

ADMINISTRATIVE PANEL DECISION

Brillon Consumer Products Private Limited v. sachin khairnar, AllOut Pest Control India Pvt. Ltd.

Case No. D2022-4063

1. The Parties

The Complainant is Brillon Consumer Products Private Limited, India, represented by Singh and Singh Law Firm LLP, India.

The Respondent is sachin khairnar, AllOut Pest Control India Pvt. Ltd., India, self-represented.

2. The Domain Name and Registrar

The disputed domain name <alloutindia.com> is registered with GoDaddy.com, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on October 28, 2022. On October 28, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On October 31, 2022, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details. The Center received an email communication from the Respondent on October 31, 2022. In response to a notification by the Center that the Complaint was administratively deficient, the Complainant filed an amended Complaint on November 1, 2022.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on November 2, 2022. In accordance with the Rules, paragraph 5, the due date for Response was November 22, 2022. On November 17, 2022, the Respondent requested for an extension to the Response due date. In accordance with paragraph 5(b) of the Rules, the due date for Response was extended to November 26, 2022. The Response was filed with the Center on November 26, 2022.

The Center appointed Shwetasree Majumder as the sole panelist in this matter on December 2, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is a manufacturer of household insecticides/mosquito repellents in various forms including coils, mats, liquid vaporizer apparatus, and liquid vaporizer refills under its mark ALL OUT. The Complainant's mark ALL OUT is registered in India since February 11, 1988 under Indian Registration number 485591 in class 9, and under number 485592 in class 5. The Complainant's related entity owns the domain name <allout.in> registered on September 29, 2015.

The disputed domain name has been registered on July 28, 2013. The disputed domain name resolves to an active website where the Respondent offers pest control services. The Respondent established its business under the name All Out India in the year 2013. In the year 2015, the Respondent incorporated a company under the present name AllOut Pest Control India Private Limited.

The Respondent had filed an Indian trademark application number 2594089 for the mark ALL OUT in class 44 on September 10, 2013. This application was opposed by the Complainant on October 5, 2016, and the Respondent subsequently abandoned it. The Respondent then filed another Indian trademark application number 3705712 for ALL OUT (figurative mark) in class 37 on December 19, 2017. This application has also been opposed by the Complainant and the Respondent has been contesting this opposition. The opposition proceedings are pending final adjudication at the Indian trademark office.

5. Parties' Contentions

A. Complainant

The Complainant claims to be a renowned manufacturer and marketer of a wide range of household insecticides/mosquito repellents in various forms including coils, mats, liquid vaporizer apparatus, and liquid vaporizer refills under the mark ALL OUT. The Complainant claims to be using the mark ALL OUT in India in since 1988.

The Complainant's brand-specific website "www.allout.in" contains information about the Complainant's products under the brand ALL OUT and the domain name <allout.in> is registered since September 29, 2015. The earliest registration for the Complainant's trademark ALL OUT dates back to February 11, 1988 in India. The Complainant has submitted copies of the Indian registration certificates for its mark ALL OUT as Annex 8 with the Complaint.

The Complainant also claims that its mark ALL OUT is a well-known mark in India. The Complainant has submitted as Annex 5 to the Complaint extracts for its social media pages for its brand ALL OUT and also an order of the Delhi High Court as Annex 7 where it rights in ALL OUT were upheld.

The Complainant states that the disputed domain name is identical to its mark ALL OUT. The Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name. The Complainant alleges that the Respondent's action of adopting a deceptively similar domain name/mark is contrary to honest practices and results in infringement of the Complainant's mark.

It is contended that the Complainant and the Respondent are engaged in the identical business of pest control. The Complainant states that the registration of the disputed domain name is clearly an attempt to attract internet users to the Respondent's website and make them wrongly believe that the Respondent is

connected to the Complainant in some manner, which brings the said act within the ambit of Paragraph 4 (b)(iv) of the Policy.

B. Respondent

In its response, the Respondent claims that the registration of the disputed domain name is prior to the Complainant's registration of its domain name <allout.in> in the year 2015. It argues that the delay of 10 years in filing the Complaint ought to disentitle the Respondent.

