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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. (COMM) 497/2016_**

GULSHAN KHATRI

..... Petitioner

Through: Ms Kajal Sharma and Mr Rajiv Bakshi
Advocates

versus

GOOGLE INC.

..... Respondent

Through: Mr Aditya Verma and Ms Tanya Verma,
Advocates

CORAM: JUSTICE S. MURALIDHAR

ORDER
20.03.2017

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1. Is a 'Googlee' a 'wrong one'? A cricket enthusiast will say, "Yes of course." In the virtual world too, the answer is well, yes, as the Petitioner, Mr. Gulshan Khatri found to his consternation, when he used it as a domain name: 'googlee.in'.

2. The cause for Mr Khatri's angst is an Award dated 6th May, 2011 by an Arbitrator appointed by the National Internet Exchange of India ('NIXI'). The Arbitrator examined a complaint against Mr Khatri by the Respondent Google Inc. USA (hereafter 'Google'). He agreed with Google that the domain name 'googlee.in' registered by Mr Khatri was confusingly similar to Google's domain name. He directed that the infringing domain name 'googlee.in' be transferred to Google.

3. Mr Khatri says Google protests too much about the letter 'e' being added to its domain name. He asserts that 'googlee.in' is not confusingly similar to 'google'. He says the Arbitrator got it wrong. He complains that the Arbitrator did not send him a copy of Google's complaint and therefore violated the principles of natural justice. He wants the Court to exercise its powers under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') and set aside the Award on the ground that it is opposed to the fundamental policy of Indian law. The Court declines. Read on to find out why.

