BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD

1) **M/S ENGRO FOODS PVT LTD.**
2) **M/S FAUJI FOODS PVT LTD.**
3) **M/S SHAKARGANJ PVT LTD.**

.... APPELLANTS

VERSUS

COMPETITION COMMISSION OF PAKISTAN

...RESPONDENT

Appeal Nos. 02/2017, 07/2017 & 08/2017.

For the appellants:	Mr. Mansoor Usman Awan, Advocate, Miss. Sabahat Rizvi Advocate and Mr. Waqas Qadeer Sheikh Advocate.
For the Respondent:	Ch. Shafiq Ur Rehman, Advocate
Date of hearing:	11-04-2017, 26-04-2017, 31-05-2017, 26-09-2017, 31-10-2017, 14-11-2017, 09-01-2018, 14-02-2018, 13-03-2018, 10-04-2018, 28-06-2018, 05-07-2018, 10-09-2018, 25-09-2018, 10-10-2018, 14-11-2018 & 12-12-2018.

JUDGMENT

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

Appeal No. 02/2017 filed by Engro Foods Ltd, Appeal No-07/2017, filed by Shakarganj Foods Ltd and Appeal No-08/2017 filed by Fauji Foods Ltd have been filed against the order dated 18-01-2017 of learned Competition Commission of Pakistan. As common, identical legal and

factual controversy is involved in all the three appeals, therefore, they are disposed of through the present Judgment.

02. Brief facts of the case are that one Mr. Muhammad Abu Ahmed lodged a complaint vide E-Mail dated 12-01-2015 before Competition Commission of Pakistan, founded on the allegations that the appellants are marketing Dairy Drink / Dairy Liquids and liquid powered Tea Whitener as Milk substitute, while using various proportions of Milk in their products, which cannot be considered, marketed, advertised and sold as Milk substitute. The matter was probed by inquiry committee under section 37 (2) of CCP. The inquiry committee came to the conclusion that Shakarganj Foods Ltd are producing products Dairy pure and Tea whitener Qudrat. Dairy pure is a dairy drink which gives clear impression that product is not a milk but clearly a tea whitener. Website disclosure and television commercial (TVC) clearly indicate its use as tea whitener. Regarding Qudrat, the inquiry committee concluded that the word UHT liquid Tea Whitener appear in small font side of the packaging and front side of the package does not indicate that it is a liquid Tea whitener, hence packaging is giving wrong impression to general public about character, properties and suitability for use, hence are definitely violations under section 10 (2)(a)(b) of Competition Act, 2010. Noon Pakistan Ltd now Fauji Foods Ltd are producing daily Rozana and Chai Max as Tea whitener. On Daily Rozana, the word daily drink is missing on packaging which mislead the public in general, harming business interest of other under takings, while Chai Max is not giving such impression. Engro Foods Ltd are producing Tarang / Tarang Elachi and Omung. Packaging and TVC of Tarang / Tarang Elachi is not giving

wrong impression to general public on formation of the product, while advertisement of Omung as a whole gives an impression that the same is milk and not drink, hence amount to deceptive market practice punishable under section 10 (a)(b)(c) Competition Act, 2010.

03. On the basis of inquiry report, show-cause notices were issued to the appellants. The appellants submitted their written replies / comments and thereafter an opportunity of hearing was given to the parties. The learned CCP vide order dated 18-01-2017 awarded different penalties to the appellants. Appellant Engro Fertilizer Ltd was directed to pay an amount equal to 0.03 percent of its last turn over (accounting year 2015) for each four violations total amounting to Rs. 6,22,92624/-. Noon Ltd (FFL) was directed to pay a fine of Rs. 02 Million, while Shakarganj Foods Ltd was fined Rs. 5,00,000/- only through impugned Judgment and order. Aggrieved from the order of learned CCP, the appellants have preferred the above mentioned three appeals.