The Respondent also states that the disputed domain name consists of a mark that has a dictionary meaning and is descriptive in respect of the services offered. The Respondent also contends that the disputed domain name is different from the Complainant's domain name and trademark as the Complainant does not provide pest control services and that it has not registered its mark ALL OUT in class 37.

The Respondent also argues that its registered company name "AllOut Pest Control India Pvt., Ltd.," has created a distinct identity in the market.

In support of its claims the Respondent relies on its certificate of incorporation, web extracts of its social media pages, and copies of work orders to demonstrate that it is an ongoing business.

6. Discussion and Findings

Paragraph 4(a) of the Policy provides that in order to divest a respondent of a disputed domain name, a complainant must demonstrate each of the following, in conjunction:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- (ii) the respondent has no rights or legitimate interests in respect of the disputed domain name;
- (iii) the disputed domain name has been registered and is being used in bad faith.

A. Delay in Bringing the Complaint

Prior to going into the elements of Paragraph 4(a), the Panel makes a preliminary noting in relation to the Respondent's apparent defence of delay and laches.

The disputed domain name has been registered since July 28, 2013 and the Complaint has been filed on October 28, 2022. The Annex with the Response indicates that the Respondent has been in business all this while. Admittedly, the Complainant has been aware of the Respondent's use of the mark ALL OUT since the year 2016 when it opposed the Respondent's Indian trademark application number 2594089. The Panel has considered the Respondent's contention but notes that the defense of laches does not apply in UDRP proceedings. This view finds resonance in the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.17.

Although section 4.17 observes, "Panels have however noted that in specific cases, certain delays in filing a UDRP complaint may make it more difficult for a complainant to establish its case on the merits, particularly where the respondent can show detrimental reliance on the delay", the test of "detrimental reliance" cannot come into play when clearly the Respondent has been put to notice of the Complainant's registered trademark rights since October 5, 2016 when it opposed the Respondent's trademark before the Indian trademark office. The Panel also notes that the fact that the Respondent chose at that juncture to abandon its trademark application goes against any notion that it (detrimentally) relied on any (in-)action on the part of the Complainant.

B. Identical or Confusingly Similar

Paragraph 4(a)(i) of the Policy requires the Complainant to show that the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights.

The Panel does not agree with the Respondent's contention that ALL OUT is a dictionary word or that it is descriptive. The Respondent itself had filed an Indian application for registration of ALL OUT as a trademark on September 10, 2013 and was therefore clearly taking the position that it was a trademark at that point in time. The Complainant has also got registered the ALL OUT trademark in India, making it clear that the Indian trademark office considered the term capable of serving a trademark function. The Complainant's trademark registrations are prior to the registration of the disputed domain name and are valid and subsisting today.

The disputed domain name incorporates the Complainant's mark ALL OUT in its entirety, together with the term "India". Referring to [WIPO Overview 3.0](#), sections 1.7 and 1.8, this Panel notes that where the relevant trademark is recognizable within the disputed domain name, the addition of other terms would not prevent a finding of confusing similarity under the first element. In the present case, the Complainant's mark ALL OUT is clearly recognizable in the disputed domain name and therefore the addition of "India" does not prevent a finding of confusing similarity. (See *Hoffmann-La Roche AG v. Domain Admin, Privacy Protection Service INC d/b/a PrivacyProtect.org / Conan Corrigan*, WIPO Case No. [D2015-2316](#)).

The generic Top-Level Domain ("gTLD") ".com" is generally disregarded for the purposes of comparison under this element.

In view of the above-mentioned findings, the Panel concludes that the disputed domain name is confusingly similar to the Complainant's trademarks and that the requirement of paragraph 4(a)(i) of the Policy stands satisfied.

C. Rights or Legitimate Interests

Pursuant to paragraph 4(a)(ii) of the Policy, the Complainant must prove that the Respondent has no rights or legitimate interests in respect of the disputed domain name. A complainant is normally required to make out a *prima facie* case that the respondent lacks rights or legitimate interests. Once such *prima facie* case is made, the respondent carries the burden of demonstrating rights or legitimate interests in the domain name. If the respondent fails to do so, a complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy. The Panel is of the view that the Complainant has made out a *prima facie* case.

