

**BEFORE THE COMPETITION APPELLATE TRIBUNAL,
ISLAMABAD**

PAKISTAN STATE OIL LIMITED.

.... APPELLANT

VERSUS

COMPETITION COMMISSION OF PAKISTAN

...RESPONDENT

Appeal No. 01/2017.

Present: Justice (R) Mian Fasih Ul Mulk, Chairperson.
Ahmed Owais Pirzada, Member Technical.
Justice (R) Miftah Ud Din, Member Technical.

For the Appellant: Barrister Sara Seerat.

For Respondent No-1: Mr. Amjad Hameed Ghouri,
Advocate.

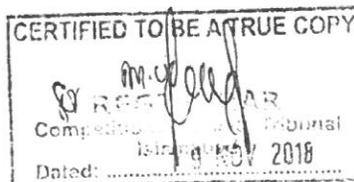
For Respondent No-2: Mr. Iftikhar Ahmed Bashir
Advocate

Date of hearing: 08.02.2017, 19.04.2017, 10.05.2017,
31.05.2017, 26.09.2017, 17.10.2017,
01.11.2017, 08.11.2017, 12.12.2017,
09.01.2018, 06.03.2018, 20.03.2018
17.04.2018, 27.06.2018, 04.07.2018,
05.09.2018, 25.09.2018, 26.09.2018,
03.10.2018, 23.10.2018, 07.11.2018

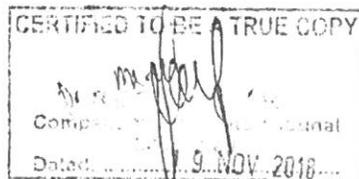
JUDGMENT

Justice (R) Miftah Ud Din, Member Technical

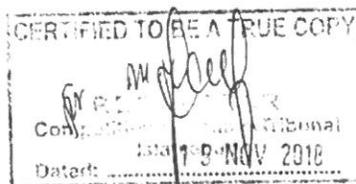
Appellant Pakistan State Oil has filed this appeal against the judgment and order dated 29-11-2016 of the learned Competition Commission of Pakistan whereby the appellant has been punished under section 10 (2) (a) and (b) of Competition Act, for deceptive marketing practices and to pay a fine of Rs.150 Million in total.



2. The brief facts of the case are that complainant Muhammad Inam Athar Siddiqui respondent No.2 filed a complaint against the appellant before the Competition Commission of Pakistan. The complainant alleged that the appellant in order to promote and market its new and enhance performance products started marketing the same with new brands premier XL gasoline and green XL plus Diesel and claim that its use both in new and old vehicles will result in more mileage, smooth running, protects engine and reduce black smoke. That as result of this advertising campaign of these new brands the complaint as well other consumer started using this brand as a preferred choice. That in the year 2012 the appellant abruptly and discreetly discontinued the use of these additives while continuously using the brand name premier XL gasoline and green XL plus diesel giving a deceptive understanding to consumers and is therefore liable to be proceeded for deceptive marketing practices. The appellant submitted para-wise comments to the complaint of respondent No.2 whereby many legal and factual pleas were taken. The matter was referred to the inquiry committee under section 37 (2) of Competition Act. On the basis of inquiry report a show-cause notice was issued to the appellant and thereafter an opportunity of hearing was afforded to the parties. The learned Competition Commission of Pakistan found the appellant guilty of deceptive marketing practices and ordered the appellant to pay a fine of Rs.150 million in total under section 10 (2) (a) and (b) of Competition Act and further directed to make appropriate changes in the branding insignia within 30 days vide impugned judgement order. Aggrieved from the same the appellant has preferred this appeal.

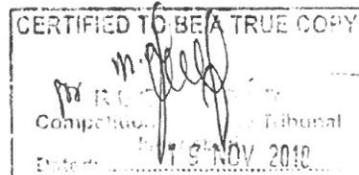


3. Barrister Sara Seerat, learned counsel for the appellant contended that complainant respondent No.2 is neither an undertaking nor a registered association of consumers, therefore, not only the complaint of respondent No.2 is incompetent but the subsequent proceedings i.e inquiry report show-cause notices and impugned judgment is wrong illegal and without jurisdiction. She further submitted that neither the points raised by the appellant in para-wise comments were reflected in the issues framed nor the appellant was afforded an opportunity to produce evidence on such issues, therefore, the learned Competition Commission of Pakistan has not effectively adjudicated the entire controversy involved in the present case. She further submitted that the appellant's marketing campaign was independent of the additive and was not linked to the additives. She contended that the appellant is providing standard fuel to the consumer after discontinuance of the additives in May 2012 and the OGRA and Hydro Carbon Development Institute of Pakistan gave clean chit to the appellant in 2014 by declaring that the product of appellant meet quality standards. Further contended that the Act of the appellant to discontinue the additive has got no necessary intent to deceive or establish any tendency to deceive or capacity to mislead. She further submitted that no harm or loss has been caused to the consumer on account of discontinuance of the additives and that in the absence of any market data in this connection, the learned Competition Commission of Pakistan was not justified to award punishment to the appellant. Further contended that demand of petroleum is rarely affected by the advertisement, but mainly depends upon supplier market share, presence or provision of additional services layout etc. She lastly argued



that no evidence at all has been produced by the complainant in support of the complaint therefore, the judgment rendered by learned Competition Commission of Pakistan is based on evidence. The learned counsel for the appellant relied upon 1993 SCMR 603, PLD 1957 SC 91, 2014 PTD 299, 2016 PLC 296, PLD 1983 Karachi 435, PLD 2016 Sindh 405, in support of the above contentions.

