

BEFORE THE  
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD  
(APPELLATE JURISDICTION)

RECKITT BENCKISER PAKISTAN LTD

.... APPELLANT

VERSUS

COMPETITION COMMISSION OF PAKISTAN

...RESPONDENT

Appeal No.01/2015

- For the appellants:
1. Barrister Mehmood Y. Mandviwalla
  2. Mr. Hasan Mandviwalla, Advocate
  3. Barrister Raja Adnan Khan

- For the Respondent:
1. Syed Umair Javed, Acting Registrar
  2. Mr. Usman Ahmed, A. D(Legal)

Date of hearing: 29-09-2015, 04-11-2015, 18-11-2015, 25-11-2015 & 26-11-2015

**JUDGMENT**

**Justice Mian Fasih-ul- Mulk, Chairperson.** This appeal is directed against the order dated 11-08-2015 passed by the learned Competition Commission of Pakistan, whereby a penalty of PK Rs.250,000/- for each of the five violations mentioned in the order was imposed on the appellant with the direction to amend its claim relating to "Kills 99.9% of Germs" within the stipulated time period or to pay PK Rs.5,000000/- (Five million) instead of PK Rs.250,000/- for the violation relating to its claim in addition to the possibility of facing

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non-compliance proceedings and penalties in accordance with the Act.

2. Brief facts leading to filing of the instant appeal are that the appellant being a registered company under the Companies Ordinance, 1984 is engaged in the manufacturing and marketing of consumer household antiseptic and pharmaceutical products. The appellant televised a marketing campaign of its product "Dettol Surface Cleaner", stated to be meant for sanitizing and cleaning surfaces and floors. The representation regarding the product of the appellant was:

- a. 'Phenyl is highly ineffective against germs';
- b. Only Dettol Surface Cleaner can kill more germs than Phenyl';
- c. Only Dettol Surface Cleaner can kill 99.9% of germs'; and
- d. Dettol Surface Cleaner can kill germs 10 times more than Phenyl'.

3. The learned Commission took notice of the same by conducting a formal enquiry in terms of Section 37(1) of the Competition Act, 2010 (hereinafter called as 'Act') and the inquiry report, so prepared and submitted, resulted into issuance of a show-cause notice (SCN) to the appellant. As directed, the appellant submitted its reply in writing whereafter chance of hearing was also provided to its representative by the learned Commission. The Appellant

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presented its view point about the product, whereafter issues were framed to consider, whether the appellant had violated Sections 10(2)(a) (b) and (c) of the Act. The appellant, being accommodative in enquiries and suggestions, made commitments to the effect that it will remove from the TVC altogether that Phenyl is highly ineffective against Germs; that the word 'only' will be removed from before Dettol Surface Cleaners; that the terms 'phenyl' will be replaced by 'ordinary non-branded phenyl' and that the claim regarding 'Kills 99.9% of germs' will not itself be amended but the names of the bacteria, the Product has been tested against, will be added to the packaging. Finally, the word 'extra' used in the instructions on the back label of the packaging of the Product will also be removed as the Product was proven to be effective against 99.9% of test bacteria after 5 (five minutes of contact with the surface.

4. Keeping in view the above, the learned Commission found the appellant's commitments regarding claims 'a', 'b', and 'c' as satisfactory and with regard to claim 'd' of the appellant, the learned Commission directed the appellant to state clearly the conditions required for the Product to achieve 99.9% efficacy against bacteria on the Products packaging and all its marketing materials; or to change the claim to include the word 'upto' between 'kills' and

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'99.9%'. The learned Commission imposed a token penalty of only PK Rs.250,000/- for each of the five violations mentioned above for a total of PK Rs.1,250,000/-. If the appellant failed to amend its claim relating to 'Kills 99.9% of Germs' in accordance with the direction laid out in Paragraphs 35 and 36 of the Order within the stipulated time period, it will be liable to pay PK Rs.5,000,000/- (Five Million) instead of PK Rs.250,000/- for the violation relating to its claim.

5. Learned counsel for the appellant contended that suo moto action was taken against the appellant by the Commission by issuing the SCN, which was properly replied to, whereafter even during enquiry proceedings the appellant remained cooperative with the officials of the Respondent but the inquiry officers did not adhere to their cogent explanations to the ten questions posed in the matter. According to the learned counsel, the said ten questions and opinion thereon was taken from an Article written by Roger McFadden available on the internet but astonishingly only that portion was made the basis of the inquiry report which was going against the appellant and the portion favouring the stance of the appellant was neither taken into consideration nor mentioned in it so as to show real picture of the matter to the members of the Competition Commission.

