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DECEPTIVE MARKETING PRACTICE

Complainant: M/s DIAMOND PAINTS INDUSTRIES (PVT) LIMITED
Respondent: M/s BERGER PAINTS PAKISTAN LTD.
Decision: Deceptive Marketing Practices – Proceeding disposed as Respondent agrees to changes made by the Commission.

The Complainant filed a complaint against the Respondent alleging that the Respondent was engaged in anti-competitive practice(s) by making a substantial and quantifiable claim regarding its product 'Berger Super Emulsion' as 'No. 1 Emulsion in Pakistan', marketing it on its paint buckets and shade cards without any study/research or report for supporting the same. Such claim being a quantifiable claim that is false/misleading held the potential to mislead the ordinary consumer and likely to cause harm to the Respondent's competitors, in violation of sections 10(2)(a), (b) and (c) of the Competition Act, 2010. Consequently, the Commission after considering the prima facie findings of the Enquiry Committee deemed it appropriate to initiate proceedings and served a Show Cause Notice (SCN) to the Respondent with opportunity of being heard.

The Respondent submitted its reply to the Show Cause Notice (SCN) along with an application under regulation 30 of the Commission (General Enforcement) Regulation 2007 (GER) stating that as per the Enquiry Report, the use of No.1 is displayed in red colour and is in bigger font than the rest of the logo, so it catches the eye of the observer first and may hold the attention of a consumer for some time, the same may appear to the consumer to imply that the product holds exemplary position regarding a certain property or is ranked first in the overall market. The Respondent claimed the remedy as provided under regulation 30 and submitted logos that it intended to use instead of the logo to which the Enquiry Commission had taken exception to.

In the hearing, the Bench pointed out that though respondent had submitted an undertaking mentioning that it had stopped advertising the impugned logo/brand but it was still being advertised on its website. The Bench also made it clear to the parties that the Commission is not a clearance agency to approve a certain advertisement/logo in terms of its compliance with competition law, however, the Commission can be contacted in an advisory role as per section 28(1) (d) read with guidelines in this regard.

The Respondent filed another undertaking confirming that the impugned logo/brand had been removed from its website and reiterated that it had ceased to advertise the impugned logo/brand in all prints and electronic media. Keeping in view the oral and written submissions, the material evidence on record, and the applicable law in the matter, the following was framed for deliberation and determination.

“Whether the Respondent has resorted to deceptive marketing practices by distributing false and misleading information in violation of section 10(1) read with section 10(2)(a) and (b) of the Act?”

Since the Respondent agreed to rectify and address the concerns of the Commission and the Complainant during the hearing, the Bench disposed the matter in terms of the following:

The Bench was of the view that presenting the impugned logo in the manner used can mislead the consumer that Respondent’s emulsion is No.1 in the emulsion paint market or that the product is better in ranking as a whole from the other competitors in the market. This has the potential to harm the position and ranking of other players in the market, thereby giving the Respondent an unearned competitive edge. This certainly can harm the business interests of other undertakings.

The Bench observed that distribution of the concerned misleading information by the Respondent led to a violation of section 10(2) (a) and (b) of the Act by the Respondent. No independent study or research to support the nexus for claiming it to be No.1 had been placed on the record either. The Respondent’s stance was that the term No.1 had been used as part of the name of the product and the trade mark logo had already been applied in this regard. Clarifying the same, the Bench deemed it relevant to state that Bench was not concerned with the trademark being registered or not, but, was concerned with the representation of the logo by the Respondent while advertising the product being deceptive in any manner. Even if an undertaking had a registered trade mark logo under the relevant laws, it would not absolve any party from complying with the relevant provisions of section 10 of the Act.

After satisfying the Commission with the compliance of Regulation 30 of GER and acceptance of the commitments filed by the Respondent, it decided not to impose any penalty on the Respondent and observed that any alleged practice of a similar nature, i.-e., using the term No.1, by any of the players in the market, in a form or manner which is misleading or deceptive, should be stopped and/or rectified forthwith by all undertakings concerned. It should be recognized that to avoid any contravention of section 10 of the Act, any specific and quantifiable claim, similar to the subject case, ought to be substantiated by some independent and/or recognizable source. The Commission, through its relevant department, could initiate a report in this regard, with respect to the relevant market and segment concerned, flagging similar violation(s), for the Commission to proceed in accordance with the law, accordingly the proceedings were disposed of.