

BY SPECIAL MESSENGER
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IN THE COMPETITION APPELLATE TRIBUNAL
2nd Floor, Federal Courts Complex, G-11/1, Islamabad.
Email Address: registrartribunal@gmail.com
Tel No: 051-9320208 Fax No: 051-9320209

No. 262
Dated: 26-01-2017

From:-

The Registrar
Competition Appellate Tribunal,
Islamabad.

To:-

1. A.Rahim Foods (Pvt.) Limited,
39 Industrial Area, Kot Lakhpat,
Lahore
2. K&N's Foods (Private) Limited,
160 Bangalore Town,
Shahrah-e-Faisal, Karachi.
3. Competition Commission of Pakistan,
Government of Pakistan, 7th Floor,
ISE Towers, 55-B Jinnah Avenue,
Islamabad

Subject: **APPEAL NO. 03/2016 JUDGMENT**
A.Rahim Foods (Pvt.) Limited VS. K & N' s Food and another

Take notice that under rule 51 of The Competition Appellate Tribunal Rules, 2015, attested copy of the Judgment dated 25-01-2017 is attached herewith for information and record.

2. Given under my hand and stamp of the Tribunal, this

26th day of January, 2017.



Charly
REGISTRAR

REGISTRAR
Competition Appellate Tribunal
Government of Pakistan
Islamabad

BEFORE THE HONOURABLE COMPETITION APPELLATE TRIBUNAL,
ISLAMABAD

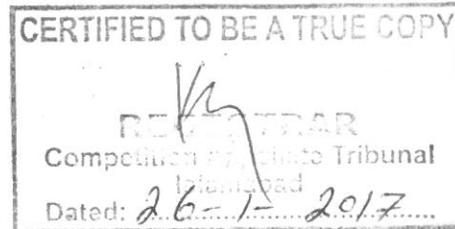
Appeal No. 03 of 2016

A. Rahim Foods (Pvt.) Limited,
(a Company incorporated under the Companies Ordinance, 1984),
39 Industrial Area,
Kot Lakhpat,
Lahore,
through its authorized signatory.

Appellant

Versus

1. **K&N's Foods (Private) Limited**
(a Company incorporated under the Companies Ordinance, 1984),
160 Bangalore Town,
Shahrah-e-Faisal, Karachi 75350
through its Chief Executive Officer/Director/Company Secretary/Principal
Officer.
2. **Competition Commission of Pakistan,**
Government of Pakistan
7th Floor, ISE Towers,
55-B Jinnah Avenue
Islamabad,



Respondents

Appeal under Section 42, read with Section 10 and of the
Competition Act XIX of 2010 challenging the order dated February
8, 2016 passed by the Competition Commission of Pakistan
comprising of Chairperson and Two Members of CCP Bench,
Islamabad.

Respectfully sheweth,

I. Jurisdiction of the Competition Appellate Tribunal.

That this Appeal is being preferred against the order dated February 8, 2016 passed
by the CCP Bench comprising of the Chairperson and Two Members. The Appellant
declares that the subject matter of the appeal falls within the jurisdiction of the

**BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD**

A.RAHIM FOODS (PVT) LTD

.... APPELLANT

VERSUS

- (1) **K&N'S FOODS (PVT) LTD.**
(2) **COMPETITION COMMISSION OF PAKISTAN**

...RESPONDENTS

Appeal No. 03/2016

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

For the appellant: Hassan Irfan Khan and Mirza Saqib
Asgher, Advocates.

For Respondent No-1: Ali Kabeer Shah, Advocate.

For Respondent No-2: Rashid Javed, Advocate.

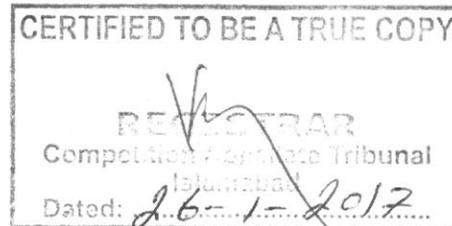
Date of hearing: 13.04.2016, 26.10.2016, 21.12.2016,
11.01.2017

JUDGMENT

MIAN FASIH UL MULK, CHAIRMAN.

The appellant, A.Rahim Foods (Pvt.) Limited, has filed the instant appeal under section 42 of the Competition Act XIX of 2010 against the order dated 08.02.2016 of the learned Competition Commission of Pakistan, whereby penalties in Pakistani Rupees 20 Million were imposed upon the appellant for the contravention of Section 10(1)(2)(a) and Section 10(2)(d) of the Act.