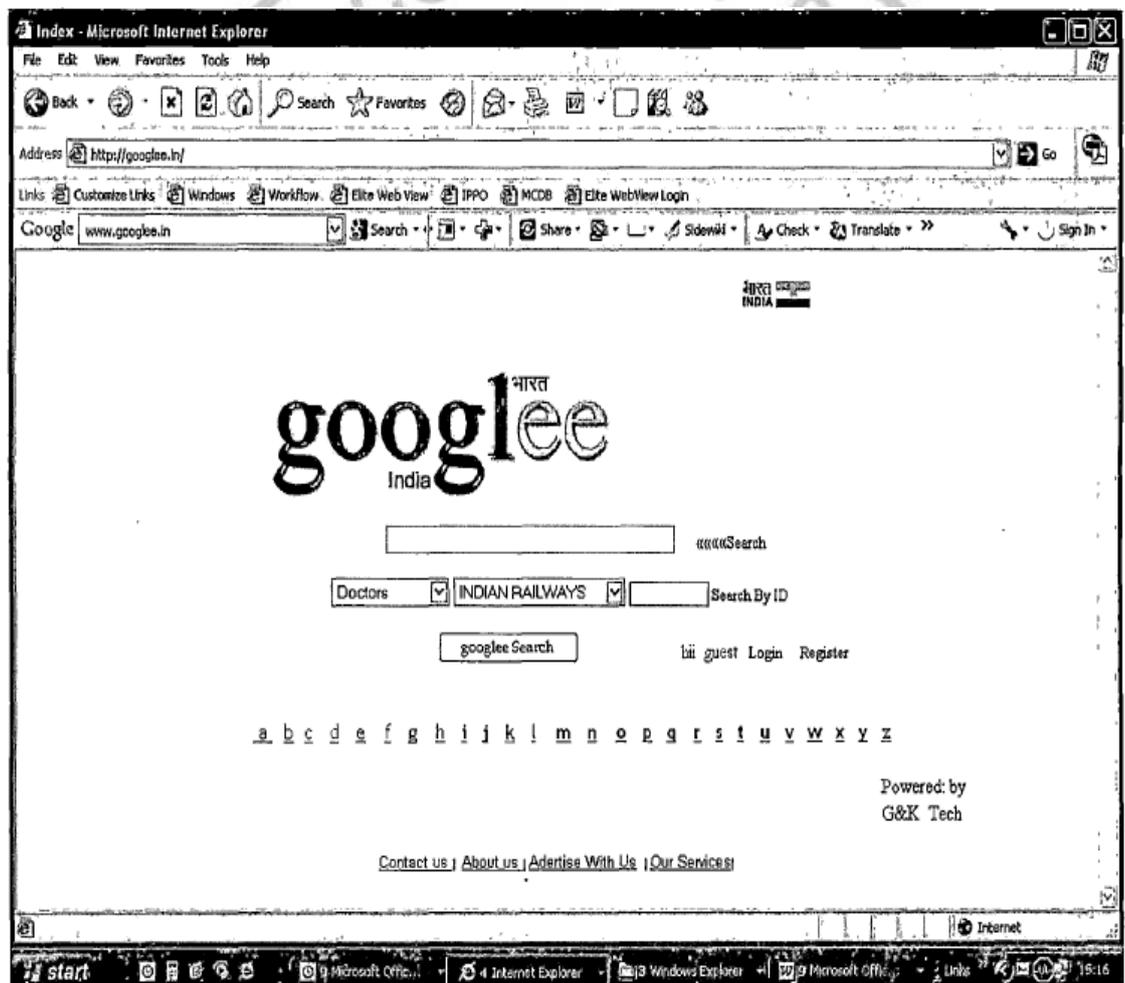
Background facts

4. Mr Khatri claims to be the sole Proprietor of M/s TCI Web Gate. He claims to have "put in a lot of research, intellectual capabilities, hard work, resources, lifetime savings and effort to prepare the content of a search engine." What Mr Khatri does not explain is on what basis he adopted a domain name by simply adding the letter 'e' to the well-known domain name 'google'. Nevertheless he managed to get the domain name with an added 'e' registered with the .IN Registry. This is how it happened.

5. The IN Registry has been created by NIXI which is a Not-for-Profit company under Section 25 of the Indian Companies Act, 1956. It was formed with the objective of facilitating improved internet services in the country. Under NIXI, the IN Registry functions as an autonomous body with the responsibility for maintaining the .IN ccTLD and ensuring operational stability, reliability, and security. At the time of its inception, .IN began with a Sunrise Period to enable the Owners of trademarks or service marks to

have domain names matching their marks by applying for .IN domain names before opening the registration for the general public. Sunrise applications were taken for 45 days with effect from 1st January, 2005.

6. On 17th February, 2007 Mr. Khatri applied to the .IN Registry online for registering the domain name 'googlee.in' through the web. The registration was granted and renewed in 2008 for four years. In 2010, it was renewed for another 8 years i.e. till 2020. This is how the screenshot of Mr. Khatri's web page looked like:



7. Google sent Mr Khatri a cease and desist notice dated 10th September, 2010. Google pointed out that by getting 'googlee.in' registered, Mr Khatri had not only copied its well-known mark Google but had adopted a nearly identical writing style, font, colour scheme and layout. It was a dishonesty and bad faith in adoption and registration of a nearly identical domain name.

The arbitral proceedings

8. When a further legal notice sent to Mr Khatri on 25th November, 2010 failed to elicit a response, Google filed a complaint against him under the .In Domain Name Dispute Resolution Policy (INDRP). Google asked that the infringing domain name be transferred to it and costs awarded.

9. The arbitral record filed by NIXI in this Court shows that a notice was issued by the Arbitrator on 4th February 2011 at 7.04 pm by email with the subject matter reading "Notice from Arbitrator In re www.googlee.in". The notice was captioned "Dispute of Domain Name: www.googlee.in". Mr. Madan Khatri, the brother of the Petitioner Mr. Gulshan Khatri replied to the said notice by email on 10th February 2011 at 11:01 pm. The said reply was all of nine paras. After tracing the brief history of the registration of the infringing domain name in the first five paras, the reply stated:

"6. I am using the Same domain since last four years incurred my life time intellectual capabilities and other resources.

7. The claimant did not shown any interest to register the claimed domain till last few days even during the Sunrise time kept for such purpose and now started blackmailing respondent to transfer the domain in his favour.

8. The Claim is not legal in eyes of law of the land and therefore claim is not maintainable.

9. If you need any other clarification, kindly allow sufficient time to provide the same."

10. A reading of the above reply makes it plain that Mr Gulshan Khatri did receive the Arbitrator's notice. He was made aware of Google's complaint. He chose to send the reply through his brother. In the reply while he sought to justify the registration of 'googlee.in' in his favour, Mr Khatri did not ask for a copy of the complaint. Also, he made no effort thereafter to follow up on the proceedings before the Arbitrator or participate in it. He knowingly took a risk.

11. On receiving the above reply, the Arbitrator proceeded with the case. In the impugned Award he noted *inter alia* as under:

"However, in response to the instant complaint. Respondent has Offered no explanation for adoption of a virtually identical domain name googlee.in . Further, it has also not denied the knowledge and use of the domain name/trade mark 'google' by the Complainant. The respondent has even failed to give any explanation/ evidence in adopting a domain name which is virtually identical to the Complainant's already existing and renowned mark/ domain name. In the interest of justice, any further delay in deciding this matter is uncalled for."

