

हरियाणा HARYANA

T 704608

BEFORE THE SOLE ARBITRATOR C.A. BRIJESH
.IN REGISTRY
C/o NIXI (NATIONAL INTERNET EXCHANGE OF INDIA)
NEW DELHI, INDIA

Tata Motors Limited
24 Homi Mody Street
Fort, Mumbai- 400001
Maharashtra

.... Complainant

Versus

Amit Badiyani
75 Padiyani
Nagpur – 440012
Maharashtra

.... Respondent

1. The Parties

The Complainant is **Tata Motors Limited** with its principal place of business at 24 Homi Mody, Street Fort, Mumbai- 400001, Maharashtra (hereinafter referred to as the **Complainant**).

The Respondent is **Amit Badiyani**, of 75 Badiyani, Nagpur – 440012, Maharashtra (hereinafter the **Respondent**).

2. The Domain Name and Registrar

The disputed domain name is <harrier.in>. The Registrar with which the Domain Name is registered is **Net 4 India Limited**

3. Procedural Timeline

August 08, 2018 : The .INRegistry appointed Mr. C.A. Brijesh as Sole Arbitrator from its panel as per paragraph 5(b) of INDRP Rules of Procedure.

August 09, 2018 : Arbitrator accorded his consent for nomination as Arbitrator and submitted Statement of Acceptance and Declaration of Impartiality and Independence to the .IN Registry.

August 16, 2018 : Parties to the dispute are informed of the constitution of the Arbitration panel and the effective date of handover. Further, NIXI forwarded a soft copy of the Complaint along with the annexures to the Respondent with a copy marked to the Complainant's Authorised Representative and Arbitral Tribunal.



August 17, 2018 : Arbitral Tribunal addressed an email to the Respondent, with a copy marked to the Complainant's Authorised Representative and NIXI, directing the Respondent to file its response, if any, within 10 days.

August 23, 2018: The Tribunal received the Respondent's response to the Complaint alongwith annexures *vide* its email dated August 23, 2018.

August 24, 2018: In view of the response filed by the Respondent to the Complaint, the Arbitral Tribunal addressed an email to the Complainant with a copy marked to the Complainant's Authorised Representative, Respondent and NIXI, directing the Complainant to file its Rejoinder, if any, within 10 days.

September 04, 2018: The Tribunal received Complainant's Rejoinder to the response filed by the Respondent.

September 04, 2018: The Tribunal addressed an email to NIXI marking a copy to the Respondent and Complainant's Authorised Representative taking cognizance of the Complainant's Rejoinder *vide* email of September 04, 2018 and intimated the parties that an award shall be passed on the basis of the material available on record.

The language of the proceedings shall be English.



4. Factual Background

4.1. Complainant's Activities


The Complainant, a part of Tata Group of Companies, states, *inter alia*, that it is India's largest automobile company and market leader in commercial vehicles and among the top three in passenger vehicles, with consolidated revenues of INR 2,74,492 Crores for the year 2016-2017 and is among the top five commercial vehicle manufacturers, in the world. The Complainant also states that, in respect of the business carried on by the Complainant and its associated companies, its products and services have come to be associated by the consumers and the members of the public exclusively with the TATA Group of Companies, wherein, the word TATA was adopted as a trade mark, with its earliest registration dating back to the year 1951 and the said mark has been extensively used in respect of the products and services manufactured and rendered by the companies belonging to TATA Group of Companies.

The Complainant was formerly known as Tata Engineering and Locomotive Company, which began manufacturing commercial vehicles in the year 1954, which today, claims to be the world's fourth largest truck and bus manufacturer. It has, since, developed Tata Ace, India's first indigenous light commercial vehicle; the Prima range of trucks; the Ultra range of international standard light commercial vehicles; Safari, India's first sports utility vehicle; Indica, India's first indigenously manufactured passenger car; and the Nano, the world's most affordable car. The Complainant further states that, it had a collaboration agreement with Daimler Benz of Germany.