2. Brief facts of the case are that respondent M/s. K&N's Pvt. Ltd. and the appellant A.Rahim Foods (Pvt.) Ltd (a part of Dawn Group)

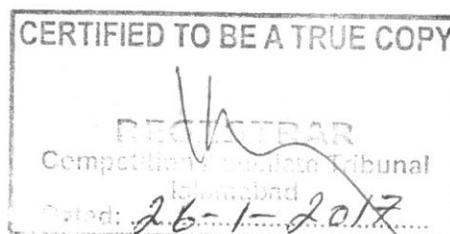


both are registered companies under the Companies Ordinance. They are involved in the business of manufacturing food products. The respondent filed a complaint before the Competition Commission of Pakistan against the appellant with the allegation that the respondent has copied the respondent/complainant labeling and packaging of frozen and / or processed meat products for use on the packaging of its own frozen and/or processed meat products, and that the appellant has also used the term "Combo Wings" without seeking any authorization from the respondent, which is a trade mark of the respondent.

3. The complaint in question led to the initiation of an inquiry and issuance of a show-cause notice to M/s A. Rahim Foods (Private) Ltd, for prima facie violating the provisions of Section 10 of the Competition Act, 2010. The Competition Commission, in the light of the complaint, reply and inquiry formulated the following three issues in the case:-

A. Whether the Respondent's product labeling and packaging is misleadingly similar to that of the complainant's K&Ns Packaging and if so, whether such confusing resemblance is deceptive and amount to the "fraudulent use of another's product labeling of packaging" within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;

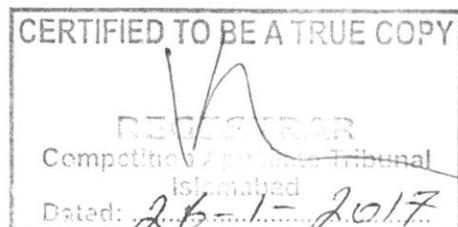
B. Whether the use of term/mark "Combo Wings" by the Respondent, in the absence of authorization from the complainant, amounts to the "fraudulent use of another's trademark..." within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;



C. Whether, the Respondent's product labeling and packaging and/or use of the mark "Combo Wings" amount to the "distribution of false or misleading information that is capable of harming the business interest" of the Complainant within the meaning and scope of Section 10(2)(a) and hence a contravention of Section 10(1) of the Act.

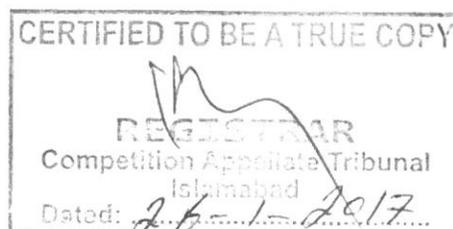
The learned Competition Commission while adjudicating upon the above issues came to the conclusion under Issue No. A that the consumers are clearly susceptible and at a serious risk of falling prey to deceptive confusion pertaining to the origin and quality of the instant commodity, due to the strikingly similar packaging and labeling of the products.

Under issue No. B it was concluded that the use of the term "Combo Wings" falls within the scope of Section 10(2)(d) of the Act, as the appellant fraudulently used the product labeling of respondent's company. Issue No. C was decided in the words that the respondent's use of the unregistered and non-exclusive mark "Combo Wing" is an act which, when viewed in isolation, does not attract the provision of Section 10(2)(a) of the Act and hence does not amount to the distribution of misleading information capable of harming the business interests of the complainant. However, such use of the said mark in conjunction with the copies packaging and product labeling as a whole is in fact misleading and capable of causing harm to the complainant. Accordingly, the learned Competition Commission imposed the penalties, stated above, on the Appellant for violating the provisions of Section 10(2)(a) and (d) of the Act. The appellant feeling aggrieved of the above decision has now filed the instant appeal.



4. The learned counsel for the appellant, in essence, raised two-fold grounds for the determination of this Tribunal. Firstly ; that the Respondent has no exclusive trademark right in red colour packaging for food products, therefore, no such right of the Respondent has been infringed when admittedly no trademark registration has been granted for red colour packaging to the undertaking. Secondly, that the learned Competition Commission has illegally incorporated the concept of "parasitic copying" which has not been defined in the Competition Act, and which concept remains alien to the Pakistani Law. The learned counsel contended that the learned Competition Commission has overstepped their powers and jurisdiction with regard to Issue No. A as no information has been given by the appellant to the consumer what to say of any false or misleading information. Reliance was placed on 1981 SCMR 1039 and 1987 SCMR 1090.