4. Learned counsel for Competition Commission of Pakistan defended the judgment and order of the learned Competition Commission of Pakistan and contended that the same is based on proper appraisal of evidence and facts available on the record. He further submitted that the complaint was lodged by a consumer who is a legal and natural person, therefore, the learned Competition Commission of Pakistan was justified to take action on the aforesaid complaint. He further submitted that the judgment of the learned Competition Commission of Pakistan is based on admitted facts and it is an established principle of law of evidence that facts admitted need not be proved, therefore, the learned Competition Commission of Pakistan was quite justified to award punishment to the appellant. He produced PLD 1985 Karachi 407 in support of the above contention. Learned counsel for complainant also supported the judgment of learned Competition Commission of Pakistan and contended that as citizen of Pakistan he has put the law in motion against the appellant for the deceptive marketing practices committed by appellant. He admitted at the bar that complainant is neither registered association of consumers nor in any way engaged, directly or indirectly in the production supply distribution of goods or provision or control of services.



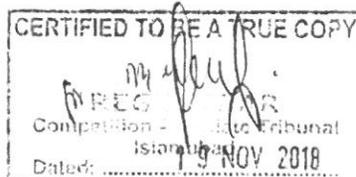
5. Taking up the case of appellant regarding competency of complaint of respondent No.2 it is better to produce the relevant provision of Competition Act and Competition Commission of Pakistan General Enforcement Regulation 2007.

Complainant: means an undertaking or registered association of consumers filing a complaint or the federal government filing a reference under regulation 17.

Undertaking: means a 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 or undertaking.

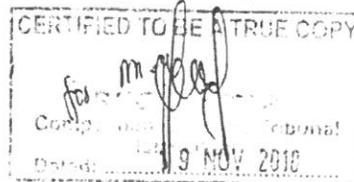
37 (2), where the commission receives from an undertaking or registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provision of chapter II, it shall unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts or is not substantiated by prima-facie evidence, conduct an inquiry into the matter to which the complaint relates.

6. Perusal of above provisions clearly indicates that complainant before Competition Commission of Pakistan can be an undertaking or registered association of consumers. Except the defined persons no other legal or natural person can be termed as complainant, therefore, the learned Competition Commission of Pakistan was not justified to hold that complaint can be made by a legal or natural person. The learned Competition Commission of Pakistan can initiate proceedings on the basis of a complaint to be made by an



undertaking or registered association of consumers. Admittedly respondent No.2 is neither an undertaking nor a registered association of consumers, therefore, he was not competent to lodge the present complaint against the appellant. Except news report, there was no other evidence to support complaint of respondent No.2. Thus, the learned Competition Commission of Pakistan has clearly violated the mandatory provisions of law by initiating proceedings against the appellant on the basis of wrong, illegal and based on no evidence complaint of respondent No.2. Whenever, a statute limits an Act to be done in a particular manner or form, it necessarily include in itself a negative, that the Act not to be done otherwise. The expression of a condition excludes doing of the act otherwise. It is the principle of logic and common sense and not a technical rule of construction. If a mandatory condition for exercise of jurisdiction by the court, Tribunal or authority is not fulfilled, then the entire proceedings which follows become illegal and suffers from want of jurisdiction/powers. Any order passed in continuation of these proceedings suffers from illegality and is without jurisdiction. Thus, we hold that the learned Competition Commission of Pakistan was not justified to proceed against the appellant on the basis of a wrong, illegal complaint based on no evidence and similarly the subsequent proceedings of conducting an inquiry, issuance of show-cause notice and awarding punishment to appellant is also illegal and without jurisdiction.

7. Taking up the case on merits, the learned Competition Commission of Pakistan initiated proceedings against the appellant on the basis of a complaint in writing of Inam Athar Siddqui respondent No.2. The appellant in para-



wise reply to the complaint specifically pleaded that no harm has been caused to the consumers because after discontinuing of additives, the appellant is providing standard fuel to the consumer regarding which clean chit has been given to appellant by OGRA and Hydro-Carbon Development Institute of Pakistan. Further pleaded that premier XL Gasoline and Green XL plus Diesel are normal brand initiatives in accordance with appellant's marketing practices is neither connected with product composition nor linked with additives. Also pleaded that demand of petroleum is rarely affected by advertisement but mainly depends upon supplier market share, presence or provision of additional services layout etc. Also pleaded that in spite of tall claim made by the supplier of additives i.e Aftan Chemicals regarding improvement in a number of parameters, no tangible effect was seen in improvement of environment or engine performance therefore, the appellant issued notice to supplier for discontinuance of additives. The supplier challenged the notice of discontinuation of additives in civil suit No.1570/2012 in Sindh High Court which is still subjudice.

