



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S. AL HAFEEZ OIL INDUSTRIES
M/S. MUSLIM CORPORATION
ON COMPLAINT FILED BY
M/S. NAWABA OIL INDUSTRIES**

(FILE No. 342/NAWABA/COMP/OFT/CCP/2019)

Dates of Hearing

30 September 2020

21 May 2021

25 May 2021

14 June 2021

Adjudicating Members

Ms. Rahat Kaunain Hassan
Chairperson

Ms. Shaista Bano
Member

Present:

On behalf of:

M/s Nawaba Oil Industries

Mr. Furqan Masood
Mr. Saad Nasrullah, Advocate

M/s Al-Hafeez Oil Mills

Mr. Arib Hafeez, Sole Proprietor
Mr. Muhammad A. Saqib, Advocate



Mr. Ramzan Jani,
Sole Proprietor

ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 53 and 54 of 2020 dated 21 August 2020 (hereinafter the 'SCNs') issued to M/s Al-Hafeez Oil Mills (hereinafter the 'Respondent No. 1') and M/s Muslim Corporation (hereinafter the 'Respondent No. 2'), jointly referred to as 'Respondents', respectively, for *prima facie* violations of Section 10 of the Competition Act, 2010 (the 'Act').

FACTUAL BACKGROUND

A. Complaint, Enquiry and Show Cause Notice:

2. The Competition Commission of Pakistan (the 'Commission') received a complaint from M/s Nawaba Oil Industries (hereinafter the 'Complainant') alleging that the Respondents have indulged in deceptive marketing practices in violation of Section 10 of the Act.

3. The Complainant is a business involved in the manufacturing and selling of cattle feed such as "khal banola" and "wanda" as well as seeds since 2001. Respondents No.1 is engaged in the manufacturing and trading of products falling within the purview of the Oil & Cotton Industry. Whereas, Respondent No. 2 is a sole proprietorship engaged in the manufacturing and selling of cattle feed. The Complainant and the Respondents fall squarely within the purview of 'undertaking' as defined by clause (q) of subsection (1) of Section 2 of the Act.

4. It was alleged in the complaint that the Respondents have copied/imitated the trademark "*Nawaba Oil Industries – Double Bhains Marka Khal Banola*" and copyrighted packaging/trade dress which includes the slogan, "*Alsi Namawaba ® Khala Banola*" of the Complainant thereby distorting healthy competition within the Industry.

5. The following complaints were made by the Complainant against Respondent No. 1:

(i). The Respondent trade mark is visually as well as phonetically "*identical, confusingly and deceptively similar*" to the Complainant's mark;

The packaging and/or trade dress used by the Respondent is identical to that of the Complainant;



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- (iii). The Respondent has a similar company name i.e. "AH Nawab Oil Industries" and logo i.e. "Asal Bhen Marka" in which the term 'Nawab' was created to confuse the customers of the Respondent;
- (iv). The Respondent has not declared himself as "AH Nawab Oil Industries, Bahawalpur" with the Bahawalpur Chamber of Commerce & Industry in the year 2017-18 proving that the packaging has been infringed and the term adopted by the Respondent has been done so to confuse the Complainant's customers;
- (v). The likelihood of confusion and deception is present because the products of the Respondent are sold at the same counter to the same consumers, pass through the same trade channels and are bought by the same class of customers as the Complainant's product.

6. The following complaints were made by the Complainant against Respondent No. 2:

- (i). The Respondent has developed trademarks, with the names "Taiz Roo Triple Bhens Mark" and "Kashmir Gham Triple Bhens Mark", which are identical, confusingly and deceptively similar to the Complainant's trade mark;
- (ii). The packaging and/or trade dress used by the Respondent is identical to that of the Complainant;
- (iii). The likelihood of confusion and deception is compounded by the fact that the literacy rate is very low and people will not be able to distinguish between identical/similar trademarks.