4.2. Complainant's use of 'HARRIER'

As stated by Complainant, the range of new generation cars launched by the Complainant includes Tiago, Hexa, Tigor and Nixon etc. of which, one such new generation SUV proposed to be launched by Complainant is under the mark HARRIER. Complainant further states that, SUV under the mark HARRIER is based on Land Rover Discovery Sport's platform and will be the first product to be based on the impact Design 2.0. The SUV under the mark HARRIER will be available in 5 and 7 seat configuration.

The HARRIER vehicle with its debut at the 2018 Auto Expo has attracted reviews and has been written about extensively by car enthusiasts on various third party portals. The images and video clips of the HARRIER vehicle are also extensively circulated on on-line platforms and social media. As a result, the Complainant asserts that, the vehicle under the mark HARRIER has come to be closely associated with the Complainant and is eagerly awaited by the general public and the people in the trade. In this regard, the Complainant has filed as **Annexure 5** few internet extracts dated October 15, 2015, February 02, 2018 etc.

 The Complainant further states that the said trade mark HARRIER will be used independently or in conjunction with the well-known trade mark TATA. In view of the mark HARRIER being closely associated with the Complainant, it is popularly referred to as TATA HARRIER and therefore Complainant further submits that, the said vehicle, symbolically carries the badge of high quality, unique designing and affordable cost.

In addition, the Complainant has registered the following domain names comprising the mark 'HARRIER':

SL. NO.	DOMAIN NAME	Tld
1	Tataharrier	.co.in
2	Tataharrier	.com
3	Tataharrier	.net
4	Tataharrier	.org

All the aforesaid domains have been registered in the June, 2018.

4.3 Complainant's Trade Mark HARRIER

Complainant claims to be the owner of the trade mark HARRIER in relation to Land Vehicles and parts thereof. In India, the mark HARRIER stands registered in the name of Complainant since September 07, 2016 under No. 3357314 in Class 12 and the same is valid and subsisting till September 07, 2026. The aforesaid claim has been substantiated by the Complainant through ANNEXURE 6.

4.4 Respondent's activities

Respondent states that he is the managing director of the company, which deals in the business of computer software and allied services under the name 'Harrier Information Systems Private Limited' commonly known as 'HARRIER' amongst its customers and clients. The aforesaid company, as stated by the Respondent was incorporated with the Registrar of Companies on April 21, 2004. A perusal of **Annexure R-1**, being the Certificate of Incorporation confirms the same. In addition, the Respondent claims to have incorporated a company in the State of Delaware, USA, under the name 'HARRIER Information Systems Inc.' on March 07, 2013. The same is corroborated by the certificate of incorporation, issued by the Secretary of State, State of Delaware which is annexed as **Annexure R-5**.

In addition, the Respondent states that, the said company has received ISO certifications 9001:2000, 9001:2008 and 9001:2015 as is clearly discernible from **Annexure R-2**. It is pertinent to note that, the documents indicate that the original certificate was issued on September 14, 2007.

The Respondent operates through its website www.harriersys.com and has its presence on various social media websites such as Youtube, Facebook and LinkedIn. The domain name <harriersys.com> was created on July 16, 2003. The Respondent in its response has given links of the aforesaid webpages for Respondent's company under the name 'Harrier Information Systems Private Limited'. In addition, to exemplify the company's presence on the internet, the Respondent has given a link of a cursory search through google with the search strings 'Harrier Information Systems Pvt. Ltd.', a perusal of which confirms the same.

The Respondent further submits that, he is also one of the directors of land development and construction company under the name 'HARIHAR Infrastructure Development Corporation', which is doing business of land development and construction prior to the year 2000. The Respondent states that, the word 'HARRIER' is phonetically similar with 'HARIHAR' and therefore, the software company 'HARRIER Information Systems Pvt. Ltd.' was established under the said name.

As per **Annexure R-4**, pertaining to 'Harrier Stockpile', the Respondent is based in Nagpur in India and it has an office by the name Harrier Information Systems Inc, based in New Jersey, USA.

4.5 Respondent's use of HARRIER

The domain <harrier.in> was registered by the Respondent on September 17, 2014 on behalf of his company 'Harrier Information Systems Private limited'. The Respondent further states that the said domain is being used for creating sub domains such as <test.harrier.in> and <demo.harrier.in> for testing and making the demos for its clients.