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6. Learned counsel for appellant argued that the Enquiry Officers in their Report has assumed the job of experts in chemical compounds of Phenol and Pine Oil which lies outside the scope of their expertise. Neither the statements of the inquiry officers were recorded in support of the said report nor the learned Commission resorted to the provisions of Section 37(3) of the Act for hiring experts on the subject, which in the circumstances of this case was required to have been done when on one hand the Learned Commission itself was the complainant by initiating suo moto proceedings and on the other hand the inquiry officers were its own employees. Thus, it can be said that learned Commission assumed the role of a complainant, an investigator, an expert witness and a judge at the same time. The chance of fair trail is the fundamental right of every citizen under the Constitution of Islamic Republic of Pakistan, which seems to have been denied to the appellant in the peculiar circumstances of the instant case. The august Supreme Court of Pakistan in the case of Land Acquisition Collector, Sargodha and another versus Muhammad Sulatna & another (PLD 2014 SC 696), has laid down as under:-

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"The provisions of the Qanun-e-Shahadat Order, 1984 including Article 59 thereof make it clear that the opinion of a witness is only relevant and carries some probative value if he is an expert in

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the fields specified in the said Article. Furthermore, even for the purpose of giving an opinion, the witness has firstly to establish the expertise vested in him either on account of academic qualification per experience or otherwise. Without such foundation, an opinion cannot itself be taken as having evidentiary value for proving a fact in issue”.

7. It was further contended that even the appellant during proceeding before the learned Commission made commitment to the effect that the claim of ‘phenyl is highly ineffective against germs’ has been removed altogether from the television commercial of the Product; that the word ‘only has been removed from the claim ‘only Dettol Surface Cleaners can kill germs more than phenyl’; that the claim ‘Dettol Surface Cleaner can kill germs 10 times more than ordinary non-branded phenyl’ and has been made more visible; that the claim of ‘Kills 99.9% germs’ has been revised to appear with an asterisk\* ‘Kills 99.9% germs\* directing consumers to the back of the Product, where the names of the bacteria that the Product has been tested to be effective against are clearly represented; and that in the usage instructions represented at the back of the Product the word ‘extra’ has been removed, but still the learned Commission burdened the appellant with heavy penalties on all the claims/allegations. The learned counsel further submitted that even during the course of proceedings before the Commission, the appellant through a written letter had made

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commitment under Regulation 30 of the Competition Commission (General Enforcement) Regulations, 2007 thereby undertaking (i) to insert names of various germs/organisms that the Product is 99.9% effective against as proven by laboratory testing and scientific studies on the back of label of the Product; and (ii) to drop the word 'extra' from the rear of the packaging of the Product and even now the appellant is ready to honor the direction of the Commission in this regard. The learned counsel, while placing reliance on certain judgments of the august Supreme Court of Pakistan, concluded that the order of the Commission being discriminatory and biased against the appellant may be set aside.

8. On the other hand, the representative (Acting Registrar of the Competition Commission of Pakistan) while defending the impugned order of the Commission submitted that under Regulation 33, the Commission is authorized to exercise discretion in its award of such decisions and there is no mandatory requirement compelling the issuance of favourable decisions upon the submission of commitments by an undertaking because of the word 'may' used therein. He referred to Section 38(1)(a) of the Act and contended that the Commission is mandated to impose a penalty if it determines that an undertaking has been found engaged in any activity

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prohibited under the Act. According to him, the appellant (Undertaking) was rightly found guilty of the charges under Section 10(2)(a) and (b) of the Act for distribution of false or misleading information, harming the business interests of another undertaking and misleading information to consumers about the quality of goods. He, therefore, concluded that the impugned order itself is a proper reply in the matter; therefore, the impugned order is liable to be upheld in the facts and circumstances of this case.

9. Perusal of the impugned Order would reveal that the appellant's commitments qua claims 'a', 'b' and 'c' were found satisfactory while the commitment made to claim 'd' to the extent of clarifying the use of the term 'germs' though was found satisfactory but achievement of 99.9% efficacy against tested bacteria was declared to be uncleared for the end user and he was directed to state clearly the conditions required for the Product to achieve 99.9% efficacy against bacteria on the Products packaging and all its marketing materials; or to change the claim to include the word 'upto' between 'kills' and '99.9%'. The appellant was given a period of 30 days for compliance in this regard. On 18-11-2015, the appellant did make an offer before this tribunal that he is ready to comply with the condition mentioned in Para-35(a) of the impugned order, provided the penalty imposed is waived off. The learned

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Registrar, however, sought time to seek instruction from the Commission with respect to the offer of the appellant. On the next date of hearing, statements of both the parties with regard to the previous hearing were recorded, whereafter the appeal was argued on merits by both the sides.