7. The Commission, after reviewing the contents of the complaint, initiated an enquiry under Section 37(2) of the Act. The enquiry in the matter was concluded vide enquiry report dated 20 July, 2020 (hereinafter the '**Enquiry Report**'). The conclusions of the Enquiry Report



"5.2 The evidence so obtained in the process of the enquiry has been analyzed and it appears that:

- a) *The Respondent No. 1 is involved in fraudulent use of the Complainant's trademark, product labeling and packaging/trade dress, which amounts to, prima facie, violation of Section 10(1) of the Act, read with sub-Sections 10(2)(a) and 10(2)(d) of the Act;*
- b) *The Respondent No. 2 is involved in fraudulent use of the Complainant's trademark, product labeling and packaging/trade dress, which amounts to, prima facie, violation of Section 10(1) of the Act, read with sub-Sections 10(2)(a) and 10(2)(d) of the Act.*

5.3 It is important to acknowledge that deceptive marketing practices have a direct impact on competitors and the public at large alike and therefore, it is in the interest of the general public and fair competition in the market that undertakings be curtailed from marketing their products in an unfair and misleading manner. It is necessary to cultivate an environment where undertakings are encouraged to resort to marketing practices which are transparent and give consumers/customers true and correct information, including the origin and nature of the products in the sense that, inter alia, who is the true manufacturer of the products. Therefore, in the light of the above mentioned findings, it is recommended that the Commission may consider initiating proceeds against M/s al-Hafeez Oil and M/s Muslim Corporation under Section 30 of the Act."

8. After, considering the conclusions and recommendations of the Enquiry Report, the competent authority, in pursuance of Section 37(4) of the Act, directed the initiation of proceedings in the public interest under Section 30 of the Act by issuing the SCN to the Respondents, wherein the Respondent was required to respond in writing within fourteen (14) days as well as to appear before the Commission on 15 September 2020 to place facts and material in support of its contention by availing the opportunity of hearing.

The SCN No. 53/2020 issued to Respondent No. 1 in its relevant parts is reproduced



4. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 2.8 to 2.17 in particular, it has been alleged by the Complainant that the Undertaking started manufacturing, packing and marketing cattle feed/wanda under trademark "Nawab" which is identical/ confusingly similar to the Complainant's trademark "Nawaba". The Complainant further alleges that the undertaking is also copying the packaging and trade dress of the Complainant, consequently is damaging the Complainant's reputation and good will is, prima facie, constitutes violation of Section 10(1) of the Act; and

5. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 4.6 to 4.17 in particular, it appears that the Undertaking fraudulently and without any authorization express or implied, used the Complainant's trademark, packaging/trade dress as well as labelling, thereby attempting to pass off its product as that of the Complainant, which, prima facie, constitutes a violation of Section 10(1), in terms of Section 10(2)(d) of the Act; and

6. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 4.18 in particular, it appears that the Undertaking's conduct of distribution of false or misleading information lacking reasonable basis and fraudulent use the Complainant's trademark, packaging/trade dress as well as labelling is capable of harming business interest of another undertaking and is in, prima facie, violation of Section 10(1), in terms of Section 10(2)(a) of the Act; and"

10. The SCN No. 54/2020 issued to Respondent No. 2 in its relevant parts is reproduced below:

4. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 2.8 to 2.22 in particular, it has been alleged by the Complainant that Undertaking imitated packaging/trade dress of Complainant's product Khal Banola, during the course of marketing/advertisement which, prima facie, constitutes a violation of Section 10(1) of the Act; and

5. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 4.19 to 4.28 in particular, it appears that the Undertaking fraudulently and without any authorization express or implied, used the Complainant's packaging/trade dress as well as labelling, thereby attempting to pass off its product as that of the Complainant, which, prima facie, constitutes a violation of Section 10(1), in terms of Section 10(2)(d) of the Act; and

6. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 4.29 in particular, it appears that the Undertaking's conduct of distribution of false or misleading information lacking reasonable basis and fraudulent use the Complainant's



packaging/trade dress as well as labelling is capable of harming business interest of another undertaking and is in, prima facie, violation of Section 10(1), in terms of Section 10(2) (a) of the Act; and”

11. Several hearings have been held on 30-09-2020, 21-05-2021, 25-05-2021 and 14-06-2021, parties have attended the hearings and argued the case in length.

