

CONSTITUTION PETITION DISMISSED BEING DEVOID OF MERIT

Petitioner: MEZAN BEVERAGES (PVT.) LIMITED through duly authorized Officer
Respondent: COMPETITION COMMISSION OF PAKISTAN, through Chairman and 2 others
Decision: Constitution Petition being devoid of merit was dismissed

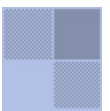
The Petitioner filed a Constitutional Petition before the Lahore High Court against the impugned notice dated 30.08.2018 (the “notice”), Show Cause Notice dated 07.07.2021 (the “SCN”) and actions taken pursuant thereto, by Respondents, being unlawful and without jurisdiction.

The brief facts of this case were that the Petitioner was a private limited company engaged in the business of manufacturing, production and sale of aerated waters, carbonated drinks and beverages, mineral water, juice and energy drinks. Amongst various products, the Petitioner also manufactured, sold and marketed, an energy drink under the brand name of ‘Storm’, registered in Class 32 under Registration No. 307388 dated 13.03.2021.

The Competition Commission of Pakistan (the “CCP”) and its functionaries were arrayed as the Respondents who were 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) Regulation, 2007 informing the Petitioner that Messrs. PepsiCo (the “Complainant”) filed a complaint against the Petitioner for alleged violation of Chapter II and more particularly, Section 10 of the Act with reference to deceptive marketing practices.

The Complainant, in essence, had alleged that the packaging of the product of the Petitioner’s brand name ‘Storm’ was deceptively similar to the Complainant’s product ‘Sting’. The Petitioner’s brand was packaged with overall look, feel, get-up and colour scheme that closely, deceptively and/or parasitically was similar to the Complainant’s brand. This fact was established through pictorial evidence that the Petitioner imitated several well-known and renowned brands other than the Complainant’s, which demonstrated the mala fide intention of the Petitioner to capitalize on the reputation and goodwill of others. As such, the Petitioner indulged in deceptive marketing practice in violation of section 10 of the Act.

The Petitioner instead of replying to the impugned notice, requested for extension of time which was granted and then informed the CCP that it had assailed vires of the Act coupled with proceedings



initiated against it by instituting a writ petition. In consequence of an injunctive order passed therein, the proceedings before CCP were suspended. However, the writ petition was dismissed and the injunctive order vacated where-after, the Petitioner was again directed to furnish its reply to the complaint but the Petitioner informed the CCP that it had challenged the judgment passed in writ petition before the Supreme Court of Pakistan which was pending and as such further proceeding had to be stayed. However, as no injunctive orders were passed by the Apex Court, the CCP again required the Petitioner to participate in the pending inquiry proceedings. In response, the Petitioner eventually filed its reply raising objections regarding 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.

The CCP opined that the only mandate of the inquiry was to determine whether the allegations leveled in the complaint amounted to violation of Section 10(1) of the Act and after conducting the inquiry, it was concluded that prima facie violations under the Act warranted initiation of 'proceedings' against the Petitioner under section 30 of the Act and accordingly impugned SCN was issued to the Petitioner, who instituted the instant petition.

The learned counsel for the petitioner contended that the CCP was legally obligated to decide the question of jurisdiction in the first instance but failed to do so. Furthermore, the CCP did not comply with the mandatory prerequisites of Section 37 of the Act, as it neither formulated nor conveyed a formal order stating that the complaint was not frivolous, vexatious, or based on insufficient facts. This constituted a contravention of the provisions of Chapter II of the Act. It was further argued that the allegations in paragraphs 3, 7, and 11 of the inquiry report related to trademark infringement, therefore, the subject matter of the complaint fell within the exclusive jurisdiction of the Intellectual Property Tribunal, which was empowered to adjudicate all alleged acts of trademark infringement under the IPO (Intellectual Property Organization of Pakistan) Act 2012, read with the Trade Marks Ordinance 2001. Consequently, the impugned notice under Section 37(2) and the impugned SCN under Section 30 of the Act were patently without jurisdiction, void ab initio, and coram non jure, and liable to be set aside, along with all collateral proceedings. The learned counsel for the CCP in rebuttal submitted that the impugned notice was issued to the Petitioner in lawful exercise of jurisdiction and an inquiry was initiated by the CCP after formulating its opinion on the basis of evaluation of the complaint that it provided sufficient material to warrant an inquiry to determine whether a contravention was made out and reply was sought through the impugned notice. Further submitted that 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 based on inquiry report recommended to initiate proceedings against the Petitioner under section 30 of the Act by holding the acts of Petitioner, prima facie to be in violation of section 10 of the Act. As such, the petition was not maintainable, being pre-mature and having been instituted only to frustrate the due process of law. Therefore, the petition was liable to be dismissed, allowing the CCP to proceed with the matter in accordance with law.

After hearing rival contentions of both the parties, the court concluded the following two points for determination:

- (i) Whether the impugned notice had been issued by the CCP after complying with the requirements of Section 37 of the Act?
- (ii) Whether the jurisdiction of the CCP with respect to descriptive marketing practices in terms of Section 10 of the Act was distinct and separate from the jurisdiction vested in the Tribunal under IPO Act?

After analyzing the scheme of law encapsulated in the Act, the Court concluded that it was manifestly clear that the Act provided for a self-contained regulatory regime to regulate and enforce the scheme of law. As such, the internal decision-making process regarding the veracity of the complaint or written opinion was not to be shared but the notice communicating the gist of reasons or nature of violations justifying the inquiry accompanied with the complaint itself constituted sufficient compliance with the requirements of section 37(2) of the Act. In the impugned SCN, detailed reasons were incorporated and right of reply coupled with hearing was duly accorded. Hence, there was no procedural irregularity regarding issuance of impugned notice and SCN on the part of the CCP.

Regarding the second query, relating to the arguments of the exclusive jurisdiction of the Tribunal to adjudicate claims of infringement of intellectual property laws and offences under IPO Act being a subsequent enactment impliedly excluding jurisdiction of the CCP in terms of deceptive marketing practice under section 10 of the Act was completely misconceived as jurisdiction of the CCP under the Act and IPO or the Tribunal under the IPO Act were distinct and separate in terms of ambit and scope of such laws and did not amount to any inconsistency or conflict of jurisdiction. The objection that the impugned SCN had been issued by the CCP without jurisdiction was discarded.

Consequently, the Court observed that the challenge to a SCN in writ jurisdiction at premature stage and the tendency to bypass the remedy provided under the concerned statute amounted to fetter the rights conferred on statutory functionaries specially constituted for the purpose of deciding 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 petition. As such, the petitioner did not approach the Court with clean hands and resorted to uncalled for litigation, obstructing the CCP as regulator empowered under the law to undertake and perform its routine functions and duties. Hence, the petition was not maintainable and being devoid of merit was dismissed.