark hasn't gained that much popularity/reputation. Due to the above facts, the Complainant's mark 'ZO' cannot be held as that may exclusively refer to the Complainant or its product or services and therefore, the domain dispute decisions referred by the Complainant are not applicable to the matter. Otherwise also circumstances are quite different in the said matter, as the Disputed Domain name has been put to use and has registration date preceding the trademark registration 'ZO' in India and the domain name registration of <zo.ai>. Further it doesn't seem feasible that Respondent would have searched for a two letter Trademark, also when it registered a four letter domain name.

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H. While searching for 'ZOAI', it doesn't throw any search result as to the Complainant's mark or it's website. Obviously, the keyword in the disputed domain name 'ZOAI' is a generic term, as defined in portuguese dictionary, as 'second-person plural' and also ZOAI is a name of many individuals around the world. Further, complainant's mark 'ZO' is also defined in collins dictionary (as a Tibetan breed of cattle, developed by crossing the yak with common cattle), also a common acronym and short common words like Zoo, Zone, Zoom, Zodiac and so on. It has been held that where the domain name is a common or generic term, it is difficult to conclude that there is a deliberate attempt to confuse. It is precisely because combination of common or random letters are incapable of distinguishing one provider from another that trademark protection is denied to them. In the matter of Canned Foods Inc v. Ult. Search Inc. (FA 96320 National Arb. Forum dated 13 Feb 2001) it was held "a Trademark that equally describes businesses conducted by many other people is not a protectable terms".

19. Mr. Sood's submission that the learned Arbitrator has drawn factual and legal conclusions from materials accessed by him without the petitioner's knowledge remains uncontroverted. The learned Arbitrator has clearly indicated that no hearings were held. Therefore, there was no opportunity to put this material to the petitioner. In the above extracted paragraphs of the impugned award, these include factual findings, for example that "*the choice of the words Zo.Ai may be incidental on the disputed domain, and mainly to indicate AI technology rather than the Complainant's product*"³⁷. In paragraph III(ii)(E) of the impugned award extracted hereinabove, the conclusion that the mark "Zo" is not a strong mark, and has not gained popularity after registration, is based on a Google search and independent research of the learned Arbitrator on "*acronymfinder.com*". The

³⁷ Refer paragraph III(ii)(D) of the impugned award (page No. 39 of the petitioner's list of documents).

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learned Arbitrator himself uses these materials to record that “*the same proves that even as on date Complainant mark hasn’t gained that much popularity/reputation*”³⁸. As far as factual findings are concerned, I am of the view that it is not open to an arbitral tribunal to conduct independent research to supply evidence which an absent respondent has not cared to place before it. The principle that an arbitrator should not rely upon evidence which he/she has gathered— at least, without putting it to the affected party – is, in fact, an aspect of fairness, and of giving the party an opportunity to be heard in terms of Section 18 of the Act.

20. In relying upon material of this nature, the learned Arbitrator has clearly fallen foul of the mandate of the Supreme Court in *Ssangyong*³⁹, whereunder it has been held as follows:-

“52. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out.”⁴⁰

21. Reference may also be made to the judgment of the Division Bench of the Madras High Court in *Tribol*⁴¹, which cites the following paragraph from the judgment of the Court of Appeal (Civil Division) (England and Wales) in *Fox vs. Wellfair Limited*⁴²;

“18. I am afraid that the arbitrator fell into error here. He felt that it was his duty to protect the interests of the unrepresented

³⁸ Para III(ii)(F) of the impugned award (page No. 41 of the petitioner’s list of documents).

³⁹ Supra (note 6).

⁴⁰ Emphasis supplied.

⁴¹ Supra (note 7).

⁴² 1981 (2) Lloyd’s Rep. 514 [at page No. 522].