It is submitted by the Respondent that the application under No. 1518993 for the mark HARRIER was registered in its name from January 11, 2007 to January 11, 2017. A perusal of **Annexure R-3** confirms the same. It appears that the same has not been renewed thereafter. The Respondent has been using 'HARRIER' as part of the corporate name since the year 2004 in India and since the year 2013 in the USA.

The Respondent claims that its use of the mark 'HARRIER' is not only limited to domain names and trade name, but also extends to softwares. In this regard, the Respondent submits that, the Respondent's company has developed a software under the name 'Harrier Stockpile' and further submits that, the domain <stockpile.in> has been purchased for the same. The same is corroborated by a brochure under the heading 'Harrier Stockpile' referred earlier i.e. **Annexure R-4**.

5. Contentions of Parties as summarised in the pleadings

5.1 Complaint

- a) The Domain Name is identical or confusingly similar to the Complainant's trade marks (Paragraph 4(i) of the .IN Policy)

- i. Complainant submits that it has secured registration under No. 3357314 in Class 12 for the trade mark HARRIER in India since September 07, 2016 and the vehicle under the name/mark HARRIER has marked its debut at the 2018 Auto Expo and has attracted reviews as well as been written about extensively by car enthusiasts on various third party portals. As a result, the said trade mark HARRIER has come to be closely associated with the Complainant and is eagerly awaited by the general public and the people in the trade.
- ii. The Complainant has contended that the mark HARRIER establishes an identity and connection with the Complainant alone and no one else. In addition, the members of trade and public are acquainted with the Complainant's mark HARRIER and therefore, any use of an identical/confusingly similar mark/domain name by the Respondent will cause confusion amongst the Internet users as to the origin or source of the domain name. The Internet users may believe that the Respondent's impugned website is associated / affiliated/ connected to the Complainant or licensed / authorized by the Complainant, which is not the case.

b) The Respondent has no rights or legitimate interests in respect of the Domain Name (Paragraph 4 (ii) and Paragraph 7 of the .IN Policy)

- i. It is the contention of the Complainant that the Respondent has no rights or legitimate interests in the disputed domain name.
- ii. The Complainant further contends that the Respondent has not made any legitimate use of the domain <harrier.in> since the date of

registration of the domain i.e. September 17, 2014 and is therefore, blocking the domain register.

- iii. In addition, the Complainant asserts that, in view of the immense popularity gained by the Complainant's mark HARRIER, there is an imminent threat of the Respondent selling the domain <harrier.in> to a third party or creating a false association with the Complainant. It is further contended by the Complainant that, the domain <harrier.in> is bound to induce the members of trade and public to believe that the Respondent has a trade connection, association, relationship or approval with/of the Complainant and therefore, the sole purpose of the Respondent maintaining the registration for the disputed domain would be to tarnish the reputation of the Complainant's trade mark HARRIER.

c) **The domain name was registered or is being used in bad faith (Paragraph 4(iii) and Paragraph 6 of the .IN Policy)**

- i. The Complainant asserts that the Respondent has not made any legitimate offering of goods or services through the domain name <harrier.in> and now that, the Respondent being aware of Complainant's mark would try to usurp the reputation and goodwill vesting in Complainant's mark HARRIER by way of holding the domain name <harrier.in> in its name.
- ii. The Complainant by placing reliance on *Tata Motors Limited vs. Mr. Shay Rahman* (INDRP No. 929) states that the very use of a domain

name by someone with no connection with the Complainant suggests opportunistic bad faith.

5.2 Reply to the Complaint

Respondent in his reply states that the Complaint has been filed, so as to pressurize him to give up the legitimate interest and use of the impugned domain name <harrier.in>. The Respondent further states that, the Complainant is silent as to the damage caused by use of the domain <harrier.in>. It is asserted by the Respondent that, the chance of customer confusion is eliminated as, the Complainant and Respondent are using the mark HARRIER in respect of dissimilar goods and services i.e. 'motor vehicles' and 'software development' respectively. It has further stated that the domain name in question <harrier.in> was registered on September 17, 2014 i.e. much prior to the adoption / registration of the mark HARRIER by the Complainant.

