

BEFORE THE COMPETITION APPELLATE TRIBUNAL,
ISLAMABAD

Rana Electric Store

.... APPELLANT

VERSUS

COMPETITION COMMISSION OF PAKISTAN

.... RESPONDENT

Appeal No. 03/2022

Present: Justice Mamoon Rashid Sheikh, Chairperson.
Muhammad Asghar Ch., Member Technical
Raja Saad Sultan, Member Technical

For the Appellant: Mr. Abdul Wahab, Advocate.
For Respondents: Mr. Daniyal Hassan, Advocate, Mr. Hassan
Ahsan Mian, Law Officer.
Dates of hearing: 12.01.2022, 13.01.2022, 08.03.2022,
30.03.2022, 15.06.2022, 05.07.2022,
11.10.2022, 23.11.2022, 08.12.2022,
24.05.2023, 14.06.2023

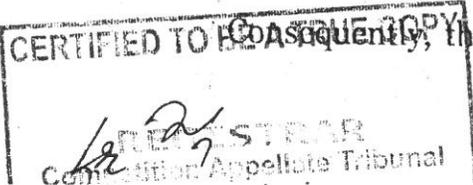
JUDGMENT

Raja Saad Sultan, Member Technical: -

Through the instant appeal **under Section 42 of Competition Act, 2010**, the Appellant, M/S Rana Cables, impugns the order dated 26-03-2019, passed by the learned Competition Commission of Pakistan (**Commission**) for violation of **Section 10 of the Competition Act, 2010**. The learned Commission has imposed a penalty of Rs. 500,000/- was imposed on the Appellant with the directions: (a) modify all promotional materials and to disclose the presence and value of the token on each pack within a period of 60 days, (b) issue public notices in at least two national English and Urdu newspapers with 15 days interval within a period of 60 days, (c) submit a compliance report not later than 60 days and failure to comply with will result in further penal consequences.

1. The background leading to the filing of instant appeal is that the Appellant is engaged in the business of electric wire cables manufacturing. The appellant inserts cash coupons in their products packaging without specifying this promotional scheme on the products packing or on any other promotional material.

Consequently, the learned Competition Commission of Pakistan



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(CCP) suspected that these cash coupons have been placed for the benefit of electricians instead of consumers.

2. The learned Commission in exercise of its powers under Section 37(1) of the Competition Act, 2010, took suo-moto action and initiated a formal enquiry for the alleged violation of **Section 10 of the Act.**

3. The enquiry report concluded that the act of withholding disclosure of the presence of cash coupons in packs of electric wire cable bundles mislead consumers. This further gives unfair competitive edge to the appellant over other undertakings working in the same sector.

4. The enquiry report led to the initiation of proceedings under **Section 30 of the Competition Act, 2010** and a show cause notice dated 18-11-2016 was issued for prima facie violating the provision of **Section 10 of the Competition Act, 2010.** In show cause notice the learned Commission has formulated the following issues;

“Whereas, in terms of the Enquiry Report in general and paragraphs 70 to 84 in particular, the inclusion of coupons in the bundles without due disclosure, is not only likely to mislead the end consumers while making their purchase decision but also such omission of material information appears to give an undue competitive edge to the Undertaking over its competitors, and

Whereas, in terms of the Enquiry Report in general and paragraphs 94 and 95 in particular, it appears that the Undertaking has omitted to disclose material information in respect of the coupons in bundles, which prima facie constitutes a violation of Section 10 of the Act, and

Whereas, the inclusion of coupons in the bundles without due disclosure, is not only likely to mislead the end consumers whilst making their purchase decision, but also such omission of material information is capable of harming the business interests of competitors, which prima facie constitutes a

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violation of Section 10 of the Act, and

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Whereas, in terms of the Enquiry Report in general and paragraphs 124 to 127 in particular, the omission of aforementioned information during the course of marketing and advertising by the Undertaking is prima facie in violation of Section 10(2)(a) and (b) read with Section 10(1) of the Act”;

5. The appellant failed to file reply to the show cause notice. However, they submitted before the Commission, that they would ensure their compliance with the Commissions directions. The main issue before the Commission was;

“Whether the practice of inserting tokens in the wire cable bundles without due disclosure constitutes deceptive marketing practice under Section 10 of the Act”

6. Learned Counsel for the appellant submitted that the impugned order was passed in an arbitrary manner and against the law. The Appellant were not engaged in any deceptive marketing practice. The enquiry report is biased, as the Appellant was not involved in the enquiry proceedings. He further relied on **Section 2(1)(e) & (k) of the Competition Act,2010**, and contended that the Appellant is a small entity and not engaged in the manufacturing of electric cables. He argued that the Commission did not calculate their market share, but they imposed a penalty, that was disproportionate to the Appellant share of the market. Further submits that the Appellant has left the business of electric cables. Learned Counsel therefore prays, that the impugned order is liable to be set-aside in the above facts and circumstances.

