

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W. P. No. 48527 of 2021

Meezan Beverages (Pvt.) Limited

VERSUS

Competition Commission of Pakistan and two others

JUDGMENT

Date of Hearing	10.06.2024
Petitioner By:	Mr. Adil Bandial, Advocate
Respondents By:	Mr. Ali Javed Darugar, Advocate

ABID HUSSAIN CHATTHA, J. This constitutional Petition is directed against the impugned notice dated 30.08.2018 (the “Notice”), show cause notice dated 07.07.2021 (the “SCN”) and actions taken pursuant thereto, by the Respondents, being unlawful, illegal and without jurisdiction.

2. The brief facts of this case are that the Petitioner is a private limited company existing under the Companies Act, 2017 and is engaged in the business of, *inter alia*, manufacturing, production and sale of aerated waters, carbonated drinks and beverages, mineral water, juice and energy drinks. Amongst various products, the Petitioner also manufactures, sells and markets, an energy drink under the brand name of ‘Storm’. The Petitioner applied for registration of trademark of Storm on 11.09.2015 with the Intellectual Property Organization (the “IPO”) under the Intellectual Property Organization of Pakistan Act, 2012 (the “IPO Act”) read with the Trade Marks Ordinance, 2001 (the “Trade Marks Ordinance”) and the same was accordingly, registered in Class 32 under No. 397388 dated 13.03.2021.

3. The Competition Commission of Pakistan (the “CCP”) and its functionaries are arrayed as the Respondents who are tasked to regulate the competition law as encapsulated in the Competition Act, 2010 (the “Act”). The CCP issued the impugned Notice to the Petitioner pursuant to

Regulation 16(2) of the Competition Commission (General Enforcement) Regulations, 2007 informing the Petitioner that M/s PepsiCo, (the “**Complainant**”) has filed a complaint against the Petitioner for alleged violation of Chapter II and more particularly, Section 10 of the Act with respect to deceptive marketing practices. A copy of the complaint along with its annexures was attached with the impugned Notice. It was further stated therein that the CCP has initiated a formal inquiry under the provisions of Section 37(2) of the Act by appointing Inquiry Officers and the Petitioner was called upon to furnish its reply to the complaint on or before 17.09.2018.

4. The Complainant, in essence, had alleged that product of the Petitioner under the brand name **Storm** in packaging is deceptively similar to that of the Complainant’s product marketed under the brand name of “**Sting**”. The Petitioner’s brand is being packaged with overall look, feel, get-up and color scheme that is closely, deceptively and / or parasitically similar to the Complainant’s brand. This fact is established with pictorial evidence that the Petitioner imitated several well-known and renowned brands other than the Complainant’s which demonstrates *mala fide* intention of the Petitioner to capitalize on the reputation and goodwill of others. As such, the Petitioner has indulged in deceptive marketing practices in violation of Section 10 of the Act.

5. The Petitioner instead of replying to the impugned Notice vide letter dated 17.09.2018 requested for extension in time to file its reply which was granted till 15.10.2018 vide letter dated 18.09.2018. The Petitioner through its reply dated 12.10.2018 informed the CCP that it has assailed the *vires* of the Act coupled with proceedings initiated against it by instituting W.P. No. 241159 / 2018. In consequence of an injunctive Order passed therein, the proceedings before the CCP were suspended. However, vide Order dated 26.10.2020, the Writ Petition was dismissed and the injunction stood vacated, whereafter, the Petitioner was again directed to furnish its reply to the complaint vide letter dated 04.02.2021. However, the Petitioner informed the CCP on 15.02.2021 that it has challenged the Judgment passed in referred Writ Petition through CPLA No. 413-C / 2021 before the

Supreme Court of Pakistan which is still pending and as such, further proceedings be stayed. As no injunctive order was passed by the Apex Court, the CCP again required the Petitioner in terms of letter dated 24.02.2021 to participate in the pending inquiry proceedings. In response thereto, the Petitioner eventually filed its reply dated 05.03.2021 raising, *inter alia*, objections regarding the CCP's assumption and exercise of jurisdiction to initiate and conduct inquiry; and non-compliance of statutory pre-requisites under Section 37 of the Act.

