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IN THE COMPETITION APPELLATE TRIBUNAL
2nd Floor, Federal Courts Complex, G-11/1, Islamabad.
E-mail Address: registrartribunal@gmail.com
Tel no: 051-9320208 Fax no: 051-9320209

No. 594
Dated: 01-12-2016

Tara Crop Sciences (Pvt) Ltd Vs. 1. Agritech Limited
2. Competition Commission of
Pakistan

NOTICE
APPEAL NO.02/2015

Take notice that under rule 51 of The Competition Appellate Tribunal Rules, 2015, attested copy of the Judgment dated 30-11-2016 is enclosed herewith for information and record.

2. Given under my hand and stamp of the Tribunal, this 1st day of December, 2016.


REGISTRAR

REGISTRAR
Competition Appellate Tribunal
Government of Pakistan
Islamabad

M/s Agritech Limited (Formerly Pak American Limited)
Through its Director, Muhammad Faisal Muzzamal,
Ismail Aiwan-e-Science Building,
Main Shahrah-e-Roomi,
Lahore.

Tara Crop Sciences (Pvt) Limited
House No.1, Block-G-II,
Canal Bank, Johar Town,
Lahore.

✓
The Competition Commission of Pakistan,
ISE Tower, Blue Area, Islamabad.



AS/1
KAM/CP
Dep. 21.12.16

**BEFORE THE APPELLATE TRIBUNAL COMPETITION
COMMISSION OF PAKISTAN**

A.No.02/2015

M/s. TARA CROP SCIENCES (PVT) LIMITED

House No.1, Block- G-II
Canal Bank, Johar Town,
Lahore.

APPELLANT

VERSUS



M/s AGRITECH LIMITED (Formerly Pak-American Limited)

Through its Director, Muhammad Faisal Muzzamal
Ismail Aiwan-e-Science Building
Main Shahrah-e-Roomi
Lahore

RESPONDENT # 1

Competition Commission of Pakistan

7th Floor South, ISE Towers 55-B
Jinnah Avenue
Islamabad

RESPONDENT # 2

**APPEAL U/S.42 OF THE COMPETITION ACT, 2010 AGAINST THE
ORDER NO. 119/AGRITECH/COMP/OFT/CCP/12 DATED 19.06.15.**

Respectfully sheweth:

**BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD**

M/s. TARA CROP SCIENCES (PVT.) LIMITED

.... APPELLANT

VERSUS

1) M/s. AGRITECH LIMITED

2) COMPETITION COMMISSION OF PAKISTAN

...RESPONDENTS

Appeal No.02/2015

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

For the appellant: Mr. Hafeez Zafar, Advocate

For the Respondent No-1: Mr. Wasif Majeed, Advocate

For the Respondent No-2: Mr. Saad Amir, Advocate

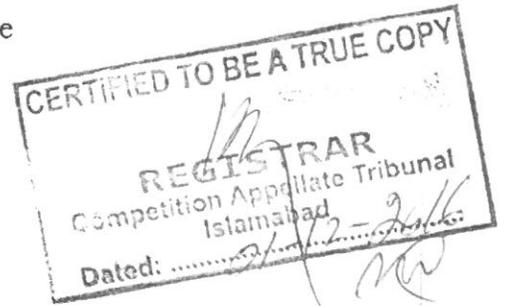
Date of hearing: 28.09.2016 & 16.11.2016

JUDGMENT

Justice (R) Miftah-ud-Din, Member Technical.

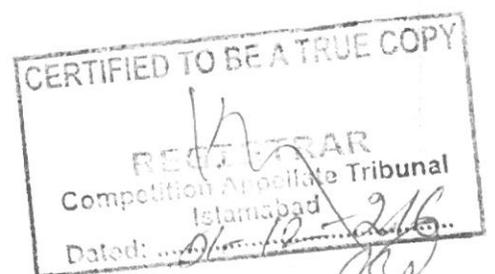
Through the present appeal, the appellant has questioned the validity, legality and propriety of the order dated 19.06.2015 of learned Competition Commission of Pakistan, whereby the appellant has been penalized under section 10 of the Competition Act 2010 and directed to pay a fine of Rs. 1 Million.