7. Learned Counsel for the Competition Commission of Pakistan (**Commission**), inter alia, argued that the enquiry was initiated on the basis of Suo moto action by the Commission **under Section 37(1) of the Competition Act,2010**. On the recommendation of enquiry committee, proceeding was initiated against the Appellant for the alleged violation of **Section 10 of the Competition Act,2010**. The Appellant representative had appeared before the Commission and had agreed to comply with the directions of the Commission. The appellant has conceded this

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issue before the Commission, however, later on failed to comply

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with the directions of the Commission. He further argued that the market share is not relevant in cases involving deceptive marketing practice. On the other respondents, who had failed to cooperate with the Commission, a higher penalty was imposed as compared to the Appellant. Therefore, the learned Counsel prayed for this appeal to be dismissed.

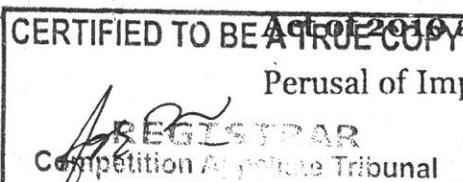
8. Arguments advanced by the learned Counsel for the parties have been heard and the documents placed on record perused with their able assistance.

9. In order to promote economic efficiency and to protect consumers, the **Competition Act, 2010** ensures that all commercial and economic activity is conducted fairly and without any competitive behavior. The **Act of 2010**, prohibits undertakings from engaging in actions such as abuse of dominant position, prohibited agreements and using deceptive marketing practices.

10. The Commission has the authority to initiate an enquiry under **Section 37 of the Competition Act, 2010**, when there seems to be a contravention of the provisions of **Chapter II of the Competition Act, 2010**. In view of the above provision suo-moto actions was taken by the learned Commission and an enquiry was initiated. **Section 36 of the Competition Act, 2010, read with Rule 23 of Competition Commission (General Enforcement) Regulations, 2007** give powers to the Commission to call upon the concerned undertaking to furnish the information concerning the business activities of the Undertaking. Record reveals that during the enquiry, the Appellant had been asked vide letters dated 27-04-2016 & 26-05-2016, to provide the relevant information. However, the Appellant did not file any reply to the above letters and failed to cooperate with the commission during the enquiry, which raises concerns about their willingness to join the process and defend their position.

11. The proceeding was initiated **under Section 30 of the Act of 2010** and a show cause notice was issued to the Appellant.

Perusal of Impugned order reveals, that the Appellant did not file



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their reply to the show cause notice, however their representative made a submission during the proceedings before the Commission, expressing their commitment to comply with the directions of the Commission in future.

12. Section 10 of the Competition Act, 2010 deals with deceptive marketing practice, and reads as follows;

“Deceptive marketing practices. (1) *No undertaking shall enter into deceptive marketing practices.*

(2) *The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to;*

(a) *the distribution of false or misleading information that is capable of harming the business interests of another undertaking;*

(b) *the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods”;*

(c).....

(d).....

13. In view of the above provision, the act of disseminating a false or misleading information lacking a reasonable basis as to the products price, properties and quality, amounts to a deceptive marketing practice. False is defined as “untrue, erroneous, and deceitful” (Black’s Law Dictionary), and misleading is defined as “delusive, calculated to lead astray or to lead into error” (Black’s Law Dictionary). Misleading information could be both oral or written representations. The purpose of distribution of such misleading information is to mislead an ordinary consumer, due to its vagueness. The distribution of misleading information may or may not be intentional, and its presence is determined by the behavior and actions of an undertaking involved. Further to prove deceptive practices, the US Federal Trade Commission (FTC) has established the following key elements. **Firstly**, there must be a

representation that is likely to mislead consumer, **Secondly**, it is

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important to evaluate whether the consumer was acting reasonably in the circumstances and, **thirdly**, the representation must be material in nature.