6. The CCP opined that the only mandate of inquiry is to determine whether the allegations leveled in the complaint amount to, *prima facie*, violation of Section 10(1) of the Act in general; and whether the Petitioner has engaged in deceptive marketing practices within the meaning and scope of Section 10(2)(a), (b) and (d) of the Act through the distribution of false or misleading information that is capable of harming business interest of the Complainant; or distribution of false or misleading information to consumers lacking a reasonable basis or through fraudulent use of the Complainant's trade dress which includes product labelling or packaging and as such, amounts to violation of Section 10(1) of the Act. After conducting inquiry, it was concluded that *prima facie* violations under the Act warrant initiation of 'proceedings' against the Petitioner under Section 30 of the Act.

7. Accordingly, the impugned SCN was issued to the Petitioner which specifically stipulated that pursuant to an inquiry conducted under Section 37(2) of the Act, the inquiry report dated 28.06.2021 appended as Annexure-1 and constituting an integral part thereof, reveals violations of Section 10(1) of the Act. Hence, the Petitioner is called upon to show cause within fourteen working days from the date of receipt of the SCN to appear and place before the CCP, facts and material in support of its contentions and to avail the opportunity of being heard. Nevertheless, the Petitioner, instituted the instant Petition.

8. In view of the above factual context, learned counsel for the Petitioner contended that the CCP was legally obliged to decide the question

of jurisdiction in the first instance but it failed to do so. The CCP did not comply with the mandatory pre-requisites embodied in Section 37 of the Act inasmuch as, the CCP neither formulated nor conveyed a formal order to the effect that the complaint is not frivolous, vexatious or based on insufficient facts and as such, constitutes a contravention of the provisions of Chapter II of the Act. Relying upon Paragraph 3.7.11 of the inquiry report which states that the Complainant has built its case, *inter alia*, on trade dress, packaging, look, feel and get-up of products, confusing or deceptive similarity in terms of shape of bottle, label, design, color combination, color scheme, logo design, lettering, color of drink, aesthetic design elements, look alike, passing off, dilution, pattern, marks, resemblance and copyrights, learned counsel argued that the nature of allegations relates to infringement of trademark, therefore, the subject matter of the complaint fell within the exclusive jurisdiction of the Intellectual Property Tribunal (the “**Tribunal**”) established under Section 16 of the IPO Act which is empowered to adjudicate all alleged acts of infringement of trademarks under the IPO Act read with the Trade Marks Ordinance. Hence, the impugned action fell beyond the purview of Section 10 of the Act as it encroaches upon the jurisdiction and mandate of the IPO and the Tribunal vested by the IPO Act as a subsequent enactment. Hence, the impugned Notice issued under Section 37(2) of the Act and the impugned SCN under Section 30 of the Act are patently without jurisdiction, *void ab initio* and *coram non judice* which are liable to be set aside along with collateral proceedings.

9. In rebuttal, learned counsel for the CCP submitted that the impugned Notice was issued to the Petitioner in lawful exercise of jurisdiction under Section 10 of the Act and an inquiry was initiated by the CCP under Section 37(2) of the Act after formulating its opinion on the basis of evaluation of the complaint that it provided sufficient material to warrant an enquiry to determine whether a contravention of Chapter II of the Act was made out and reply from the Petitioner was sought through the impugned Notice. However, the Petitioner abused the process of law and delayed the enquiry by initiating frivolous and unnecessary litigation, restricting the CCP to proceed further within the mandate and scope of the

Act. Complete complaint was sent to the Petitioner on the basis of which the CCP had formed its opinion for initiating inquiry and as such, the mandate of Section 37 of the Act had been fully complied with. The inquiry report itself also endorses the view that the complaint is not frivolous or based on insufficient material and it has been recommended to initiate proceedings against the Petitioner under Section 30 of the Act by holding that acts of the Petitioner, *prima facie* appear to be in violation of Section 10 of the Act. As such, the pre-requisites of Section 37 of the Act were duly adhered to by the CCP in accordance with the test developed in case titled, “Competition Commission of Pakistan and others v. Dalda Foods Limited, Karachi” (**2023 SCMR 1991**), wherein, the Supreme Court of Pakistan has recognized jurisdiction of the CCP to prevent and address anti-competitive practices. Accordingly, the SCN was issued to the Petitioner and an opportunity of hearing has been provided. All contentions and preliminary objections of the Petitioner including that of jurisdiction of the CCP are liable to be addressed during ‘proceedings’ under the SCN. However, the Petitioner with *mala fide* intention has again proceeded to challenge the SCN through the instant Petition. Without prejudice to the above, the CCP is duly authorized under Section 30 of the Act to issue a show cause notice in cases of contravention of Chapter II of the Act, in particular, Section 10 thereof. The CCP under the Act and the IPO as well as the Tribunal constituted under the IPO Act do not have overlapping but distinct and separate jurisdiction within the ambit of the Act and the IPO Act, respectively. As such, this Petition is not maintainable being pre-mature and having been instituted only to frustrate the due process of law. Therefore, this Petition is liable to be dismissed and the CCP should be allowed to proceed with the matter in accordance with law.