04. Learned counsel for the appellants contended that the complainant is neither an undertaking nor association of register consumers, therefore, the complaint was not entertainable under section 37 (2) of CCP. Further contended that CCP lacks jurisdiction to adjudicate upon breach of standards of Pakistan, standard and quality control Authority as the same are voluntary in nature and not available to public. Further submitted that its implementation depends upon adoption of the same by the parties to the contract. The learned counsel for the appellants went on to say that the inquiry in the present case was not properly conducted and that it was a unilateral exercise carried out by the inquiry committee in the absence

of appellant in total disregard of the Rules and Regulations in this connection. It was added that the appellants were neither associated with the inquiry proceedings nor the date and place of survey and name of departmental stores and markets were shown in the inquiry report and that not a single statement of any witness was recorded during the course of inquiry/investigation. It was argued that the show-cause notices are also based on the same wrong, illegal and one sided inquiry report. Further submitted that CCP has wrongly held Gawalas as undertaking and that the CCP has not undertaken any detail study to ascertain the hygienic / adulteration level of milk sold by Gawalas across Pakistan. Further argued that all the appellants made commitment before CCP to remove the objectionable content in new promotional material and that the CCP has given favourable decisions to many undertakings pursuant to commitments made by them but the appellants have been treated with discrimination, while awarding different penalties. Learned counsel for Noon Pakistan Ltd contended that NPL was acquired by Fauji Fertilizer Foods on 13-10-2015, where after the product Daily Rozana was stopped and this fact is admitted on the record but even then, in the inquiry report dated 16-03-2016 as well as in the impugned Judgment, FFL has been held responsible for the same without any legal justification.

05. 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 Mr. Muhammad Abu Ahmed complainant 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 to be proved, therefore, the learned competition commission of Pakistan was quite justified to award punishment to the appellants. He further submitted that complainant as citizen of Pakistan put the law in motion against the appellant for the deceptive marketing practices committed by appellants and that CCP can initiate suo-moto proceedings in such like cases.

06. Before taking up the matter of competency of complaint before learned CCP, we would like to first answer the contentions of learned counsel for CCP regarding admissibility of evidence, as well as suo-moto notice in the present case. The contention of learned counsel for CCP that CCP has relied upon admitted facts and evidence in the present case under the principle of law of evidence that facts admitted need not to be proved, is without any substance, because we have not come across any notice issued by Competition Commission of Pakistan to appellants to admit certain facts, authenticity of any document or enquiry report and the appellants in response to such notice admitted those facts and authenticity of documents. The learned counsel for Competition Commission of Pakistan has failed to point out any document or other oral and documentary evidence to which the appellants have been confronted by the Competition Commission of Pakistan, and appellants accepted the same, therefore, we are not persuaded to believe that Competition Commission of Pakistan has decided the controversy between the parties on admitted facts and

evidence on record. Taking up the matter of assuming suo moto jurisdiction by Competition Commission of Pakistan, no doubt under section 37 (1) of Competition Act, Competition Commission of Pakistan can take suo moto notice and conduct inquiry but in the present case it is not clear that how and on what information suo moto notice was taken. Suo moto notice can not be taken on mere thoughts and imaginations but there must be some information from TV commercials, print and electronic media to initiate suo moto action by Competition Commission of Pakistan, which has not happened in the present case. The record shows that office of Fair Trade (OFT) had made quarries specific to the nature of Dairy Omung and its marketing as alternate to loose milk in September 2011, but no further action was taken in the matter to specifically conduct inquiry under section 37 (1) of Competition Act at that time. It was on 12.01.2015, when one Abu Ahmad made a complaint through email, where upon action was taken regarding various products of many under takings including the appellants. The inquiry report itself indicates that inquiry was conducted under section 37 (2) of Competition Act, therefore, Competition Commission of Pakistan can not be allowed to resile from admitted documentary evidence. Thus, we hold that the contention of learned counsel for Competition Commission of Pakistan that suo moto action was taken in the present case under section 37 (1) of Competition Commission of Pakistan is not justified.

07. Taking up the case of appellants regarding competency of complaint, it is better to produce the relevant provisions 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.

08. 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 Abu Ahmad is neither an undertaking nor a registered association of consumers, therefore, he was not competent to lodged the present complaint against the appellant. Except E-Mail, there was no other evidence in support of complaint. 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 incompetent wrong, illegal and based on no evidence complaint. 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 is 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 appellants on the basis of a incompetent and illegal complaint based on no evidence. Similarly the subsequent proceedings of conducting an inquiry, issuance of show-cause notice and awarding punishment to appellant is also illegal and without jurisdiction.

