

BY: SPECIAL MESSENGER
THROUGH REGISTERED POST/AD

IN THE COMPETITION APPELLATE TRIBUNAL
2nd Floor, Federal Courts Complex, G-11/1, Islamabad.
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No. 407
Dated: 30-09-2016

Pakistan Poultry Association Islamabad through its Chairman, Khalid Saleem Malik, Kahlid Plaza, D-Chowk first Floor Blue Area, Islamabad

Vs.

✓
Competition Commission of Pakistan, Government of Pakistan, 7th Floor, ISE Towers, 55-B Jinnah Avenue, Islamabad

NOTICE
APPEAL NO. 09/2016

Take notice that under rule 51 of The Competition Appellate Tribunal Rules, 2015, attested copy of the judgement dated 28-09-2016 is enclosed herewith for information and record.

2. Given under my hand and stamp of the Tribunal, this 30th day of September, 2016.


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051-9320208

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Government of Pakistan
Islamabad



177. No. 347
Date 03/10/16

BEFORE THE COMPETITION APPELLATE TRIBUNAL,
ISLAMABAD

Appeal No. 09 /2016

Pakistan Poultry Association Islamabad through its Chairman, Khalid Saleem Malik, Khalid Plaza, D-Chowk First Floor Blue Area, Islamabad.

.....Appellant

Versus

The Competition Commission of Pakistan, through its Chairman, 7th Floor ISE Tower, 55-B Jinnah Avenue, Islamabad.

.....Respondent

APPEAL UNDER SECTION 42 OF THE
COMPETITION ACT XIX OF 2010 AGAINST
THE ORDER DATED 29.02.2016 PASSED BY THE
COMPETITION COMMISSION OF PAKISTAN

Claim in Appeal

To set aside the impugned order dated 29.02.2016 passed by the Competition Commission of Pakistan adjudicating by its three members, where they imposed penalty of Rs. 100 million (Rupee one hundred million) upon the appellant and also set aside show cause notice No.13 of 2015 dated 16.11.2015

May it please your Lordships:

1. That Pakistan Poultry Association Islamabad is a trade organization licensed by the Ministry of Commerce under Trade organizations Act formed for no profit. It is representing various sectors constituting the

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BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD

PAKISTAN POULTRY ASSOCIATION

.... APPELLANT

VERSUS

COMPETITION COMMISSION OF PAKISTAN

...RESPONDENT

Appeal No.09/2016

For the appellant: Ch.Khurshid Ahmed, Advocate

For the Respondent: Mr. Azid Nafees, Advocate

Date of hearing: 15.06.2016 & 21-09-2016

JUDGMENT

Ahmed Owais Pirzada, Member Technical.

This Judgment disposes of the appeal, filed by Pakistan Poultry Association ("appellant") against the order dated 29-02-2016 of the Competition Commission of Pakistan ("respondent"). The order held Pakistan Poultry Association's actions to be in violation of section 4(1) read with section 4(2)(a) of the Competition Act 2010 ("The Act") and imposed penalties as specified in Para 17 of the impugned Order.

BACKGROUND:

To recapitulate, the essential facts are that the appellant has been established, besides other objectives, to provide facilities

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for and foster, encourage, secure and maintain good and closer relationship and unanimity among members and the Trade in general and to promote and protect their business interests and to do all that is necessary for the furtherance and development of Poultry Farming and allied trade in Pakistan.

2. The respondent taking notice of a series of Newspaper advertisements in the dailies "Jang", "The News" and "Nawa-e-Waqt" by the appellant regarding the rates of (a) live broiler chicken (b) broiler chicken meat and (c) chicken eggs, issued notice dated 16th November 2015, under section 30 of the Act to the appellant by taking cognizance under section 37(1) of the Act calling upon to show cause in writing its position with regard to fixing the selling prices of broiler chicken and chicken eggs, which prima-facie have the object and / or effect of preventing, restricting or reducing competition within the two relevant markets, respectively in contravention of section 4(1) of the Act read with section 4 (2) (a) thereof. Subsequently a written response, submitted by the Appellant is summarized as under:-

- a. Advertisements were not issued nationwide but appeared only in Islamabad and Lahore;
- b. Prices are not fixed by the appellant but by the market committee of local governments;
- c. Prices of broilers and broiler meat in Karachi are fixed by the Commissioner Karachi.
- d. Poultry products are subject to arbitrary price fixation by the administration of many cities;
- e. Poultry products are a generic perishable commodity, the demand and supply of which fluctuates substantially.