5. On the other hand, learned counsel for the Respondent defended the impugned order and submitted that the Respondent is a leading Pakistani company and a pioneer in the poultry and frozen foods sector. The respondent has been involved in the production and supply of high quality and hygienic poultry and food products for over 48 years, thus has obtained the trust of consumers across the country, who without hesitation acquire the Respondent's products ; that the Respondent has built on its 50 years of experience in the poultry business to integrate all poultry production activities under one umbrella which enables it to effectively manage and control all stages of production but the appellant has distorted healthy competition by entirely copying the Respondent's K&N's



Packaging and used the recognition and goodwill associated with K&N's Packaging for unjust personal gain. Further submitted that the appellant entered the market in 2008 much later than the respondent and copied from the Respondent's product labeling and packaging, in particular the appellant has made identical use of the identical red colour theme. Leaned counsel invited the attention of the Tribunal to the packaging cooking instructions of both appellant and respondent No-1, which for the purpose of clarity and better understanding are reproduced as under:-

Respondent No. 1/ Complainant's Packaging Cooking Instructions:

*Procedure: Appliances and utensils vary; cooking times accordingly.
Defrost product inside refrigerator until slightly thawed, prior to cooking.
Avoid re-freezing thawed product.*

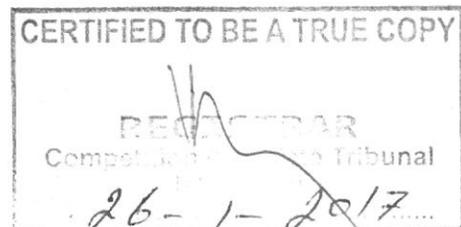
Cooking Pot: To enjoy traditional Kofta curry, prepare curry with your choice of recipe. Add slightly thawed Kofta along with water. Cook until ready

OR

*Karahi: To enjoy Kofta as a snack, preheat oil to frying temperature (170C).
Deep fry slightly thawed kofta for five minutes, or until brown.*

Appellant's Packaging Cooking Instructions:

Appliances and utensils vary; cooking times accordingly. Defrost product inside refrigerator until slightly thawed, prior to cooking. Avoid re-freezing thawed product.



To enjoy Kofta as a snack, preheat oil to frying temperature (170C). Deep fry slightly thawed kofta for five minutes, or until brown.

OR

To enjoy traditional Kofta curry, prepare curry with your choice recipe. Add slightly thawed Kofta along with water. Cook until ready.

Based on the above submissions it was stated that the text of the ingredients, storage and cooking instructions have in fact been copied verbatim from the Respondent's K&N Packaging, therefore the learned Competition Commission has rightly found the appellant guilty for violating the provisions of Section 10(2)(a) and (d) of the Act.

6. Before dilating upon merits of the case, this Tribunal deems it proper to reproduce Section 10(2)(a) and (d) of the Competition Act for the sake of convenience:-

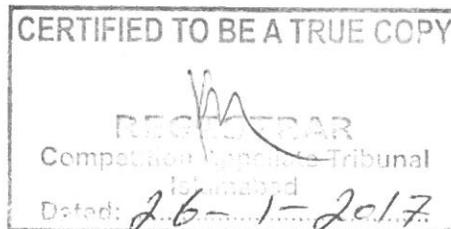
10. Deceptive marketing practices -----(1) No undertaking shall enter into deceptive marketing practices.

(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)

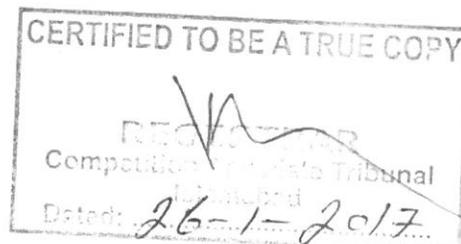
(c)



(d) fraudulent use of another's trademark, firm name, or product labeling or packaging.

7. As per available record, the respondent launched its products in the year 2003. On the contrary, appellant started the same colour, labeling and packaging of the respondent's product in the year 2012. It is also evident from the record that the appellant before the year 2012 used to distribute its meat products in the markets with a different and distinguished form. The said product was re-launched by the appellant in the year 2012 with similarity to the product of the respondent in many aspects.