14. The Appellant includes cash coupons of various denominations within the packaging of their electric cable bundle. However, neither the bundles packaging nor any other promotional material provides any indication of this scheme or mentions the availability of cash coupons. The products this information is deemed as material information that can significantly influence consumers in making their purchase decision. Moreover, keeping in view the conduct of the entire electric cable industry, it appears that the Appellant has deliberately omitted this material information of the presence of cash coupons inside the packing, to mislead an ordinary consumer. The Appellant has not denied this practice before the learned Commission, instead, their representative who appeared before the learned Commission undertook to comply with the directions of the Commission. Therefore, the Appellant omission of this material information would be misleading as it lacks a reasonable basis as to the price, characteristics and properties of the product.

15. During proceedings before the Tribunal, the learned Counsel for the Appellant has not disputed the issue regarding the presence of cash coupons inside the packaging of electric cable bundles. However, the learned Counsel for the Appellant argued that the Commission overlooked the market share of the Appellant and imposed a penalty, which was disproportionate to their market share. He referred to **Section 2(1)(e) & (k) of the Competition Act, 2010** to substantiate his argument.

Section 2(1)(e) & (k) reads as follows;

“Section 2(1): In this Act, unless there is anything repugnant in the subject or context;”

(e) “Dominant Position of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an

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appreciable extent independently of competitors, customers,

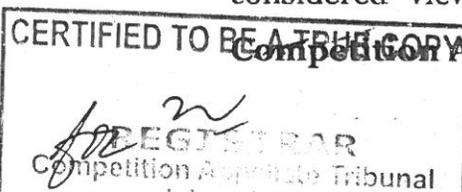
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consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent”;

(k) “relevant market means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reasons of the products characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas”.

16. Bare reading of the above provision indicates that this defines the dominant position and the relevant market. **Section 3 of the Competition Act, 2010**, deals with abuse of dominant position and it also mention the practices which constitutes an abuse of dominant position. It is pertinent to mention here that the deceptive marketing practice is not included in the “practices” referred in **Section 3(3) of the Act**. An abuse of dominant position by an undertaking could be relevant in misleading representations, where the aim is to keep the potential competitors out of the market. The purpose of this abuse of dominant position is to maintain the firms market power by preventing new entrants. *Reliance is placed on AstraZeneca AB and AstraZeneca Plc V European Commission, Case C-457/10 (Para 68)*. Whereas in the instant appeal, the Appellant is involved in deceptive marketing practice with the intention to mislead an ordinary consumer.

17. We are more convinced with the argument of learned Counsel for the Commission that the “market share” is not relevant in cases involving deceptive marketing practices. We are of the considered view that, in terms of **Section 10(2)(b) of the Competition Act, 2010**, the market share is not considered as a

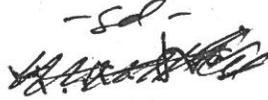


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significant factor in assessing deceptive practices, unless there is an abuse of dominant position involved, which is not the case in instant appeal. However, the market share of an undertaking engaged in deceptive marketing practices could be considered as relevant in cases in assessing the potential harm caused to the business interests of other undertakings in terms of **Section 10(2)(a) of the Competition Act, 2010**. Therefore, in view of above, the market share is not considered as a relevant factor in deciding the issue of deceptive marketing practice.

18. Moreover, perusal of impugned order reveals that the undertakings, which did not follow a compliance oriented approach before the learned commission, a penalty of Rs. 5 million was imposed on them. On the other hand, the appellant and other undertakings, that committed to comply with the directions of the commission a lesser penalty of Rs. 500,000 was imposed.

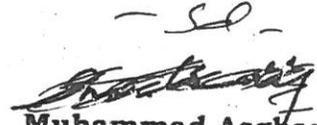
19. In view of above, we are of the view, that the instant appeal is without merit and is accordingly dismissed.

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Justice Mamoon Rashid Sheikh
Chairperson



Raja Saad Sultan
Member Technical-II

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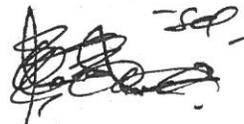
Muhammad Asghar Ch.
Member Technical-I

Announced in open Court
14.07.2023

- SP -


Raja Saad Sultan
Member Technical

Approved For Reporting

- SP -


Raja Saad Sultan
Member Technical