2. The brief facts of the case resulting in presentation of present appeal are that respondent No-1 Agritech Ltd lodged a complaint with Competition Commission of Pakistan founded on the allegation that respondent No-1 is using the word "Tara" for their product and business which



is identical to the product name of appellant. He further alleged that by using the word "Tara" of respondent No-1, the appellant is creating an impression in the mind of consumers that the products of appellant are that of respondent No-1 and passing of their goods to the consumer as goods of the appellant. The respondent No-1 further alleged that he is prior user of word "Tara" since 2006 and the appellant has got no right to use word "Tara", thus the unauthorized use of word "Tara" by the appellant is harming the business interest of respondent, which act of the appellant amounts to deceptive marketing practices, punishable u/s 10 of Competition Act 2010.

3. Notice of the complaint of Respondent No-1 was issued to the appellant, who submitted written reply to the effect that appellant is prior user of the "Mark Tara" and that the appellant is exclusively dealing with Pesticides and that the appellant has already applied for the "Trade Mark" Tara Zari Markaz, and that respondent No-1 has already instituted a Civil suit before the learned Additional District Judge, Lahore, therefore, the subsequent proceedings before learned Competition Commission of Pakistan are hit by the principle of, res sub judice u/s 10 of the Civil Procedure Code. He further alleged that till the decision of word "Tara" between the appellant and respondent No-1 the learned Competition Commission of Pakistan has got no power to proceed against the appellant in the present case.

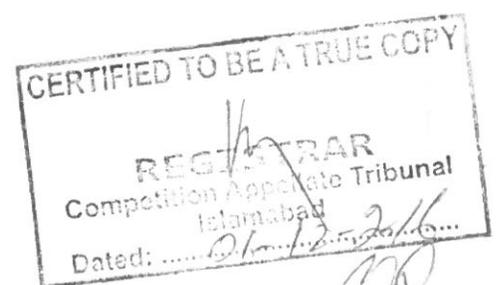


4. In view of the allegations of respondent No-1 and appellant, the matter was referred for inquiry and on the basis of inquiry report, a show cause notice was issued to the appellant as to why proceedings under section 10 of the Competition Act 2010 not be taken in the matter.

5. After giving an opportunity to the parties to submit their documents in support of their allegations and after hearing the learned counsel for the parties, the learned Competition Commission of Pakistan awarded punishment to the appellant under section 10 2(a) to pay a fine of Rs. 5 Lacs and also to pay a fine of Rs. 5 Lacs under section 10 2 (b), total amounting to Rs. 1 Million through the impugned order dated 19.06.2015. Aggrieved from the same, the appellant has preferred this appeal.

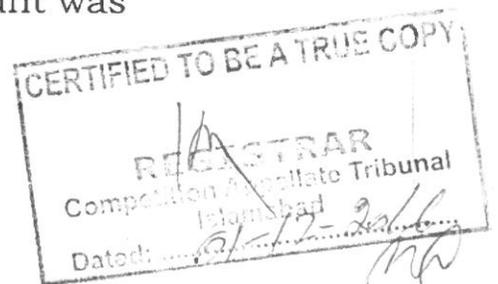
6. We have heard the arguments of learned counsel for the parties and gone through the material available on record. Learned counsel for the parties was given another opportunity to advance arguments on the respective allegations in the instant appeal.

7. The learned counsel for the appellant contended that the suit regarding the same matter between the same parties regarding the same subject matter is pending adjudication before learned Additional District Judge Lahore, therefore, the present matter cannot proceed in the light of section 10 of the Civil Procedure Code. He further



submitted that appellant is prior user of the term "Tara", which fact is obvious from the National Tax number and advertisement in magazine "Maayaar" in the year 2004 / 2005. He argued that individual mark Tara has not been registered in the name of respondent No-1 and that, "Tara Zarai Markaz", is used exclusively for pesticides and about two hundred outlets are already in operation for sale of pesticides and there is no proof of deceptive marketing practices or distribution of false or misleading information, capable of harming the business interest of the respondent No-1, therefore, the learned Competition Commission of Pakistan was not justified to award punishment to appellant under section 10 2 (a) and 10 2 (b) of the Competition Act 2010. He further argued that term "Tara" has become common to Trade, hence attained the status of public jurises, therefore, the learned Competition Commission of Pakistan was not legally justified to award penalty to appellant. Learned counsel for the appellant placed reliance on 2009 CLC 354, 1996 CLC 1657, 2008 CLS 398, 1999 YLR 638, 2007 CLD 966, 2010 CLD 311, 1987 MLD 1256, 1989 MLD 1598, 2008 CLD 974, 2008 CLD 1243, 2007 CLD 991 and 2011 CLD 193.