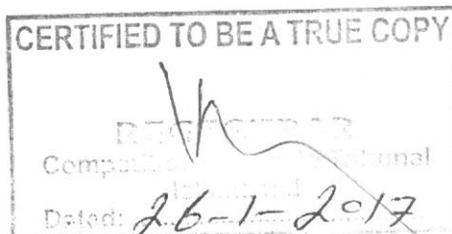
8. No doubt the respondent at the time of filing the complaint before the learned Competition Commission was not a registered owner of the trade mark for its Products and the learned counsel for the appellant eagerly argued that it was not within the domain of the Competition Commission to take cognizance of the case when the respondent was having no registered trade mark for the product in question but the plain reading of clause (d) of sub-section (2) of Section 10 of the Competition Act, 2010 would reveal that it bestows jurisdiction upon the Competition Commission for fraudulent use of another's trademark, firm name, or product labeling or packaging whether the same is registered or not. If the appellant has not used the trademark and firm name of the respondent, it has clearly used the products labeling / packaging of the respondent with deceptive marketing manner, which fact the appellant itself admits but with a different meaning. Clause (d) of sub-section (2) of Section 10 of the Act



clearly provides jurisdiction to the learned Competition Commission to provide protection to the manufacturers against copycats / parasitic copy (look-alike). The fraudulent use of product labeling or packaging constitutes a deceptive marketing practice. Designing the packaging of a product in a way which gives it the general look and feel of a competing, well-known brand would obviously confuse the consumer and such a practice would amount to willful deceitfulness by passing off a product to the market similar to another product of another company.

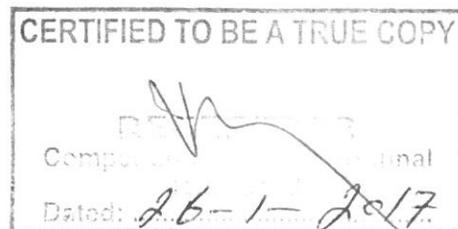
9. The Respondent started its product in "red" colour packaging much before the introduction of the same product by the appellant with the same red colour. It is also a matter of record that other competitors in the market are using different colours for the same products. The appellant is marketing the same products abroad but entirely with a different packaging including colour, layout and design. The use of similar packaging, colour, layout, design, language used for the product information including the list of ingredients, cooking and storage instructions by the appellant in the country is obviously aiming at harming the image of the respondent's product and personal gain by misleading the consumers, where both the products are put to sale in the same supermarkets, stores/shops in juxtaposition.

10. The Competition Act, 2010 is a state of the art modern law which gives the Competition Commission of Pakistan legal and investigative instruments and powers to engender free competition in all spheres of commercial and economic activity, enhance economic

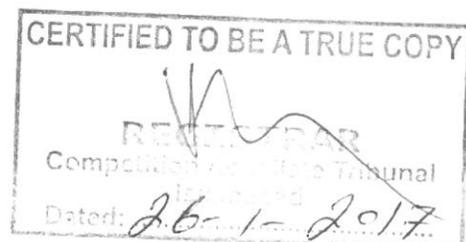


efficiency, and to protect consumers from anticompetitive behavior. The Act applies to all undertakings in Pakistan regardless of their public or private ownership and to all actions or matters that can affect competition in Pakistan. Briefly, the law prohibits situations that tend to lessen, distort, or eliminate competition such as actions constituting an abuse of market dominance, competition restricting agreements, and deceptive marketing practices. In other words, the Act prohibits deceptive marketing practices – any advertising or promotional material that misrepresents the nature, characteristics, qualities, or geographic origin of goods, services or commercial activities. We find that the Competition Commission has taken great pain in deciding the case after thoroughly perusing the whole record before it and has rightly found the appellant guilty of deceptive marketing under Section 10(2)(d) of the Act.