10. From the rival contentions of the parties, the points of determination before this Court are as follows:

- (i) Whether the impugned Notice has been issued by the CCP after complying with the requirements of Section 37 of the Act? and

(ii) Whether the jurisdiction of the CCP with respect to deceptive marketing practices in terms of Section 10 of the Act is distinct and separate from the jurisdiction vested in the Tribunal under the IPO Act?

11. In order to address the first query, it is expedient to analyze the scheme of law encapsulated in the Act which has been promulgated to make provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency, to protect consumers from anti-competitive behavior and to provide for the establishment of the CCP to maintain and enhance competition. As such, the domain, scope and focus of the Act is to foster competition and curb anti-competitive practices between competing undertakings. Section 2(q) of the Act defines ‘undertaking’ which means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity, in any way, engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings. One component of competition law is deceptive marketing practices. Section 10(1) of the Act provides that no undertaking shall enter into deceptive marketing practices. Section 10(2) of the Act states that deceptive marketing practices shall be deemed to have been resorted to or continued, if an undertaking resorts to the distribution of false or misleading information that is capable of harming the business interests of another undertaking; the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use or quality of goods; false or misleading comparison of goods in the process of advertising; or fraudulent use of another’s trademark, firm name, or product labeling or packaging. Section 28 of the Act stipulates the functions and powers of the CCP to initiate ‘proceedings’ in accordance with the procedures of the Act and ‘make orders’ in cases of contravention of provisions of the Act; to conduct studies for promoting competition in all sectors of commercial economic activity; to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of the Act;

to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of the Act, rules or orders made thereunder; to engage in competition advocacy; and to take all other actions as may be necessary for carrying out the purposes of the Act. This Section also allows delegation of powers and functions of the CCP to its members or officers. Section 30(1) of the Act proclaims that where the CCP is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such ‘orders’ specified in Section 31 thereof, as it may deem appropriate and may also impose a ‘penalty’ at rates prescribed in Section 38 thereof. Section 30(2) of the Act imposes an obligation upon the CCP to adopt due process by giving notice of its intention to make such an order stating the reasons therefor, to such undertaking, as may appear to it, to be in contravention; and give the undertaking an opportunity of being heard on such date as may be specified in the notice and of placing before the CCP, facts and material in support of its contention. Section 30(5) of the Act requires the CCP to pass a reasoned order while Section 30(4) thereof provides that such an order shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract or memorandum or articles of association.

12. Section 37 of the Act relates to enquiry and studies. Section 37(1) thereof empowers the CCP on its own or upon a reference made to it by the Federal Government, to conduct enquires into any matter relevant to the purposes of the Act. Section 37(2) of the Act provides that where the CCP receives from an undertaking or a registered association of consumers, a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by *prima facie* evidence, conduct an enquiry into the matter to which the complaint relates. Section 37(4) of the Act states that if upon the conclusion of any inquiry under Sub-Section (1) and (2), the CCP is of the opinion that findings are such that it is necessary in the public interest so to do, it shall initiate ‘proceedings’ under Section 30 of the Act. Sections 41 to 44 of the Act provide for the remedies of appeal that may be availed by an

aggrieved person subject to conditions enumerated therein. Section 43 of the Act constitutes Competition Appellate Tribunal and empowers it to hear appeals under Section 42 thereof against an order of the CCP comprising two or more members or of the Appellate Bench of the CCP. Final appeal against the order of the Competition Appellate Tribunal lies to the Supreme Court of Pakistan under Section 44 of the Act. Finally, Section 59 confers overriding effect to the provisions of the Act, notwithstanding anything contained in any other law for the time being in force.