10. The undertaking is an international company, which not only sells its products in Pakistan but some other countries also. The product follows international standards and is registered with the National Regulatory for Compulsory Specifications in South Africa. The Product being manufactured by the appellant in Pakistan is identical to the formulation, which the appellant manufactures and sells in South Africa and the Middle East. The stance of appellant is that their claim 'Kill 99.9%' is based on the European Testing Standards 'EN 1276" and SABS Laboratory, which confirms that the Product can kill 99.9% of germs . these facts and reports produced by the appellant before the enquiry officers and the Commission remain unchallenged on the available record. The said reports are indicative of the fact that the Undertaking uses 'Quats' (Quaternary Ammonium Compounds) in its Product, the disinfection qualities of which are being recognized internationally and used for a variety of household, institutional and industrial products. Instead of comparing the substance of "Quats" and its efficacy with such

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other compounds, the Commission dilated upon the Chemical compounds, the Commission dilated upon the chemical compounds such as 'Phenol' and 'Phenyl' without giving any consideration to the Product compound i.e 'Quats'.

11. Perusal of the Inquiry report reveals that the enquiry officers of the Commission put ten questions to the appellant, to which the appellant offered its answers but no counter explanation was offered by the enquiry officers in their Report. The appellant has annexed an Article written by Roger McFadden, a technical director Coast wide Laboratories. The inquiry officers relied upon some portion of the Article and omitted remaining part of it, which related to the effect that the Quats are the best choice as they are effective against a broad spectrum of harmful micro-organisms such as bacteria and viruses (which is used by the appellant in its Product) and that the chemical compound Phenol and Phenyl are aggressive enough to damage the surfaces.

12. It is also a matter of record that the appellant vide letter dated 28.08.2015 brought into the knowledge of the Respondent identical claims of other competitors of the appellant in the market. As per assertion of appellant no action was taken by the respondent against those undertakings. However, the stance of the respondent on the

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other hand was that they have already initiated inquiry in respect of the product "Max all purpose cleaner" and would take action in accordance with the law against the remaining undertakings in due course of time. As the learned Registrar has argued before this Tribunal that the appellant has not been discriminated at all and that there was no malafide or ulterior motive on the part of the Commission. We hope and expect that the Commission would not single out any one undertaking and leave others without cogent reasons.

13. The learned Commission in its impugned order has admitted that throughout the course of investigation and hearings, the Commission has found the appellant to be accommodating of its enquiries and suggestions. A number of commitments were made by the Respondent in this spirit during the course of hearings. The appellant committed to rectify the allegations (a) to (c) and under allegations (d) committed to insert names of various germs/organisms that the product is 99.9% effective against as proven by laboratory testing and scientific studies on the back of label of the Product and to drop the work 'extra' from the rear of the packaging of the Product. It may be mentioned here that view of the representative of the Commission was that such a commitment at this stage cannot be made as the proper time for it was during proceedings before the Commission and this

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Tribunal is under a statutory duty to uphold the provisions of its parent statute, and not only uphold the penalty imposed by the Commission, but to increase the quantum of penalty if necessary, rather than to reduce or waive it altogether. (Emphasis provided). This Tribunal cannot understand the logic behind the contention. This Tribunal is an appellate authority over the orders of the commission and an appellate authority can uphold, set aside, modify/rectify the orders of the Commission if found against the provisions of the Act. No such clog is there in the Act itself that this Tribunal is bound to uphold the orders of the Commission in all circumstances whatsoever. The established Principle of law is that an appeal is continuation of a judgment/order of the trial court. If the appellant has made the commitment before this Tribunal to obey the directions of the Commission in letter and spirit, then we see no reason to discard such a commitment on the ground that the same was required to have been made before the Commission.

14. In view of the above discussion, this appeal is allowed and the impugned Order dated 11.08.2015 is set aside. The appellant is directed to state clearly the conditions required for the Product to achieve 99.9% efficacy against bacteria on the product packaging and all its marketing materials. The appellant is further directed to submit the

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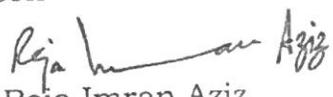
  
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compliance report to Registrar of this Tribunal as well as Registrar of Competition Commission of Pakistan within a period of thirty (30) days, failing which the appellant will be liable to pay PKR Five (05) Million for the violation relating to its claim of 'kills 99.9% of germs' in addition to the possibility of facing non-compliance proceedings and penalties in accordance with the Act.

**Announced:**  
26-11-2015

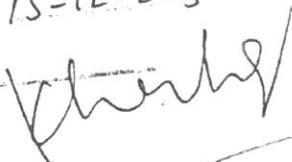
  
Justice  
Mian Fasih-ul-Mulk  
Chairperson

  
Ahmed Owais Pirzada  
Member Technical

  
Raja Imran Aziz  
Member Technical

For Supreme Court

Application No.	06
Dated	14-12-2015
Applicant	Adman Saeed
No. of Pages	24
Copying Fee	510
Search Fee	/
Urgent Fee	/
Total Fee	510
Date of Registration of Case	15-12-15
Date of Delivery	15-12-2015



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