09. Taking up the report of inquiry committee, the purpose guideline and procedure prescribed under rule 23 of CCP General Enforcement Regulation, 2007 has not been taken into account by the inquiry committee. The main object of inquiry committee is to associate all concerned at the investigation stage and to collect documents, record statements and evidence on affidavit of all witnesses acquainted with facts and circumstances of the case. The inquiry report indicates that neither the appellants were associated with investigation proceedings nor any documentary or oral evidence of appellants and other concerned were taken during investigation. Similarly, neither

the complainant was examined at investigation stage nor the statement of other persons acquainted with facts and circumstances of the case were recorded. Allegedly the inquiry committee visited various markets and departmental stores but neither the description and particulars of the store has been given in the report nor the statement of anyone from the market was recorded regarding deceptive marketing practices of appellants. The relevant evidence to be collected during inquiry was that of consumers and other undertakings and competitors but the inquiry report is silent regarding collection of evidence in this connection. Instead of conducting the job of collecting evidence in support of complaint, the inquiry committee has just made academic discussion to provide a foundation for issuance of show-cause notice and writing Judgment by the learned Competition Commission of Pakistan. Thus, we hold that the report of inquiry committee is defective, one sided and based on no evidence.

10. On the basis of a defective and one-sided report based on no evidence, the learned CCP has awarded different penalties to appellants for almost the same violations. For similar violations, Noon Ltd Pakistan (FFL) has been directed to pay a fine of Rs. 02 Million and Shakarganj Foods Ltd Pakistan to pay a fine of Rs. 5,00,000/- only, while Engro Foods Ltd has been fined Rs. 6,22,92,624/- without any plausible explanation for such discrimination. The only reason for awarding excessive penalty to EFL is advertisement through TV Commercials, affecting the public at large but no one from the public has been examined by the learned CCP. The inquiry report and findings of learned Competition Commission of Pakistan are solely based on certain definitions of Pakistan Standards and quality control

authority (PSQCA), and Punjab Food Authority (PFA). Neither the inquiry committee nor learned CCP has answered the objections of learned counsel for appellants regarding applicability of the aforesaid provisions in the present case. Rule 12 of the Pakistan Standards Rules 2008 provides that Pakistan standard are voluntary in nature and available to public. Its implementation depends upon adoption of the same by the parties concerned. The Pakistan standards are binding, if it is stipulated in contract, or referred to in legislation or made mandatory by specific orders of the Federal Government under section 14 of PSQCA. Section 14 of PSQCA provides that Federal Government by notification prohibit the manufacture, storage and sale of any articles specified therein, which does not conform to the Pakistan standards. Learned counsel for CCP has failed to produce any notification or specific order issued by the Federal Government, prohibiting the manufacture, storage and sale of Milk and Daily products under section 14 of PSQCA. Thus, we hold that the inquiry committee and learned CCP were not justified to apply these standards in the present case. The learned CCP has awarded punishment to the appellants in order to safeguard and protect the rights of consumers, undertaking and competitors but no one from public has been examined and likewise no undertaking or competitor appeared before CCP to support the fact of deceptive market practices, committed by the appellants, and that the business interest of other competitors has been harmed by the deceptive practices of the appellants. No evidence at all exist on the record that the appellants have committed continuous and repeated acts of deception to invoke the penal provision of section 10 of Competition Act, 2010 by the CCP. All the appellants have undertaken before Competition Commission of Pakistan to remove the objectionable contents

from the advertisement but even then, the appellants have been fined, while similarly placed other persons have been issued warning in similar situations, which is apparently a discrimination.

11. After foregoing discussion, we have come to the conclusion that not only complaint in the present case is incompetent but the inquiry report is also one sided, wrong, illegal and based on no evidence. An iota of evidence was neither collected during inquiry proceedings nor recorded before CCP to prove the allegations of deceptive marketing practices against the appellants. Resultantly, we accept all the three appeals, set aside the impugned order of learned Competition Commission of Pakistan and dismiss the complaint in the present case. No order as to costs.

Announced in open Court
16-01-2019

Justice (R) Mian Fasih Ul Mulk,
Chairperson

Justice (R) Miftah Ud Din,
Member Technical

Ahmed Owais Pirzada
Member Technical

Ahmed Owais Pirzada, Member Technical.