13. Therefore, it is manifestly clear that the Act provides for a self-contained regulatory regime to regulate and enforce the scheme of law. The ‘proceedings’ in cases of contravention can only be initiated under Section 30 of the Act and based upon an order passed thereunder, the CCP may also impose a penalty at rates prescribed in Section 38 of the Act in all cases of contravention of the provisions of Chapter II. The powers of the CCP to conduct studies or inquiries or to give advice or to engage in competition advocacy do not involve any penal consequences and are merely tools available to the CCP to gather information to administer various provisions of the Act. Under Section 37(2) of the Act, when an aggrieved person triggers the powers of the CCP to hold an inquiry against a specified undertaking on a set of allegations contained in the complaint, the CCP is obliged to act accordingly unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by *prima facie* evidence. As such, the internal decision-making process regarding veracity of the complaint or a written opinion thereon need not be shared but the notice communicating gist of reasons or nature of alleged violations justifying the inquiry accompanied with the complaint itself constitutes sufficient compliance of the requirements of Section 37(2) of the Act.

14. The Supreme Court of Pakistan in Dalda Foods case (supra) authoritatively addressed the questions regarding mandate of Section 37 of the Act with reference to the powers of the CCP for conducting an inquiry. It was held that ‘enquiry’ and ‘studies’ are independent tools employed by the CCP to collect and assess information on market trends and do not constitute an adverse action or ‘proceeding’ under Section 30 of the Act against the

undertaking. As such, Section 37 of the Act does not in itself result in penal consequences. Addressing the requirements of Section 37 of the Act, it was opined that the CCP is obliged to communicate the gist of reasons to the undertaking if it decides to proceed against the undertaking as recorded in its internal deliberations which led to the decision of initiating such an inquiry. This is a minimum requirement for the purposes of transparency and good governance and also facilitates the regulatory process by keeping the undertaking informed. The result of an inquiry may lead to enunciation of formal ‘proceedings’ under Section 30 of the Act which requires issuance of notice, communication of detailed reasons and right of hearing.

15. In the instant case, gist of the reasons or nature of allegations i.e. ‘deceptive marketing practices’ constituting violation of Section 10 of the Act was stated in the body of the impugned Notice under Section 37(2) of the Act and the complete complaint of the Complainant along with its annexures was appended therewith, the contents whereof, surely constituted and conveyed all the reasons on the basis of which the CCP considered it expedient to conduct an enquiry as the latter did not find it frivolous or vexatious or based on insufficient facts, or not substantiated by *prima facie* evidence. As such, the test developed in Dalda Foods case (supra) in terms of requirements of Section 37 of the Act was fully met. Moreover, in the impugned SCN, detailed reasons were incorporated and right of reply coupled with hearing was duly accorded. Hence, there is no procedural infirmity or irregularity regarding issuance of impugned Notice and SCN on part of the CCP.

16. The second query pertains to exclusion of jurisdiction of the CCP under the Act vis-à-vis the Tribunal created under Section 16 of the IPO Act with respect to the nature of allegations levelled against the Petitioner in the impugned Notice and SCN. In order to address the query, it will be beneficial to examine the IPO Act which was promulgated in the year 2012 with the primary objective to establish the IPO for protection of various intellectual property rights of the citizens to foster creative thinking, stimulate creativity, provide incentives for technological innovations and attract investments. The existing institutional arrangements under various intellectual property laws were consolidated under the umbrella of the IPO

to achieve exclusivity and integration regarding all subjects and matters relating to intellectual property rights. Section 2(h) of the IPO Act defines intellectual property laws as the laws specified in its Schedule which includes the Trade Marks Ordinance. The IPO was established under Section 3 of the IPO Act and the policy board was setup under Section 4 thereof. Section 16 thereof provides for the establishment of the Tribunal(s) to exercise jurisdiction under the IPO Act. Section 17(4) of the IPO Act provides that subject to Sub-Section (5) thereof, no Court other than a Tribunal shall have or exercise any jurisdiction with respect to any matter to which jurisdiction of the Tribunal extends under the IPO Act. Sub-Section (5) thereof further provides that nothing in Sub-Section (4) shall be deemed to affect any proceedings pending before such Court immediately before the coming into force of the IPO Act. Sub-Section (6) thereof states that all suits and proceedings pending in any Court instituted under intellectual property laws shall stand transferred to, and be heard and disposed of by, the Tribunal(s) having jurisdiction under the IPO Act. Section 18(1) of the IPO Act importantly proclaims that all suits and other civil proceedings regarding ‘infringement of intellectual property laws’ shall be instituted and tried in the Tribunal, whereas, Sub-Section (2) of Section 18 starts with the non-obstante clause and provides that notwithstanding anything contained in any other law for the time being in force, the Tribunal shall have exclusive jurisdiction to try any offence under intellectual property laws. Section 19 relates to appeals and grants right to any person aggrieved from the final judgment or order of the Tribunal to prefer an appeal to the High Court having territorial jurisdiction over the Tribunal. Under Section 36 of the IPO Act, the Trade Marks Registry, Copyright Office and Patent Office were integrated and made part of the IPO, notwithstanding anything contained in any other law for the time being in force and upon commencement of the IPO Act. Section 39 thereof unequivocally stipulates that provisions of the IPO Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