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3. After due deliberation and analysis, the respondent vide order dated 29.02.2016, has held that the appellant's action to be in violation of section 4 (1) read with section 4 (2)(a) of the Act with respect to two distinct Markets. The respondent vide aforesaid order has imposed the penalty of Rs. 50 Million for the violation in the market for broiler chicken and Rs. 50 Million for the violation in the market for chicken eggs. The Appellant has also been ordered to immediately cease and desist from advertising the rates of Poultry Products as an association, filing a compliance report with the Registrar of the respondent within two months of the issuance of aforesaid order.

THE APPEAL:

4. Being aggrieved, the appellant preferred instant appeal under section 42 of the Act, on the following grounds:-

i) The daily rates of broiler and chicken eggs depend upon demand and supply, average auction rate + retailer margin, which have no concern with the appellant.

ii) The advertisement appeared only in Lahore and Islamabad, where the two markets are influenced by prices fixed by local administration of Lahore and Islamabad. The prices of broiler and broiler meat in Karachi are fixed by Commissioner Karachi.

iii) The respondent also fell in error by holding the alleged advertisement as fixing the selling prices of Poultry products, whereas merely advertisement of rate cannot be considered the "decision".

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iv) The respondent fell in error while interpreting the relevant law i.e section 4 (1) read with section 4 (2) (a) of the Act by holding that the rates advertised by the appellant as the decision of the appellant without referring any meeting, agenda of the meeting and object of meeting which are essential element for any agreement or decision. There is no sign of any financial benefits to the appellant which is a requirement of business object, so there is no question of preventing, restricting or reducing competition in the relevant market ever arised. Learned counsel has further added that appellant is the public limited company and all its decision are made as per the procedure, provided in the Memorandum and Article of Association. The burden of proof is on the respondent to establish that any meeting has been held for taking decision regarding fixing of selling prices of Poultry products, which the respondent could not mention.

v) The respondent has ignored the fact that Pakistan Poultry Association does not fall under the definition of undertaking as defined in section 2(1)(q). The Appellant is not even an association of undertakings as per the aims and objectives given in its Memorandum and Articles of Association.

vi) The respondent has relied upon an earlier decision in the matters, which cannot be relied upon being subjudice before the Hon'ble High Court.

vii) The respondent has relied upon the Judgment of "Dole Food and Dole Fresh Fruits Europe Vs. Commission", which is not relevant in the matter.

viii) It is bounded duty of the respondent to determine the market of the product in question, which in the present case relates

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to two different items of the Poultry products namely Broiler Chicken and Chicken eggs, which have not been determined.

5. During the proceedings of the court, the learned counsel of the appellant has stated that the association is a non profit entity, having nothing to do with the market business. The advertisement referred in the impugned order is just a piece of information with regard to decision of local government authorities for the awareness of general public, he further added. The learned counsel has stated that the association is not an undertaking by any means with reference to the definition given under section 2(1)(q) of the Act. He has further stated that the association has never been involved in fixing prices of the Poultry products, which are fixed by the local government, however, the respondent has taken the position that the government bodies do not come under its purview which amounts to discrimination. He has argued that the appellant has wrongly been taken as a business entity / profit making body / undertaking. To prove the aforesaid, the learned counsel has also referred copies of the decision of Market Committee, he has attached with the appeal. Learned counsel has also placed reliance on the Judgments 1990 SCMR 705, PLD 1964 Supreme Court 502 and 2011 CLD 1575. Finally, learned counsel by referring the grounds of the appeal as well as his arguments has stated that the impugned order may be set aside and the show cause notice may be declared null and void.

6. Contrary to it, learned counsel for the respondent has argued that the appellant is an undertaking, under section 2(1)(q) of the Act. The learned counsel is of the view that the appellant is in collaboration with the management to fix the prices by the "so called" committee, which has no such authority to decide the prices.

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in such manners. He has further stated that on the basis of price Committee Lahore's decision, which is very much doubtful in the eye of law, the appellant has decided to advertise the prices of the Poultry products in the national dailies, specifically mentioning that on these prices, the referred Products are available throughout Pakistan, instead of mentioning Lahore Market. The learned counsel has also referred Memorandum of the Association, wherein it has been provided that the Association will promote and protect Members business interest and to do all that is necessary for the furtherance and development of Poultry Farming and Allied Trade in Pakistan, arguing that the aforesaid provision of the memorandum clearly proves active involvement of the appellant in Poultry business. He has further stated that under the statute the regulatory authorities are competent only to regulate the business without involving themselves in giving price structure to the market. The learned counsel is of the view that any irregularity, committed by the price committee Lahore is to be looked into by their authority under their law. By advertising prices of the Poultry products under its own title, the appellant has taken full responsibility with regard to the prices of the Poultry products mentioned in the advertisement. In such kind of situation, there is no need to further mention any decision of the association as the outcome is a sufficient proof in the shape of advertisement appeared in the National Press.