12. I have gone through the Judgment, authored by my learned brother by virtue of which, the appeals filed against the impugned order dated 18th January, 2017 of the Competition Commission of Pakistan (the "**CCP**"), by the Appellants, have been accepted. After taking into account the arguments, advanced by the Learned Counsel, representing the parties before us and after carefully examining the record, I, with utmost respect to my learned brother do not find myself incline to support the position taken by him and, therefore, would like to bring on record the reasons for my dissent.

13. For the sake of brevity, I do not wish to reproduce the facts of the case since they have already been provided by my learned brother. However, for ease of reference it is reiterated that a bare perusal of the record reveals that on receipt of the complaint, the CCP, after an initial probe, has taken suo-moto notice, pursuant to section 37 (1) of the Competition Act, 2010 (the "**Act**") and appointed an Enquiry Committee to verify and ascertain whether or not any violation of the Act has been committed by the Appellants. During the course of inquiry, the Enquiry Committee has issued letters to the Appellants, providing them an opportunity to bring on record their position, provide clarification and explanation in relations to the alleged breaches committed by them. Accordingly, the Appellants have submitted their detailed replies along with supporting documents to the Enquiry Committee which have been examined and considered. The Enquiry Committee, relying on the documents, submitted by the Appellants, has concluded and held that the publicity campaigns run by the Appellants have been capable of giving wrong impression to the general public. It is also imperative to note that EFL and SPFL, during the course of proceedings taken place before CCP, have informed, in writing, that they have modified their respective publicity campaigns in order to address the concerns of the regulator i.e, CCP. The Enquiry Committee as well as the CCP have relied on documentary evidence, placed on the record by the Appellants with reference to the letters, issued by the Enquiry Committee and the final show cause notices, issued by the CCP. I am, therefore, of the considered opinion that the reliance of the Enquiry Committee and the CCP on the aforesaid evidence, being the admitted position, has been fully justified.

14. I would now turn to the issue, highlighted by my learned brother, pertaining to the conduct of the CCP and the way in which the investigation has been initiated and carried out in this behalf. Before deliberating on this issue, it is important to bear in mind that Section 37 (1) of the Act provides that the Commission on its own and shall upon a reference made to it by the Federal Government conduct inquiries into any matter relevant to the Act. It is a matter of record that the CCP, after an initial probe, has taken suo-moto notice pursuant to the aforesaid Section of the Act and appointed an Enquiry Committee to investigate whether or not any violation / breach of the Act has been committed by the Appellants. It is also a matter of record that the CCP, after the receipt of the Enquiry Report which held that the Appellants have been in breach of section 10 of the Act, i.e. deceptive marketing, has initiated proceedings against the Appellants under section 30 of the Act. Moreover, as prescribed by law, the CCP has issued Show Cause Notices to the Appellants, providing them an opportunity to appear before the Commission and place facts and material on record to support their contentions. It is only after adhering to all legal formalities that the CCP has passed the Impugned Order. I am of the view that the argument advanced by the Appellants, in relation to the complainant not being an undertaking carries no weight since the Inquiry ordered by the CCP has been a consequence of its taking suo-moto notice under Section 37 (1) of the Act, complying all the procedural formalities. I, therefore, see no reason as to why the Impugned Order should be set-aside when the same has been passed in light of the applicable law. Moreover, as mentioned earlier, presence of a qualified

complainant, i.e, undertaking, is not a prerequisite for the CCP to assume jurisdiction under Section 37 (1) of the Act. Hence, suo-moto proceedings initiated by the CCP, in the present circumstances, are in line with the provisions of the Act, referred herein above.

15. I fully understand and appreciate that the contentious issue, on the basis of which my learned Brother has deemed it fit to set-aside the Impugned Order, is the reference and inclusion of Section 37 (2) of the Act in the report of the Enquiry Committee. The said section caters to a complaint submitted by the undertaking on the basis of which the law is set into motion. The procedure prescribed in the law must be followed in its letter and spirit, however, I am of the considered opinion that the legislative intent and the objective of the special law, promulgated by the Parliament, must take precedence and its purpose must be furthered. On the basis of this understanding, I find it unfavourable to allow the Appellants to take benefit of and hide behind any technical error committed by the CCP. The Superior Court of the Pakistan have time and again held that technicalities should be ignored to advance the purpose / objective of the law and to suppressing mischief. In order to understand the legislative intent behind this Act, it is imperative to see the preamble of the Act which is a gateway and bedrock to understanding the scope and purpose of the Regulatory Regime governing Competition Law. The stated purpose of the Act as per the preamble is to protect the consumers from Anti-Competitive behaviour. In light of the same, I do not believe that the mere reference of Section 37 (2) of the Act in the Inquiry Report, being technical in nature, can be construed as fatal error, enough to nullify the