The Respondent further stressed on the fact that, the company under the name 'Harrier Information Systems Private Limited' was incorporated in 2004 and the mark HARRIER was registered as a trade mark in its name since the year 2007 which is much prior to the announcement of launching a vehicle in the name of TATA HARRIER / HARRIER by the Complainant. The Respondent thus submits that, the domain <harrier.in> is connected with its principal business and has used the said domain for creating sub domains such as <test.harrier.in> and <demo.harrier.in> for testing purposes for its clients and therefore has legitimate interest in the said domain and the question of holding the domain <harrier.in> in bad faith does not arise.

It is further stated by the Respondent that the company 'Harrier Information Systems Private. Limited.' has been granted first ISO Certificate on September 14, 2007.

In addition, the Respondent states that, it operates its business through the domain <harriersys.com>, however, on account of unavailability of 'ccTLD' .IN in the year 2004, the domain <harrier.in> could not be registered in its name.

The Respondent further states that its company 'Harrier Information Systems Private Limited' has also developed a software comprising the mark 'Harrier' under the name 'Harrier STOCKPILE'. Having said that, the Respondent states that, its company is commonly known by name "HARRIER" amongst its customers/clients and that there wasn't any deliberate attempt to attract internet users so as to cause any damage to the Complainant.

Re Complainant's placing reliance on the decision of this Tribunal in the case of Tata Motors Limited vs. Mr. Shay Rahman (INDRP No. 929), the Respondent refutes the same by stating that, the said award has no application to the present case as the Respondent therein did not provide any evidence re its business activities under the name 'TAMO', conversely, in the present case the Respondent claims to have established its case beyond any reasonable doubt.

5.3 Rejoinder

The Complainant reiterates that, the Respondent is not making any legitimate use of the domain <harrier.in> and that there exists imminent threat of the Complainant's trademark HARRIER being misused. Further, its has been asserted by the Complainant that, the impugned domain name <harrier.in> is

inactive and a check on Fortigate network security, categorizes the said domain under the heading 'Pornography'. The Complainant further apprehends that the Respondent by taking advantage of the repute of the Complainant's trade mark HARRIER, would offer the same for sale to a third party for a hefty consideration.

In addition, *re* Respondent's contention of using the mark HARRIER in respect of dissimilar goods and services, the Complainant asserts that, TATA group is a conglomerate of several entities, each of which are commercially successful nationally and Internationally, of one such group company is 'Tata Consultancy Services' - a multi-national information technology company. The Complainant states that this factor could further cause confusion that the information technology services allegedly provided by the Respondent is in some way associated with the Tata Group, resulting in an unfair advantage to the Respondent and detrimental to the Complainant.

The Complainant reiterates that from the date of registration of the impugned domain <harrier.in> i.e. September 17, 2014, no legitimate use has been made and the Respondent is merely maintaining the domain name to ride on the popularity of Complainant's mark HARRIER/TATA HARRIER. The Complainant's stand that HARRIER is not actively used by the Respondent is further established by the fact that the Respondent's application for registration for the mark HARRIER in Class 42 under No. 1518993 has not been renewed and has therefore lapsed on January 11, 2017.

The Complainant further states that the sub-domain <test.harrier.in> and <demo.harrier.in> is not active, as alleged by the Respondent.

In addition, the Complainant asserts that, the Respondent has its presence on the internet *vide* the domain name <harriersys.com> and emphasizes that the Respondent's mark 'HARRIER STOCKPILE' is to be considered as a whole and therefore, the Respondent is not associated with the mark HARRIER *per se*.

The Complainant further states that absent use of the impugned domain name by the Respondent and on account of the Respondent being known as 'Harrier Information Systems Pvt. Ltd.' and trading under the domain name <harriersys.com>, the Complainant submits that the Respondent has not complied with the conditions under Rule 7 of the INDRP.

6. Discussion and Findings

As per paragraph 4 of the .IN Domain Name Dispute Resolution Policy (INDRP), any person who considers that a registered domain name conflicts with his legitimate rights or interests may file a Complaint with 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 rights in respect of the domain name;
- iii. The Registrant's domain name has been registered or is being used in bad faith.