HEARING IN THE MATTER OF RESPONDENT NO. 1

12. For the disposal of the SCN issued to the Respondent No. 1, hearings were held on?. Accordingly Managing Partner along with Mr. Saad Nasrullah, Advocate appeared on behalf of the Complainant. Mr. Javed Hafez along with Mr. Arib Hafeez and Mr. Muhammad A. Saqib Advocate appeared on behalf Respondent No. 1 and argued the matter in detail.

13. At the outset, we must record our appreciation for the counsels Mr. Muhammad A. Saqib, Advocate and Mr. Saad Nasrullah, Advocate representing the matter on behalf of the Complainant and the Respondent No. 1, who explained and argued the matter ably and provided thorough assistance to the Commission in the matter.

14. During the course of hearing the Bench informed the parties that in deceptive marketing cases the Commission is inclined towards a compliance oriented approach and the purpose of Section 10 aims at bringing about correction of behaviour rather than imposing penalties. The Commission in such instances encourages that parties acting in good faith reduces the aspect of contraventions Both the Complainant and the Respondent No. 1 have voluntarily shown their willingness to resolve the matter on the basis of mutual consent and desired for a consent order. Subsequently, the parties filed Undertakings and Commitments before the Commission which are reproduced as under:

Undertaking by the Complainant

“I Saad Nasrullah, Advocate High Court, of HAMAYUNS LEGAL & IP Consultants and an authorized representative of M/s. Nawaba Oil Industries (hereinafter referred to as the “Complainant”).

On behalf of the Complainant, I hereby voluntary submit and agree to the following terms and conditions for the settlement by and between the Complainant and M/s. Arib Hafeez Oil Mills (hereinafter referred to as the “Respondent No.1”) through the consent order to be issued by the Competition Commission of Pakistan hereinafter referred to as the “Commission”:



- a) That the Respondent No.1 will not use the term 'Nawab' in their trademark/tradename or in any other literature used for marketing of their products.
- b) That the Respondent No.1 has right to use any trademark/tradename other than "Nawab" for its buffalo food products and either party shall not interfere into other party's business.
- c) That the Respondent No.1 shall not use the current packaging and marketing materials employed in the subject matter in any manner whatsoever and shall dispose off appropriately such packaging and marketing materials no later than two weeks from the date of the Order passed by the Commission. This condition shall be binding not only Respondent No.1 but all its distributors/dealers and the Respondent No.1 shall ensure its compliance at all ends.
- d) That the Respondent No.1 may create and use a distinct label design by changing the buffalo device/image in the manner that those shall not be confused with or have any semblance with the device/image of buffalo used by the Complainant. However, the Complainant does not have any objection with Respondent No.1 using the color scheme used currently in its packaging as the Complainant has already changed its color scheme of their packaging. The new label design/logo be submitted to the Commission no later than one month from the date of order.
- e) In lieu of the above settlement, the Complaint before the Commission shall stand disposed in terms of the above and both the parties undertake to abide by the terms and conditions of this settlement in letter and in spirit."

Undertaking by the Respondent No. 1

"I Muhammad A. Saqib, Advocate High Court, and an authorized representative of M/s. Al-Hafeez Oil Mills (hereinafter referred to as the "**Respondent No. 1**").

On behalf of the Respondent No. 1, I hereby voluntary submit and agree to the following terms and conditions for the settlement by and between the Respondent No. 1 and M/s. Nawaba Oil Industries (hereinafter referred to as the "**Complainant**") through the consent order to be issued by the Competition Commission of Pakistan hereinafter referred to as the "**Commission**":

- a) That the Respondent No.1 will not use the term 'Nawab' in their trademark/tradename or in any other literature used for marketing of their products.
- b) That the Respondent No.1 has right to use any trademark/tradename other than "Nawab" for its buffalo food products and either party shall not interfere into other party's business.