8. The learned counsel for respondent No-1 contended that brand "Tara" was launched and advertised by respondent in 2006 for Urea products i.e, "Tara DAP, Tara MAP, Tara MOP and Tara SSP and huge amount was



invested in the campaign to make Tara a recognizable brand for these products. He further argued that the use of word "Tara" packing and color by the appellant is deceptive marketing practice harming the reputation of Tara Mark as well as business interest of the respondent. He further submitted that the practice of appellant to use the brand Tara Zarai Markaz also falls under the ambit of free riding on the respondent reputation. He lastly argued that appellant has obviously distributed misleading information to consumers lacking a reasonable basis capable of harming business interest of the respondent, therefore, the learned Competition Commission of Pakistan was quite justified to award penalty to the appellant under section 10 2(a) and 10 2(b) of the Competition Act 2010.

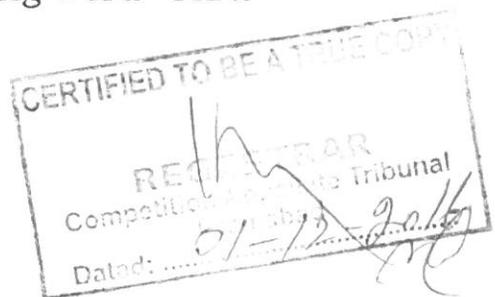
9. The learned counsel for respondent No-2 adopted the arguments advanced by learned counsel for the respondent No-1 and submitted that the documentary material available on the record clearly shows that the appellant has committed deceptive marketing and that the appellant has also not discharged the burden of proof that it is not dealing with the products, similar to respondent No-1, therefore, learned Competition Commission of Pakistan was quite justified to award penalty to the appellant.

10. Taking up the first contention of learned counsel for appellant regarding application of section 10 of CPC to the



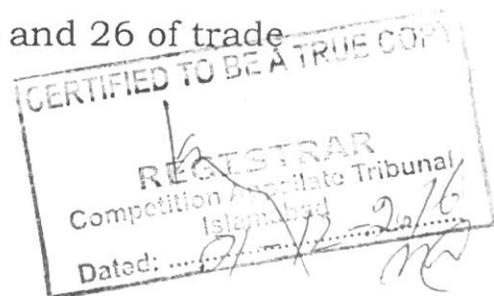
present proceedings, no doubt the parties are litigating over the matter of Trade Mark before learned Additional District Judge, Lahore but the same is a different subject matter having no similarity with proceedings before Competition Commission of Pakistan. The proceedings regarding deceptive marketing practices exclusively falls within the jurisdiction of Competition Commission of Pakistan under a special statute, can neither be termed as Civil suit nor the principle of res sub judice applicable to these proceedings. In this connection, reliance is placed on 1999 YLR 1112 and 1984 CLC 3189. After arguing at some length on this legal aspect of the matter, when the learned counsel for the appellant was confronted with special nature of proceedings before Competition Commission of Pakistan, he finally frankly conceded that he would no more press the point of application of section 10 of CPC to proceedings before the learned Competition Commission of Pakistan.

11. Now coming to assertion of learned counsel for appellant regarding public jurises, the word "Tara" used by respondent No-1 has not become common to trade to such an extent to loose its primary function i.e distinguishes the goods of respondent No-1 from the goods of any other undertaking. Likewise no material exists that word "Tara" is common to trade to such an extent that the same is largely used unhindered by many persons in the same trade. Respondent No-1 is very vigorously protecting word "Tara"



against actual and probable infringement by other undertakings by initiating action against them. In these circumstances the concept of public jurises is of no help to the appellant in the present case.