Based upon the pleadings, it is required to be examined as to whether the parties have been able to justify/rebut the aforesaid premises:

6.1 Identical or confusingly similar trade/service mark

As is evident from the perusal of WHOIS records, the Complainant has registered the domain names <tataharrier.co.in>, <tataharrier.com>, <tataharrier.net> and <tataharrier.org> on June 28, 2018 and June 27, 2018 respectively Respondent

on the other hand, registered the domain name <harrier.in> much prior to the Complainant's aforesaid domain names i.e. on September 17, 2014.

Further, the Complainant is the proprietor of the registered trade mark HARRIER in Class 12 since September 07, 2016 in India which has been filed on a 'proposed to be used' basis. On the other hand, the Respondent has placed on record extracts from the online records of the Trade Mark Registry re his application under No. 1518993 dated January 11, 2007 for the mark

HARRIER

in Class 42 with claim of use since April 21, 2004. Though, the mark may not have been renewed, the same cannot override the fact that, the Respondent is a prior adopter and user of the mark HARRIER in respect of its business. The exclusive right obtained by registration cannot operate against the rights of prior users of the same or similar trade marks. In the case of *M/s R. J. Components and Shafts vs. M/s Deepak Industries Limited (CS(OS) 900/2002)*, the Hon'ble High Court of Delhi recognized the legal principle of **prior user of a mark**. The Court in the said case reiterated that '*prior user of a trademark will override the subsequent user even if the subsequent user has registered the trademark*'.

Thus, the Respondent has adopted the mark/domain name prior to the Complainant.

In the view of the foregoing discussions, Complainant has failed to satisfy this Tribunal that, the Respondent does not have prior proprietary rights in respect of the mark HARRIER and the aforesaid condition is held in favour of the Respondent.

6.2 Rights and legitimate interests

The Complainant has asserted that Respondent has no rights or legitimate interests in the disputed domain name. Paragraph 7 of the INDRP enumerates three circumstances (in particular but without limitation) and if the Arbitrator finds that the Registrant has proved **any** of the said circumstances, the same shall demonstrate its rights to or legitimate interest in the disputed domain name. The said paragraph is reproduced herein under:

“Registrant’s Rights to and Legitimate Interest in the Domain Name - Any of the following circumstances, in particular but without limitation, if found by the Arbitrator to be proved based on its evaluation of all evidence presented, shall demonstrate the Registrant’s rights to or legitimate interest in the domain name for the purposes of Paragraph 4 (ii):

- i. Before any notice to the Registrant of the dispute, the Registrant’s use of, or demonstrable preparations to use, the domain name or a **name corresponding to the domain name** with a *bona fide* offering of goods or services;
- ii. The Registrant (as an individual, business, or other organisation) has been commonly known by the domain name, even if the Registrant has acquired no trademark or service mark rights; or
- iii. The Registrant is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”

The Respondent operates its business under the corporate name 'Harrier Information Private Limited' and was incorporated on April 21, 2004. Further, the Respondent operates through the domain name <harriersys.com> registered since, July 16, 2003, which comprises the mark HARRIER. In addition, the Respondent has placed on record certificate of incorporation from the Secretary of State, State of Delaware, the USA with respect to 'HARRIER Information Systems Inc.' dated March 07, 2013. In addition, the Respondent's use of the mark HARRIER is not only limited to trade name, but, the same is also used as a trade mark as is clearly discernable from the brochure provided by the Respondent, which mentions about its product comprising the mark 'HARRIER' i.e. 'Harrier Stockpile'.

The Respondent has thus, provided convincing evidence to demonstrate that it is using the mark HARRIER to promote a genuine business for software development and that it has been using the mark HARRIER in connection with its products as well. The Respondent has in fact submitted ISO Certifications for its company 'Harrier Information Pvt. Ltd'. (dating back to 2007). On the other hand, documents filed by the Complainant (Annexure 5) indicate use of the mark HARRIER only since October 2015.

Therefore, this Tribunal finds that, the Respondent registered the disputed domain name much prior to the Complainant, to promote its own business without intending to trade off or exploit the Complainant's trademark.