17. Therefore, it is vividly evident that purpose of the IPO Act is to consolidate the regulation of all existing intellectual property laws included in its Schedule by the IPO and vest exclusive jurisdiction in the Tribunal to

try all offences and adjudicate all suits and other civil proceedings regarding infringement or breach of intellectual property laws.

18. Putting the Act in juxtaposition to the IPO Act, a simple and straight forward conclusion is evident that both the enactments have conspicuously distinct purpose, scope, and mandate. The Act relates to competition law, whereas, the IPO Act pertains to intellectual property laws. Each enactment has created a specialized regulatory body and has put in place a self-contained regulatory framework to administer duties and obligations imposed by law. The IPO Act consciously excludes the Act from its Schedule and as such, the legislature has intentionally kept the Act beyond the purview of the IPO Act. Hence, ‘deceptive marketing practices’ under Section 10 of the Act constitute a necessary and essential element of competition law, jurisdiction of which is vested with the CCP under the Act. It is invoked and employed in the context of enforcement of competition law and the same has no relation, nexus or connection with breach or infringement of intellectual property rights under the intellectual property laws included in the Schedule of the IPO Act which have their own dimensions, contours and consequences being subject of jurisdiction of the Tribunal under the IPO Act. As such, violations of Section 10 of the Act in terms of ‘deceptive marketing practices’ under the Act has different ingredients than ‘infringement of intellectual property rights’ under the ‘intellectual property laws’, although an impugned action may entail concurrent proceedings within the distinct scope, mandate and ambit of the Act and the IPO Act. The distinction becomes more vivid as there is no requirement of ‘breach of intellectual property rights’ under the ‘intellectual property laws’ including the Trade Marks Ordinance to invoke and trigger the jurisdiction of the CCP under the Act in terms of ‘deceptive marketing practices’. The consequences and penalties for ‘deceptive marketing practices’ under provisions of the Act are contrastingly different from the ‘infringement of intellectual property laws’ under the IPO Act. This conclusion is manifestly evident from the express exclusion of the Act from the Schedule of the IPO Act. Hence, the argument that exclusive jurisdiction of the Tribunal to adjudicate claims of infringement of intellectual property laws and offences under the IPO Act being a subsequent enactment

impliedly excludes jurisdiction of the CCP in terms of deceptive marketing practices under Section 10 of the Act is completely misconceived since jurisdiction of the CCP under the Act and the IPO or the Tribunal under the IPO Act are distinct and separate in terms of ambit and scope of such laws and does not amount to any inconsistency or conflict of jurisdiction. Therefore, the objection that the impugned SCN has been issued by the CCP without jurisdiction is discarded, accordingly.

19. It is now well entrenched in our jurisprudence that the constitutional jurisdiction of this Court as a normal rule cannot be invoked on mere suspicion or apprehension when no substantive right is infringed and the aggrieved party has the right to advance its defense in response to a notice. The challenge to a show cause notice in writ jurisdiction at premature stage and tendency to bypass the remedy provided under the concerned statute amount to fetter the rights conferred on statutory functionaries specially constituted for the purpose to initially decide the matter. The objections of the Petitioner would have been decided by the CCP during proceedings under the SCN but such an occasion did not arise due to the filing of the instant Petition. As such, the Petitioner did not approach this Court with clean hands and resorted to uncalled for litigation, thereby, obstructing the CCP as regulator empowered under the law to undertake and perform its routine functions and duties. Reliance is placed on case titled, “Commissioner Inland Revenue and others v. Jahangir Khan Tareen and others” (**2022 SCMR 92**). Therefore, the titled Petition was not maintainable on this score as well.

20. In view of the foregoing reasons, this constitutional Petition is devoid of merit and the same is **dismissed**.

(Abid Hussain Chattha)
Judge

Approved for reporting

Judge

Announced in Open Court on 26.06.2024.

Judge