

Deceptive Marketing Practice - Appeal before Competition Appellate Tribunal

Appellant: Messrs. **OPTIONS INTERNATIONAL (SMC PVT.) LIMITED**
Respondents: **COMPETITION COMMISSION OF PAKISTAN and another**
Decision: **Appeal Dismissed**

In this case the proceedings before the Competition Commission were initiated by the authorized representative of Starbucks Corporation (Respondent No.2). During the proceedings the Appellant was unable to deny the evidence and the material brought on record by the Commission's Enquiry Committee for which he submitted an undertaking before the Commission that he would not use the logo/trade mark of Starbucks Corporation in future and would remove all such materials containing the name and logo of Starbucks. The Commission on conclusion of its proceedings found the involvement of the Appellant in contravention of the provisions of the Competition Act 2010 (Act) and thereby penalized him for PKR 5,000,000/- (Rupees five million only) and in case of non-compliance, the Appellant was made liable to pay an additional penalty amounting to PKR 100,000/- (Rupees one hundred thousand) per day. Feeling aggrieved by the decision of the Commission, the Appellant preferred an appeal before the Competition Appellate Tribunal, which not only confirmed the findings of the Commission but also increased the penalty imposed by the Commission.

In the appeal the learned counsel for the Appellant submitted that the impugned order of the Respondent No.1 was wrong, against the law, based on no evidence and that Starbucks' marks had no business of its own in Pakistan, hence the marks had no Locus Standi to be filed in the complaint, nor did the Commission have the jurisdiction to entertain such complaints. The Appellant further argued that the Commission had based its decision on the Enquiry Report and without a hearing which was seen as a denial of fair trial to the Appellant and against the fundamental rights guaranteed under the Constitution of Islamic Republic of Pakistan. The Appellant went on and argued that since the Complainant was unable to produce any piece of evidence reflecting loss of business and deception, the penalty imposed by the Commission did not correspond with the alleged contravention and was a very high amount which required reduction.

The learned law officer assisted by the learned counsel for the Respondent No.2 supported the impugned order and submitted that the material evidence was the Enquiry Report and was full of undeniable evidence, had not been rebutted and the Appellant gave an undertaking and made a commitment, before the Commission. In presence of such a commitment the Appellant was estopped to question the proceeding and even the filing of appeal except on the quantum of penalty. The learned law officer also submitted that it was established on the record that the Appellant contravened the provisions of section 10 of the Act and was rightly penalized by the Commission after being given a proper chance of defence which confirmed that there was no question of denial of fair trial. Lastly, it

was submitted that the quantum of penalty corresponded to the gravity of contravention and such that the penalties imposed called for no intervention.

After hearing the arguments of the counsels of the parties and going through the available record, the Competition Commission Tribunal observed that the Appellant had been penalized for contravention of section 10 of the Act based on a complaint filed by Respondent No.2 M/s Starbucks Corporation USA for unauthorized use of the logo/trade mark 'Starbucks'. Though, the counsel for the Appellant tried to make out a case by stating that he was not using the mark of Starbucks and if the Starbucks had any objection, he was ready to remove the same. The record of the case made it clear that though Appellant was a registered limited company and a tax payer but different advertisements on Facebook pages of the Appellant were available on file making it clear that besides its own name 'Options International/Options Coffee Shop', the name of the Starbucks marks was boldly used on its website and advertisements. The record also reflected that Starbucks' marks on the signboard of its coffee house and restaurant as well as on packaging materials, menus, flyers and other promotional material were used, which could only be done when there was authorization. However, there was no such authorization on record and after realizing its fault the Appellant had filed an undertaking before the Commission that he would not use the name and registered trade mark of Starbucks in future.

The counsel for the Appellant also argued that since Starbucks did not have any commercial existence in Pakistan, it had no locus standi to file the complaint and the Commission had no jurisdiction to entertain the complaint. Although Starbucks had no business setup of its own in Pakistan however, its trade mark and logo were registered, which gave it the proprietary rights to use the said trademark. No one else could use the said mark in any capacity unless permitted by Starbucks. The Competition Act, 2010 had not imposed any such embargo on an undertaking having no commercial activity in Pakistan, to approach the Commission for safeguarding its rights. As such unlawful use fell within the contravention of section 10 of the Act along with an action under section 86 of the Trade Marks Ordinance, 2001. The provisions of subsection 10(1) of the Act prohibited all undertakings from entering deceptive marketing practices without making any distinction between a foreign company not registered or operating in Pakistan. In such a situation any undertaking, whether based in Pakistan or not for the purposes of section 10 of the Act and Competition (General Enforcement) Regulations 2007, regulations 16 and 17 could file a complaint to protect their legal rights along with an action under Trade Marks Ordinance of 2001 or any other law.

The argument regarding the denial of a fair trial was baseless as the Commission as well as the Tribunal in many of their orders/judgments held the legal value of the Enquiry Report as nothing more than a fact-finding exercise by the Commission. The material collected could be used against a person but before using such material they were put on show cause notice by the Commission, which had to be complied with under the provisions of the law and the rules. During the proceedings the aggrieved person had every right to rebut the evidence/material brought on record by the inquiry committee. Mere inquiry report legally could not be the basis of imposing any penalty or taking any action against

any person or undertaking. So, the question of non-provision of a fair trial by the appellant did not arise.

The Appellate Tribunal thus held that the Appellant contravened the law as during the proceedings before the Commission he had made certain commitments but failed to comply with his own commitments, which was also highlighted by the Commission in the impugned order. The directions issued by the Commission for compliance were also not fulfilled by the Appellant; the Commission took a lenient view and imposed a penalty of PKR 5,000,000/- (Rupees five million) which was not paid and the Appellant continued using some of the images on social media. Due to these circumstances the Appellate Tribunal increased the penalty to PKR 6,000,000/- (Rupees six million) instead of PKR 5,000,000/- (Rupees five million) under Rule 25 of the Competition Appellate Tribunal Rules, 2015. The tribunal also imposed a further penalty of PKR 5,000/- (Rupees five thousand) per day declaring 03.12.2021 to be the date of first such non-compliance for the noted period and for the penalty to continue till payment of the same with the Commission. Consequently, the appeal was dismissed with the modification with no order as to cost.