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party in much the same way as a judge protects a litigant in person. But in a case like this, I do not think it is the duty of the arbitrator to protect the interests of the unrepresented party. If the defendants do not choose to turn up to protect themselves, it is no part of the arbitrator's duty to do it for them. In particular, he must not throw his own evidence into the scale on behalf of the unrepresented party - or use his own special knowledge for the benefit of the unrepresented party - at any rate he must not do so without giving the plaintiff's experts a chance of dealing with it - for they may be able to persuade him that his own view is erroneous."⁴³

Applying the aforesaid principles laid down by the Court of Appeal, the Madras High Court held thus:

"48. It is not the duty of the arbitrator to go to the aid of the parties and state what they could and should have done for themselves. His function is not to supply his special knowledge, but to play the role of an impartial arbitrator without assuming the role of an advocate for the defaulting side. At any rate, he should not use his own knowledge to give them a chance of answering it and showing the way as to how the matter should be dealt with. This conduct cannot be termed as 'fair' and what had happened as alleged, when not controverted, can be taken as deemed to have been admitted. The inevitable conclusion is that the proceedings have been misconducted; and the arbitrator has to take responsibility for it"."⁴⁴

22. In *Fleetwood Wanderers*⁴⁵ also, the High Court of England and Wales has relied *inter alia* upon *Fox vs. Wellfair Limited*⁴⁶ to hold as follows:

"35. "To comply with its duty under Section 33(1) of the Arbitration Act 1996 to act fairly, the tribunal should give the parties an opportunity to deal with any issue that may be relied upon by it as the basis of its findings. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of

⁴³ Emphasis supplied.

⁴⁴ Emphasis supplied.

⁴⁵ Supra (note 8).

⁴⁶ Supra (note 42)

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the award and if the tribunal are minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point”.⁴⁷

23. Mr. Bakshi submitted that the present case is distinguishable from *Ssangyong*⁴⁸, as the learned Arbitrator’s independent research would not have affected the outcome of the decision. According to learned counsel, the petitioner had not put forth material in support of specific elements which it was duty bound to establish, and it is in these circumstances that the learned Arbitrator was compelled to undertake his own research. In this regard, Mr. Bakshi relied upon the test of prejudice laid down by the Supreme Court in the judgment in *Sudhir Kumar Singh*⁴⁹. I am unable to agree. In the said judgment, the prejudice test was held to constitute an exception to the general applicability of the principles of natural justice, in relation to issuance of a tender by a statutory corporation, and not arbitral decision making, governed by Section 18 of the Act. In the latter case, the judgment of the Supreme Court in *Ssangyong*⁵⁰ squarely applies. It is also difficult to parse the inadmissible material from material which could have been legitimately relied upon by the learned Arbitrator, so as to conclude that he would have, in any event, reached the same conclusion⁵¹.

⁴⁷ Emphasis supplied.

⁴⁸ Supra (note 6).

⁴⁹ Supra (note 15).

⁵⁰ Supra (note 6).

⁵¹ Refer to the Judgment of the Constitution Bench in *Dhirajlal Girdharilal vs. CIT* AIR 1955 SC 271, and the judgment of a Full Bench of the Madras High Court in *Swami Motor Transport (Private) Limited vs. Raman and Raman (Private) Limited* 1960 SCC OnLine Mad 166.



24. I am, therefore, of the view that the petitioner is entitled to succeed on this ground also.

III. Other Grounds:

25. It may be noted that in his rejoinder submissions, as well as in the post-hearing written submissions filed by him, Mr. Sood has confined the challenge to grounds (A) and (B), summarised in paragraph 6 hereinabove. I have found in the petitioner's favour on both these grounds. I do not, therefore, propose to deal with grounds (C) and (D) enumerated therein.

Conclusion:

26. For the aforesaid reasons, the petition is allowed, and the award of the learned Arbitrator dated 18.02.2019 is set aside. However, the petitioner will be at liberty to invoke arbitration afresh for adjudication of the same claims, in accordance with law, if it is so advised.

PRATEEK JALAN, J.

JULY, 03, 2023

'Bhupi'/Pv/Faisal/SM/

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