ANALYSIS

7. After due deliberation following issues have emerged:-
- i) Whether the Pakistan Poultry association is an undertaking u/s 2(1)(q) of the Competition Act, 2010

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- ii) Whether the advertisement given by the appellant is in line with the decision of Market Committee, Lahore.
- iii) Whether the association by advertising the prices in the newspaper have committed any illegality under the Act.

The aforesaid issues have been examined quite in detail to analyze the position in this regard. To determine whether the appellant is an undertaking or not, definition of the undertaking, provided under section 2(1)(q) of the Competition Act is reproduced as under:-

“undertaking” means any 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 on control of services and shall include an association or undertaking; and”

Besides others, Para 4(a) of the memorandum of association of Pakistan Poultry Association clearly provides that the association will promote and protect the business interest of its members and to do all that is necessary for the furtherance and development of Poultry Farming and allied trade in Pakistan. Simple reading of the aforesaid provision of the memorandum clearly indicates that the association is supposed to do all that is necessary for the furtherance and development of the Poultry business which gets it involved in all kind of business activities relating to this area. Further, the association is supposed to promote and protect the interest of its members which again is an area which cannot be excluded from this business. The advertisement itself indicates that the association is involved in this business on behalf of its members to look after their interest in line with its Memorandum of

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Association. In these circumstances it is an established fact that the Association is a business entity and very much an undertaking under the definition given under 2(1)(q) in the Act. As far as discrimination pointed out by the appellant with regard to involvement of local government, it is observed that the local government (price committee) do not have any business interest involved in the matter. In these circumstances, the local government (price committee) cannot be held responsible to prevent, restrict or reduce competition within relevant market. Furthermore, the local government (price committee) cannot be restrained to perform their statutory duties under the Local and Special Laws.

8. As regard the second issue, the Perusal of decision of the market committee, Lahore reveals that the decision is specifically for Lahore and for a specific day and date. The advertisement given by the Poultry Association does not give any such impression which could indicate the spirit of decision with reference to its applicability on certain dates and its scope of municipal limits. It has clearly been indicated in the advertisement that the rates referred in the advertisement are applicable throughout Pakistan and the meat on such rates is available across the country. It is, therefore, observed that the advertisement is not even in line with the Market Committee's decision.

9. To examine third issue, section 4 (1) of the Act is reproduced as under:-

“Prohibited agreements. — (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of

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undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5”.

Violation of section 4 of the Act may occur through either of the two methods.

- (i) An agreement of undertaking,
- (ii) A decision of an association of undertaking.

The term agreement has been defined under section 2 (1) (b) of the Act as “Any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable. Similarly a decision of an association of undertakings reflect an understanding between its members. In the context of Competition Laws ordinary dictionary meaning of the decision is to be considered in the attending circumstances of the case. The aforesaid provision of the Act, clearly indicates that no undertaking or association of undertakings, shall prevent restrict or reduce competition within the relevant market unless exempted under section 5. The appellant is an association of the undertakings involved in Poultry Business. According to its memorandum, the association is also supposed to promote and protect the interest of its member and to do all that is necessary for the furtherance and development of Poultry farming and Allied Trade in Pakistan. By advertising prices of the poultry products in the national press the appellant has clearly prevented, restricted and reduced competition within the relevant market, which is a clear violation of section 4 of the Act. Although the appellant has taken the position that no such

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decision or agreement referred in section 4 of the Act could be produced or referred by the respondent in its decision, however, the evidence of advertisement referred above, completely fulfills the conditions referred in section 4 of the Act with regard to violations adversely affecting the competitive environment in the market. It is, therefore, observed that the appellant has violated Section 4 (1) read with section 4(2)(a) of the Act.

10. The judicial precedents cited by learned counsel for the appellant proceeds on distinguishable facts relating to service matters or period of limitation, having no relevancy to the legal and factual facts available on record of the instant appeal, hence are of no help to the appellant.

11. In the circumstances, after analyzing the relevant facts and material available on record, we have come to the conclusion that finding, recorded by Competition Commission of Pakistan are based on proper appraisal of relevant provisions of Competition Law as well as other material brought on record. The same are, therefore, maintained.

Resultantly the instant appeal being without any substance is dismissed with no order as to cost.

Announced in open court
28.09.2016


Justice (R)
Mian Fasih Ul Mulk,
Chairperson

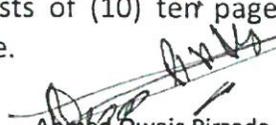

Justice (R) Miftah-Ud-Din
Member Technical


Ahmed Owais Pirzada
Member Technical

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Date	29/9/2016
Signature	Smeed Hussain

CERTIFICATE:

This judgment consists of (10) ten pages, each dictated, read over, corrected and signed by me.


Ahmed Owais Pirzada
Member Technical


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