12. The Arbitrator concluded that 'googlee.in' was confusingly similar to Google's domain name and registered mark. He directed its cancellation. He directed that it be transferred to Google.

Privity of contract

13. Ms. Kajal Sharma, learned counsel for Mr Khatri, first submitted that

there was no privity of contract between Mr Khatri and Google much less an arbitration agreement. According to her there could have been no arbitration involving the two of them. She says that even Section 7 of the Act does not stand attracted.

14. The above objection is misconceived. By getting the infringing domain name registered with the IN Registry, Mr Khatri was bound by the INDRP regime which envisaged a complaints mechanism. The decision on Google's complaint was in terms of the INDRP.

Natural justice

15. Ms. Sharma next contends that the Arbitrator overlooked Rule 4(c) of the INDRP which required a copy of the complaint and documents filed to be provided to the person complained against. Also, Rule 13 of the INDRP, made it mandatory for such person to be informed of and supplied with a copy of the Award. Both these rules were violated. Resultantly, says Ms. Sharma, the principles of natural justice and consequently Section 18 of the Act were violated.

16. It is not as if Mr Khatri was unaware of the complaint. He did send a reply to the notice sent to him by the Arbitrator. He never complained that he had not received the copy of Google's complaint. Further the Award was uploaded on NIXI's website as required by the INDRP which was binding on Mr Khatri.

17. In *The Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee (1977) 2 SCC 256*, the Supreme Court observed that:

"...Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter."

18. In *Sohan Lal Gupta (Dead) Through LRs & Ors. v. Asha Devi Gupta & Ors.* (2003) 7 SCC 492, the Supreme Court reminded that in order to succeed in a plea of violation of the principles of natural justice, the person aggrieved should be able to show that "he was seriously prejudiced thereby".

19. The question then is how seriously was Mr Khatri prejudiced? The incidental question is whether Mr Khatri has a solid defence on merits, which if put forth would have altered the decision?

Mr Khatri has no defence

20. Mr Aditya Verma, learned counsel for Google, is right in contending that both the above questions should, in the facts of the present case, be answered in the negative. Mr Khatri has no valid explanation why he chose a domain name that is so nearly identical to what is perhaps the most widely used search engine. It is trite that 'google' is also a well-known domain name and mark. The word 'google' has metamorphosed into a verb in the English language. You no longer search for something on the net. You 'google' it.

21. Mr Khatri is unable to dispute the following facts. In fact, as any other

net user, he would know that Google indexes more than 8 billion pages and owns 61.8% of the market share in worldwide searches. More than half of the search engine requests come from outside the USA. Google's products and services reach more than 150 countries including India. It has an Indian domain name: google.in. Google is also registered in India as a trademark (No. 845041) in Class 09 since 12th March, 1999.

22. The Court concurs with the Arbitrator's conclusions. The domain name and mark 'google' is a coined word, distinctive in nature, particularly in relation to the goods and services that it represents. The adoption by Mr Khatri of a nearly identical mark /domain name 'googlee.in' is indeed in bad faith and not merely a coincidence. A glance at his web page (set out in para 6 above) shows how slavish his imitation is of Google's writing style, font, colour scheme and layout. In sum, Mr Khatri has no statable defence.

23. In *Yahoo Inc v. Akash Arora & Anr. 78 (1999) DLT 285*, this Court noted that the two marks/domain names i.e., 'Yahoo!' of the Plaintiff and "YahooIndia" of the Defendant were almost similar and there was “every possibility and likelihood of confusion and deception being caused”. It is no different here. In *Satyam Infoway Ltd. v. Sifnet Solutions Pvt. Ltd. (2004) 6 SCC 145*, the Supreme Court noted that *"The use of the same or similar domain name may lead to a diversion of users which could result from such users mistakenly accessing one domain instead of another."*

In conclusion

24. Mr Khatri was rightly stopped in his tracks by the Arbitrator from continuing with his misadventure. He could not have hoped to get away with

exploiting Google's goodwill and reputation by merely adding an 'e' to its domain name. Google rightly cried foul. The Arbitrator declared Mr Khatri out. The Court's DRS concurs. Mr Khatri stands bowled by his own 'googlee'.

25. Nothing in the impugned Award that warrants interference under Section 34 of the Act. The petition is dismissed. No costs.

MARCH 20 2017
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S. MURALIDHAR, J