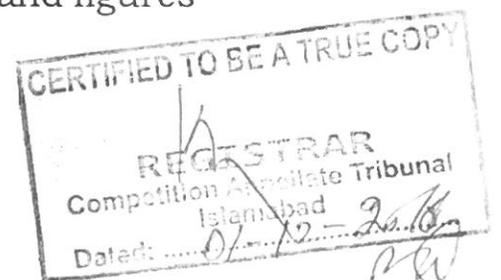
12. Now we take up the main contention of learned counsel for the appellant regarding penalty awarded to appellant by learned Competition Commission of Pakistan under section 10 2(a) and 10 2(b) of the Competition Act, 2010, admittedly the parties are litigating over the trade mark "Tara" before a competent forum, therefore, no proceedings under section 10 2 (d) of Competition Act has been taken against the appellant by the learned Competition Commission of Pakistan. However there is no legal bar on the powers of learned Competition Commission of Pakistan to proceed against the appellant under section 10 (2)(a)(b) of the Competition Act, which are separate and distinct penal provisions as compared to section 10 (2)(d) which is subject to decision of trade mark dispute by a competent forum. Undertakings use trade mark to help secure their brand equity for which registration is necessary but for the purpose of invoking the penal provision of Competition Laws, registration is not the sole indictor. Right in a trade mark arises out of continuous use of such mark and registration merely certifies that right. Exclusivity of user attach to a registered trade mark is not absolute, but is subject to limitation as provided under section 22,25 and 26 of trade



mark Act 1940. Such exclusivity would not effect the right of prior user, though unregistered. Right in a trade mark created by prior user despite no registration is superior right recognized under section 25 of the Trade Mark Act.

13. In support of the claim of appellant that he is prior user of the mark "Tara" and that he is exclusively dealing in pesticides reliance is placed on an advertisement published in magazine "Mayaar" in December 2005 and November 2006 as well as NTN certificate. The advertisement in Mayaar magazine is in respect of Tara seeds and not pesticides. Similarly the NTN certificate is in respect of Tara packages which too in the name of one Shahid Masood and not appellant. In the absence of evidence in the shape of advertisement cost sales revenue from the products in the market and actual good services in the market under the word "TARA", mere NTN certificate and advertisement is of no help to the appellant in the present case. As no worth reliance evidence exists on record that appellant is prior user of term Tara and that he is exclusively dealing in pesticides, therefore, the learned Competition Commission of Pakistan was quite justified to disbelieve the claim of appellant in this connection.

14. As compared to appellant respondent No-1 in support of his claim as prior user of mark TARA produced documentary evidence in the shape of application forms, advertisement costs goods services in the market and figures

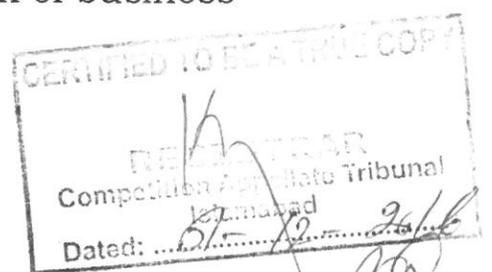


of sale revenue from the market that he is dealing in fertilizer "TARA DAP", "TARA" urea" and "TARA SSP" since 2006. Thus the claim of respondent No. 1 as prior user of term "TARA" is fully established on record. The documentary evidence available on record further indicates that on account of continuous prior use of word "TARA" by respondent No. 1 for considerable length of time, spending huge amount as brand promotion expenses as well as vigorously protecting the word "TARA" against actual and probable infringement by other undertakings, respondent No. 1 has earned reputation and good will for the word "TARA". The right of respondent No-1 as prior user of word "TARA" is protected under section 25 of the trade mark Act, therefore, the learned Competition Commission of Pakistan was justified to initiate penal action against the appellant on the complaint of respondent No. 1, to ensure fair competition and discourage the practices of deceptive marketing. Thus the case law cited by learned counsel for appellant regarding right of prior user favours respondent No-1 more than appellant.