11. So far as the penalty imposed upon the Appellant under Section 10(2)(a) of the Act is concerned, we would observe that generally, the CCP conducts inquiry into an alleged deceptive marketing practice either on its own initiation or in response to complaints filed with it. On a finding of a prima facie case, show cause notices are issued and formal hearings conducted afterwards, following which the final orders are issued. The basic difference between the CCP case law and that of the U.S and the EU is that the undertakings in the former are exclusively responsible for a marketing practice that the CCP may perceive as deceptive. A marketing practice is deemed deceptive by the watchdog when it provides false or misleading information. False information is contrary to truth or fact;



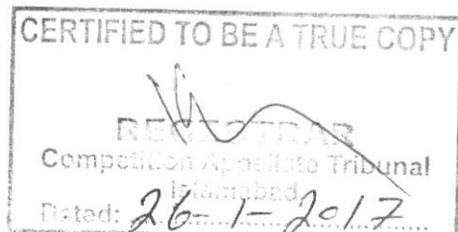
implies either conscious wrong or culpable negligence; has a stricter and stronger connotation than can be justified; and is not readily open to interpretation. On the other hand, misleading information has the capability to give a wrong impression; is likely to lead to error of judgment of conduct; and tends to misguide consumers because of it being vague. The omission of material information is also considered misleading, and hence, deceptive. Misleading information may or may not be deliberate, has a less onerous connotation and is open to interpretation in contrast to false information. Accordingly, the undertakings must consider that the liability with regards to distributing false information would be higher than that of misleading information. In a majority of cases, the learned Competition Commission has directed the undertakings to discontinue the alleged practice or to amend the alleged deceptive advertisement without imposing any financial penalty in the first instance. For the purpose of Section 10 of the Competition Act, 2010, the consumer neither carries the burden of an ordinary prudent man under the Pakistani contract law nor that of the 'average' consumer under the Pakistani trademark law. In this case, we find that the appellant's undertaking neither distributed false or misleading information that were capable of harming the business interest or respondent's undertaking either through electronic media, print media or any other kind of written pamphlets etc. to believe the consumer that the product is of K&N's or similar to that. The dictionary meaning of the word 'perception is, *"the ability to see, hear, or become aware of something through senses; the way in which something is regarded, interpreted or understood"*. Both these definitions point towards a person's own personal



understanding and judgment. "Disseminate" is defined as: "to spread (something, especially information) widely". "Information" is defined as: "Facts provided or learned about something or someone what is conveyed or represented by a particular arrangement or sequence of things". Clearly, the consumer purchases the item purely based on his/her own prior knowledge and judgment, as no clear advertising, telecasting or conveying any information has not been carried out by the appellant for the sale of his products. Also as per dictionary meaning "distribute" means, to apportion, to deliver, to spread out, to disperse". Similarly "distribution" means, "the passing or personal property, the act of process of apportioning or giving out" amongst other definitions.

12. In view of the above, this Tribunal is of the view that although the learned Competition Commission of Pakistan has rightly imposed penalty upon the appellant under section 10(2)(d) of the Act, the penalty imposed upon the appellant under section 10(2)(a) of the Act is not warranted and liable to be set aside.

13. Accordingly, the appeal in hand is partially accepted and while maintaining the order of the learned Competition Commission qua imposing penalty on the appellant under Section 10(2)(d) of the Competition Act, 2010, the order of the learned Competition Commission with regard to imposing penalty under Section 10(2)(a) of the Act is hereby set aside. The appellant is directed to cease use of the contentious copycat packaging for its frozen and/or processed meat product within one month and shall ensure that the products are repackaged in a manner distinct in its overall layout, design, shape, size, language and colour scheme so as to be easily distinguishable from the Respondent's products. The appellant is



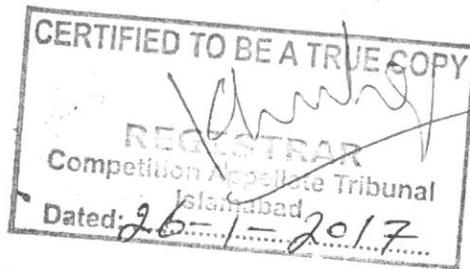
further directed to submit a copy of compliance report to the Registrar of this Tribunal and another copy to Registrar of learned Competition Commission of Pakistan.

Announced in open court
25.01.2017


Justice (R) Mian Fasih Ul Mulk,
Chairman


Justice (R) Miftah-Ud-Din
Member Technical


Anjum Owais Pirzada
Member Technical



Application No.	120
Dated	26-01-2017
Applicant	Competition Commission of Pak
No. of ...	13
Copy ...	FoC
Search ...	
Urgent ...	/
Total Fee	FoC
Date of Prep	26-01-2017
Date of Delivery	26-01-2017
Prepared	Noman Shafi