In view of the above, this Tribunal finds that the Respondent has proved that it has been using HARRIER in connection with a *bona fide* offering of goods or services before receiving notice of the present dispute.

The Complainant has thus failed to prove that the Respondent has no rights or legitimate interests in the disputed domain name.

6.3 Bad faith

Paragraph 6 of the INDRP enumerates the circumstances evidencing registration and use of domain name in bad faith. The said paragraph is reproduced herein under:



"Evidence of Registration and use of Domain Name in Bad Faith: For the purposes of Paragraph 4(iii), the following circumstances, in particular but without limitation, if found by the Arbitrator to be present, shall be evidence of the registration and use of a domain name in bad faith:

- i. Circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant, who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's documented out-of-pocket costs directly related to the domain name; or
- ii. the Registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Registrant has engaged in a pattern of such conduct; or
- iii. by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other on-line location, by

creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location."

The following are the findings *re* bad faith:

- (i) From the evidence on record, it is clear that the Respondent registered the domain <harrier.in> and the trade mark / trade name comprising HARRIER much prior to the adoption of the mark HARRIER by the Complainant. There is no evidence put forth by the Complainant to establish bad faith on the part of the Respondent to register the domain <harrier.in> or that the said domain was registered to attract internet users by creating a likelihood of confusion with the Complainant's mark HARRIER.
- (ii) The following table clearly establishes *bonafide* on the part of the Respondent:

S. No.	Basis	Complainant	Respondent
1.	Date of application	Application for the mark HARRIER was filed on September 07, 2016	Application for the Mark  filed on January 11, 2007
2.	Use claimed	Filed the mark HARRIER on 'proposed to be used' basis	Filed the mark  with use claimed since April 21, 2004
3.	Trade Name	No trade name	1)Harrier Information Systems Private Limited, Maharashtra

			(incorporated on April 21, 2004) 2) Harrier Information Systems Inc., State of Delaware, the USA (incorporated on March 07, 2013)
4.	Date of earliest domain name registration comprising HARRIER	Domain names <tataharrier.com>, <tataharrier.net> and <tataharrier.org> registered on June 27, 2018	Domain name <harriersys.com> registered on July 16, 2003.
5.	Domain names comprising HARRIER	<tataharrier.com> <tataharrier.net> <tataharrier.org> <tataharrier.co.in>	<harriersys.com>, <demo.harrier.in> <test.harrier.in>
6.	Mark HARRIER used on/as	The mark HARRIER will be used on Vehicle as a trade mark	The mark HARRIER is used as a trade name (Harrier Information Systems Pvt. Ltd. and Harrier Information Systems Inc.) and as a trade mark (on its product 'harrier stockpile', brochures, envelopes etc.)

(iii) A simple mention of the FortiGuard web filter to show incorrect categorization of the domain <harrier.in> under the heading 'Pornography' holds no water since the website www.harrier.in does not lead to any obscene webpages. On the contrary the Respondent has filed brochure, web extracts, incorporation documents to show legitimate adoption/use of HARRIER.

This Tribunal is of the view that, the Respondent has satisfied the criteria under Paragraph 4(iii) as mentioned above. Thus, it cannot be stated that the domain name was registered in order to prevent the Complainant from reflecting the mark HARRIER in a corresponding domain name. Mere fear as to what might happen if the Respondent were ever to sell the name to a third party cannot be a sole basis for establishing bad faith, especially when *bonafide* adoption / use has been shown by the Respondent. This Tribunal cannot speculate on future events or operate in a *quasi* jurisdiction (*Hola SA and Hello Ltd. vs. Idealab; WIPO Case No. D2002-0089*)

Thus, the Complainant has failed to prove bad faith on the part of the Respondent.

7. Award

From the foregoing findings, the Complainant has failed to establish any of the grounds mentioned above. This Tribunal holds that the Respondent's adoption / use of HARRIER is prior and *bonafide*.

The Complaint is accordingly dismissed.

The parties shall bear their own cost.

Dated: October 16, 2018



C.A. Brijesh
Sole Arbitrator