15. Admittedly the appellant is continuing his business under the franchise network "Tara Zarai Markaz", therefore, the overall market in which appellant and respondent No.1 are operating is agriculture. The consumers targeted by the appellant on fore mentioned brand through marketing practices are ordinary farmers. An ordinary farmer already familiar with products of respondent No. 1 under brand "TARA" is likely to assume connection between the said products and products of "Tara Zarai Markaz" i.e that of appellant. The appellant franchise network "Tara Zarai

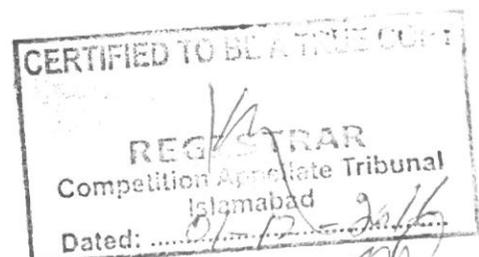
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Islamabad
Dated: 27/11/2016

Markaz” obviously indicates the aim of providing all types of agricultural related products in one shop, is capable of deceiving ordinary consumers and other stake holders into assuming an affiliation between the products of appellant and respondent No. 1. For the purpose of deceptive marketing, actual deception need not be proved. It is sufficient to establish that the advertisement has the tendency to deceive, and capacity to mislead ordinary consumers. The appellant’s franchise network “Tara Zarai Markaz” mentioned in the advertisement by itself is sufficient and capable of deceiving ordinary consumers and other stake holders to assume an affiliation between the product of appellant and respondent No. 1. An ordinary consumer experienced with long and continues use of good quality products of the brand of the respondent No. 1 may be swayed into purchasing the products of appellant solely on the basis of use of the brand “TARA”. Thus the appellant is very likely to benefit from the good will, reputation, huge expenditure on brand promotion and protecting the brand “TARA against actual infringement incurred by respondent No-1, which is obviously a free ridding on the part of appellant to earn benefits without paying or sharing the costs. Similarly consumers having negative experience of the product of appellant may also be dissuaded from purchasing the product of respondent No-1 which may not only result in direct harm to sale and revenue but also result in damage to brand “Tara”, image, good will and reputation of business



interest of respondent No-1. In these circumstances the burden was shifted to the appellant to prove the prior use of brand "Tara" as well as to distinguish his franchise network products from those of respondent No-1, or that he is exclusively dealing with pesticides, but appellant has failed to discharge this burden by producing reliable evidence regarding prior use or that franchise network products of appellant are different from respondent No-1 and that appellant is exclusively dealing in pesticides.

16. As a corollary to the above discussion we have come to the conclusion that on the basis of inquiry report and undisputed documents produced and admitted by the parties, the learned Competition Commission of Pakistan has awarded punishment to the appellant. It is an established principle of law of evidence that facts admitted need not be proved. It is evident from the documentary evidence available on the record that "TARA DAP" "TARA Urea" and "TARA SSP" fertilizers product of respondent No-1 are available in the market since 2006, while "TARA Zarai Markaz" of appellant was incorporated on 31st July 2012 and as per T.M 16, date of filing is March, 2013. Obviously respondent No-1 is proved to be a prior user of term "TARA", therefore, appellant was legally and morally bound to ascertain at the time of starting business that the name and style of the brand he intended to use is not in the name of any other undertaking. The appellant has failed to exercise this care and caution and subsequently launched

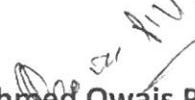


marketing campaign in the name of "TARA" without consent and permission of respondent No-1, which apparently amounts to deceptive marketing and infringement of right of respondent No-1 as prior user guaranteed under section 25 of the trade mark Act 1940. Thus on the basis of un rebutted documentary evidence available on record, the appellant is proved to have committed deceptive marketing practices by distributing misleading information lacking a reasonable basis to consumers, which are capable of harming the business interest of respondent No-1, therefore, the learned Competition Commission of Pakistan was quite justified to award penalty to the appellant. The Judgment and order of learned Competition Commission of Pakistan is based on sound reasoning duly supported by relevant material available on record, warrants no interference by this Tribunal in exercise of appellate jurisdiction under section 42 of Competition Act, 2010. The appeal of the appellant is devoid of merits, hence dismissed leaving the parties to bear their own cost.

Announced in open court
30.11.2016


Justice (R)
Mian Fasih Ul Mulk,
Chairperson


Justice (R) Miftah-Ud-Din
Member Technical


Ahmed Owais Pirzada
Member Technical

CERTIFICATE:

This judgment consists of (12) twelve pages, each dictated, read over, corrected and signed by me.


Justice (R) Miftah-Ud-Din
Member Technical

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Competition Appellate Tribunal
Islamabad
Dated: 01-12-2016

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