whole proceedings of the CCP nor can the same, with utmost respect to my Learned Brother, be treated as a valid ground to set-aside the Impugned Order passed by the CCP. Reliance, in this regard, is placed on PLD 1963 SC 382, 2010 CLC 797, 2016 SCMR 48, PLD 1973 SC 589, 2015 PTD (Trib) 589, 2016 SCMR 646 and 2018 CLC 519.

16. As described herein above, the Enquiry Committee has complied with the formalities prescribed under the Competition Commission Inquiry (Conduct of Investigating Officer) Rules, 2007. Furthermore, while reaching to the conclusion, the Enquiry Committee has relied on the documentary evidence made available to it by the Appellants. The record reflects that EFL and SFPL, during the proceedings before the CCP, have modified their respective publicity campaigns in an attempt to address the concerns of the CCP. The aforementioned conduct of the said Appellants clearly indicates that they have impliedly admitted to the fact that the publicity campaigns, on which the CCP issued them the Show Cause Notices, have been in violation of Section 10 of the Act. Keeping this fact in mind, I find no valid ground to hold that the CCP erred in concluding that the Appellants have been in contravention to Section 10 of the Act.

17. On the contrary, one of the Appellants namely FFL, took the position that since the production of "Daily Rozana" had been stopped after it acquired NPL, therefore, they are not responsible for any misdoing of their predecessor. I do not find any weight in the argument and the position taken by FFL. Under the law, post-acquisition, all assets and liabilities of NPL stood transferred to FFL, hence, any Order passed by the CCP, on account of any breach committed by NPL, is applicable to FFL. The only exception to this

principle, as I see it, is if FFL would have brought on record the contract it has executed with NPL which could demonstrate that any liabilities incurred by NPL would not be carried forward to FFL. However, the FFL has failed to bring on record any such document. In these circumstances, FFL is fully responsible to discharge all liabilities of NPL including the penalty imposed by the CCP on it.

18. I also find it necessary to express my views on whether or not "Gawalas" would fall within the definition of the word *"undertaking"* as has been defined in the Act. The learned counsel representing the Appellants argued that Gawalas have been wrongly held as undertaking by the CCP. The definition of the word undertaking, as mentioned in the Act, covers both legal and natural person involved in the supply of goods. Since Gawalas are involved in supply of milk in almost all towns of the Country,I find no justification in the arguments advanced by the Learned Counsel for the Appellants. For all intent and purposes, Gawalas or any other natural person(s) involved in supply of goods fall within the meaning of word *"undertaking"*.

19. With regard to the applicability of certain conditions of the Pakistan Standards and Quality Control Authority (PSQCA) and Punjab Food Authority (PFA), pointed out by Learned Counsel for the Appellants during the hearing before us, these conditions have first been referred by the Appellants in their response to the letters issued to them by the Enquiry Committee. Although the position so taken by the Appellants have been responded by the Enquiry Committee and the CCP, however, the penalties imposed by the CCP in the instant case are for violation of Section 10 of the Act. In these circumstances, notification by the Federal

Government under section 14 of PSQCA, being not involved in the matter, does not require further deliberation.

20. For the reasons provided herein above, I am of the view that Technical error cannot be a valid ground for setting-aside the impugned order. Further, on merits, EFL and SPFL have made amendments in their campaign during the course of proceedings before the CCP to address the concerns mentioned in the Show Cause Notices issued to them. The EFL has gone further in this behalf, submitting, in writing, that in future it would comply with all directions of the Commission. The argument extended by FFL that it is not responsible for the misdoings of its predecessor is also not tenable under the Law. In view of the above, the illegalities committed by the Appellants have been proved. In these circumstances, I see no reason for any intervention in the impugned Judgment / order dated 18th January 2017 of the Competition Commission of Pakistan. Consequently, all the three Appeals are dismissed with no order as to costs.

Announced in open court on:
16-01-2019

(Ahmed Owais Pirzada),
Member