

## Fraudulent use of a trade mark, product labelling and packaging

<b>Complainant:</b>	<b>M/s NAWABA OIL INDUSTRIES.</b>
<b>Respondents:</b>	<b>1. M/s ALHAFEEZ OIL INDUSTRIES and 2. M/s MUSLIM CORPORATION.</b>
<b>Decision:</b>	<b>Deceptive Marketing Practices 1. (Respondent No.1)- Case disposed in terms of consent agreement. 2. (Respondent No.2)- Penalty Imposed.</b>

The Complainant filed complaints against Al-Hafeez Oil Mills (hereinafter referred to as “the Respondent-1”) and Muslim Corporation (hereinafter referred to as “the Respondent-2”), referred to as “the Respondents”, respectively, alleging that the Respondents had indulged in deceptive marketing practices in violation of section 10 of the Competition Act, 2010 (the ‘Act’) by copying/imitating the trade mark “Nawaba Oil Industries – Double Bhains Marka Khal Banola” and copyrighted packaging /trade dress which included the slogan, “Alsi Namawaba ® Khala Banola” of the Complainant and distorting healthy competition within the industry. The complaints made against the Respondent No.1 were as follow:

- (i) The Respondent trade mark is visually as well as phonetically “*identical, confusingly and deceptively similar*”,
- (ii) The packaging and/or trade dress used by the Respondent-1 is identical,
- (iii) The company name “AH Nawab Oil Industries” is similar and the logo “Asal Bhen MARKA” in which the Term “Nawab” creates confusion amongst the customers.
- (iv) The Respondent-1 has not declared himself as “AH Nawab Oil Industries, Bahawalpur” with the Bahawalpur Chamber of Commerce and Industry in the year 2017-2018, proving that the packaging has been infringed and the term adopted by the Respondent has been done so to confuse the Complainant’s customers.
- (v) The likelihood of confusion and deception is present because the products of the Respondent are sold at the same counters, pass through the same trade channels and are bought by the same class of customers as the Complainant’s product.

The complaints made against the Respondent No.2 were as follow:

- (i) The Respondent has developed trademarks, with the names “Taiz Roo Triple Bhens Mark” and “Kashmir Gham Triple Bhens Mark”, which are identical, confusingly and deceptively similar to the Complainant’s trade mark.
- (ii) The packaging and /or trade dress used by the Respondent is identical to that of the Complainant;
- (iii) The likelihood of confusion and deception is compounded by the fact that the literacy rate is very low and people will not be able to distinguish between identical / similar trade marks.

The Commission initiated an enquiry and on receipts of the conclusions of the Enquiry Report issued show cause notice (SCN) to the Respondents requiring them to respond in writing and to appear before the Commission on the date of hearing to place facts and material in support of its contention by availing the opportunity of hearing.

In the hearing before the Bench, the counsels for the Complainant and the Respondent No.1, explained and argued the matter ably and provided thorough assistance to the Commission in the matter. During the hearing the Bench informed the parties that in deceptive marketing cases the Commission is inclined towards a compliance oriented approach and the purpose of section 10 aims at bringing about correction of behaviour rather than imposing penalties. Both, the Complainant and the Respondent No.1 voluntarily showed their willingness to resolve the matter on the basis of mutual consent and desired for a consent order and consequently both parties filed undertakings and commitments before the Commission.

The Commission in view of the peculiar circumstances and facts of this case disposed it in terms of the consent agreement without going into the merits of the case.

However, the Respondent No.-2 during the hearing showed willingness to file commitments as per the satisfaction of the Bench but the commitment filed by him was deemed completely unsatisfactory and consequently the commission framed the following issue, which required determination.

Whether Respondent No.2 is involved in fraudulent use of the Complainant's trademark, product labelling and packaging/trade dress, which amounts to, Prima facie, violation of section 10(1) of the Act, read with sub-sections 10(2) And 10(2) (d) of the Act.

Though Respondent No.2 contested the allegations against him in person but neither he replied to the complaint forwarded to him nor attended all hearings except the two hearings. Despite the Respondent No.2 having affirmed to furnish an undertaking in line with the resolved conditions for a disposal by consent, the Respondent No.2 failed to do so. Therefore, the commission examined the issues in the light of the material available on record and reached to the conclusion.

The Bench argued that the Respondent No.2 developed its own brand name for its products and that the Complainant did not have sole ownership of use of the particular colour, it was important to note that in instances of deceptive marketing the overall general impression of the products packaging, logo, etc., had to be taken into account, as the overall impression contributed considerably to the risk of consumer confusion. Therefore, it could not be denied that artistic work of the logo and packaging/trade dress indeed had significant resemblance with that of the Complainant and was clearly copied from the latter. The Bench was of the considered view that the consumers were clearly susceptible and at a serious risk of falling prey to deceptive confusion pertaining to the origin and quality of the products, due to the striking similarity in the Complainant's and Respondent No.2's trade dresses.

The Bench reached to the conclusion that the Respondent No.2 was fraudulently using said trade mark/packaging for the purpose of marketing its similar product in violation of section 10(2)(d), read with section 10(1) of the Act and unfairly creating a material perception on the part of actual or potential consumers in favour of Respondent No.2, which in turn, was capable of harming the image, goodwill, sales and other business interests of the Complainant.

The Bench keeping in view the conduct of Respondent No.2 and circumstances of the case, imposed a penalty of PKR 2 (Two) Million and directed it to cease and desist from using the trade mark or packaging material similar to that of the Complainant or other undertaking, in future. Respondent No.2 was further directed to create a mark, packaging, marketing material etc. different from Complainant within 30 days of this order and file compliance report within thirty five days from the date of this order with the Registrar of the Commission.