To demonstrate rights or legitimate interests in a domain name, the defenses under UDRP paragraph 4(c) include that before any notice of the dispute, the respondent ought to have used, or made 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.

As a rebuttal to the Complainant's *prima facie* case, the Respondent has demonstrated that the disputed domain name is being used to offer its pest control services long before any notice of the dispute. Page 4 of the Respondent's Annex indicates that the Respondent started using the business name ALL OUT INDIA at least since 2013 and went on to incorporate a company (see page 5 of Annex to Response) by the name of All Out India Private Limited in the year 2015. Further, Pages 32 -52 of the Annex to Response are copies of work orders of the Respondent. These pertain to the years 2013, 2014, and 2015. Studying these work orders, the Panel observes that the Respondent has a sizable clientele in India.

The Respondent's case is that the Complainant is neither providing pest control services nor has a trademark registration covering these services. The Annexes to the Complaint and the Complainant's trademark registrations lead to the conclusion that the Complainant does not offer pest control services. The Complainant however additionally contends that its trademark ALL OUT is a well-known mark and also that pest control services (falling in class 37) are allied and cognate to its goods under classes 5 and 9.

In the above backdrop, the Panel considers that the issue of rights or legitimate interests essentially turns on answering the question: Can the Respondent's use of the disputed domain name for pest control services be considered *bona fide* under the defense under paragraph 4(c) of UDRP.

To answer this question, the Panel would have to adjudicate two critical issues which are clearly outside the remit of the present proceedings:

- (i) Whether the Complainant's trademark is well-known; and
- (ii) Whether the Complainant's trademark rights in relation to classes 5 and 9 can be said to be "allied and cognate" to pest control services under class 37, in respect of which the Respondent claims to have rights.

Both of these issues are already at the heart of the ongoing opposition proceedings at the Indian trademark office, where the Complainant on May 18, 2018 opposed the Respondent's Indian application number 3705712 for ALL OUT (figurative mark) in class 37. The Panel observes that in the said proceedings the Complainant has argued that its mark ALL OUT is a well-known mark and the decision in the proceedings is awaited.

As the above recitation makes it clear that this is not a garden-variety cybersquatting case. The only arguable reason that the Complainant is seeking relief in this forum is that the particular property at issue is a domain name. There are however wider trademark (registration and infringement) issues which have been placed before the Panel in the present case. These issues, are not suited for resolution under the Policy (see, for example, the observations of the UDRP panels in *The Thread.com, LLC v. Jeffrey S. Poploff*, WIPO Case No. [D2000-1470](#); *Kurt Garmaker d/b/a "Repetition Miniature Schnauzers" v. Hilde Haakensen, Axcium Design*, WIPO Case No. [D2015-0993](#); and *IL Makiage Cosmetics (2013) Ltd. v. Mark Rumpler / Mordechai Rumpler / Domains By Proxy, LLC*, WIPO Case No. [D2015-2311](#)). This Panel finds that it will be prudent for a court or tribunal of competent jurisdiction in India to adjudicate the rights of the parties in the mark ALL OUT and the import of the Respondent's business and rights, if any.

In these circumstances, the request for a determination on the merits of the Complaint must be rejected. In reaching this conclusion, although the Panel notes that the Respondent has withdrawn its first trademark application once opposed by the Complainant, and faces an opposition on its second one, the Panel takes no position on the merits of any wider dispute between the Parties. The Complainant remains free to seek remedies in other fora and the Panel notes for completeness that the present finding is confined to the Policy and that it does not seek to influence any such subsequent proceedings, should they be raised.

D. Registered and Used in Bad Faith

In light of the Panel's finding above it is unnecessary for the Panel to address the topic of the Respondent's bad faith under the third UDRP element.

7. Decision

For the foregoing reasons, the Complaint is denied.

/Shwetasree Majumder/

Shwetasree Majumder

Sole Panelist

Date: December 13, 2022