8. The above mentioned most important and material points agitated by appellants were neither inquired into nor any opinion was expressed thereon by the inquiry committee. Therefore, we are constrained to hold that the inquiry report is the outcome of one-sided aspect of the case based on mere allegations in complaint, without any evidence as well as, without covering or answering the pleas taken by the appellant. The learned Competition Commission of Pakistan has also based its finding on this one sided, defective and incomplete inquiry report. The record further indicates that no proper issues were framed by the learned Competition



Commission of Pakistan at the initial stage of proceedings to afford an opportunity to the parties to produce evidence in support of these issues. Only at the time of writing judgment some issues/questions were formulated per choice which has been answered by the bench which is a complete deviation from the provision of section 33 Competition Act 2010 and rule 23 of Competition Commission, General Enforcement Regulation 2007. Under the above provisions the proceedings before Competition Commission of Pakistan shall be deemed to be judicial proceedings in a civil suit under the code of civil procedure, whereby the Competition Commission of Pakistan can order for discovery and production of any document, accept evidence on affidavit requisition of any public record examination of a person acquainted with facts and circumstances of the case. In the present case the learned Competition Commission of Pakistan has not issued any notice to the parties to produce documents or record their evidence on affidavit or notice to admit the authenticity of public record or certified copies of public record. The complainant has neither appeared before the learned Competition Commission of Pakistan to depose on affidavit in support of the complaint nor the learned Competition Commission of Pakistan has recorded the statement of any other consumer or undertakings in support of the aforesaid complaint. The points involved in the present case are admittedly disputed questions of facts and this factual controversy between the parties can not be resolved without recording pro and contra evidence. As no evidence at all was recorded by the learned Competition Commission of Pakistan in the present case, therefore, the judgment rendered by the learned Competition Commission of Pakistan is based on no evidence.

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Commissioner
Date: 2018

9. In order to safeguard the interest of consumers and competitors under the Competition Act, the learned Competition Commission of Pakistan has excessively fined the appellant for the Act of discontinuance of additives and also not giving due publicity to the Act of discontinuance of additives, but neither any competitors nor registered association of consumers appeared and deposed before the commission that they have been harmed or deceived by the aforesaid acts of discontinuance of additives and that such act was not given due publicity by the appellant. No one appeared and deposed before Commission in support of complaint that the brands premier XL gasoline and green XL plus diesel are linked with additives or connected with product composition. Nothing on record exists that on account of discontinuance of additives any harm was inflicted to consumers or other competitors. Similarly, no market data has been collected to show that on account of discontinuance of additives the appellant obtained monetary gains through increase of market share or market share and profit of competitors has decreased. In the absence of market data and quantification of the damages caused to customers and competitors the learned Competition Commission of Pakistan was not justified to excessively fine the appellant. Neither any prescribed mode of publicity exists in Competition Act nor the learned Competition Commission of Pakistan has specified the same in the impugned order publication through newspaper is recognized mode of information and publicity. Besides news reports, news conference and news clarifications, there exists documentary evidence in the shape of communication between appellant and Ministry of Petroleum, as well as Afton Chemicals i.e suppliers of additives. The pendency of civil suit in Sindh High

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M. J. Khan

Commissioner

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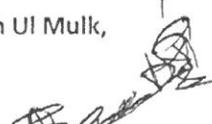
Court between appellant and Aftan Chemicals is an admitted documentary evidence available on record. Litigations between the parties regarding discontinuance of additives is a notice to the public in general and parties to the suit in particular. It is proved from documentary evidence that due publicity has been given to the act of discontinuance of additives by appellant and the finding of learned Competition Commission of Pakistan in this connection against the appellant is based on mere surmises and conjectures.

10. As a sequel to foregoing discussion, we conclude that assumption of jurisdiction by the learned Competition Commission of Pakistan, conducting inquiry, issuing show-cause notice and awarding punishment to appellant on the basis of an illegal, incompetent and based on no evidence, complaint of respondent No-2, is not only wrong, illegal and unjustified but also devoid of merits. Resultantly, we accept the present appeal, set aside the impugned Judgment and order and dismiss the complaint of respondent No-2. Parties are left to bear their own costs.

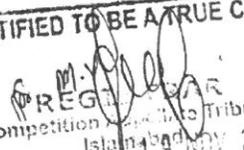
Announced in open court
07.11.2018


Justice (R) Mian Fasih Ul Mulk,
Chairperson


Justice (R) Miftah-Ud-Din
Member Technical


Ahmed Owais Pirzada
Member Technical

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Competition Commission of Pakistan
Islamabad
Dated: 19 NOV 2018