- c) *That the Respondent No.1 shall not use the current packaging and marketing materials employed in the subject matter in any manner whatsoever and shall dispose off appropriately such packaging and marketing materials no later than two weeks from the date of the Order passed by the Commission. This condition shall be binding not only Respondent No.1 but all its distributors/dealers and the Respondent No.1 shall ensure its compliance at all ends.*
- d) *That the Respondent No.1 may create and use a distinct label design by changing the buffalo device/image in the manner that those shall not be confused with or have any semblance with the device/image of buffalo used by the Complainant. However, the Complainant does not have any objection with Respondent No.1 using the color scheme used currently in its packaging as the Complainant has already changed its color scheme of their packaging. The new label design/logo be submitted to the Commission no later than one month from the date of order.*
- e) *In lieu of the above settlement, the Complaint before the Commission shall stand disposed in terms of the above and both the parties undertake to abide by the terms and conditions of this settlement in letter and in spirit.”*

15. Since, the Respondent No. 1 has filed the undertaking and committed to stop using the term ‘Nawab’ on its packaging its and committed to dispose of all marketing material not later than two weeks from the date of the order, we are not inclined to look into the merits of the case at hand and to dispose of SCN No. 53 of 2020 in terms of the consent agreement above. This lenient approach has been taken in view of the peculiar circumstances of the instant case and the fact the Commission is inclined to have a compliance oriented approach *vis-à-vis* OFT matters.

HEARING IN THE MATTER OF RESPONDENT NO. 2

16. For the disposal of the SCN issued to the Respondent No. 2, hearings were held. The Respondent No. 2 did not appear before the Bench on first hearing held on 30-09-2020. However, Respondent No. 2 did participate in the hearings held on 21-05-2021, 25-05-2021 and 14-06-2021. The Respondent No. 2 during the hearings held on 21-05-2021 and 25-05-2021 showed willingness to file commitments as per the satisfaction of the Bench. However, the commitment filed by the Respondent No.2 have been deemed to be completely unsatisfactory.



ANALYSIS

17. Based on the allegations levelled in the Complaint, findings of the Enquiry Report and SCN issued to the Respondent along with the submissions made before us, following issue which requires determination:

Whether Respondent No. 2 is involved in fraudulent use of the Complainant's trademark, product labeling and packaging/trade dress, which amounts to, *prima facie*, violation of Section 10(1) of the Act, read with sub-sections 10(2)(a) and 10(2)(d) of the Act.

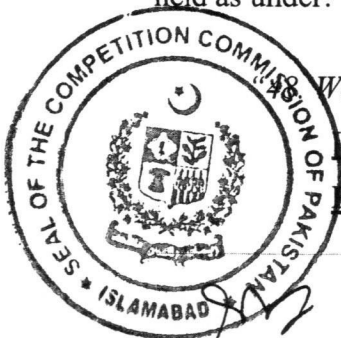
18. In the instant matter, Respondent No.2 has contested the allegations against him in person. During the course of the Enquiry proceedings, the complaint was forwarded to Respondent No.2 for the submission of its reply. However, no response was received in this regard, nor were the subsequent reminders replied to.

19. Similarly, Respondent No. 2 failed to attend all the hearing pertaining to the instant matter and the two hearings in which he was present, there was minimal or no participation from his end. While Respondent No. 2 did affirm that he would furnish an undertaking in line with the resolved conditions (as agreed upon by all the parties involved) for a disposal by consent in the instant matter, the Respondent No. 2 failed to do so as has been mentioned in above. Therefore, we shall examine the aforementioned issues in light of the material available on record.

20. At the outset, it is important to note that the impugned trademark in question has been registered by the Complainant with the Intellectual Property Organisation of Pakistan (IPO) under the Trademark ordinance, 2001 with Reg. No. 191616, dated January 27th, 2004. The Complainant has been active in the relevant market since 2001.

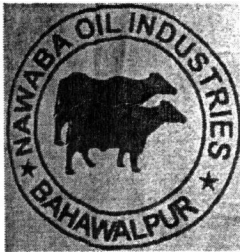
21. The importance of trade mark and its protection from competitors has already been highlighted, In the matter of violation of trademarks of DHL, 2013 CLD 1014, wherein it was held as under:

We also would like to refer to the judgments of Hoffmann-La Roche [1978] E.C.R. 1139, para.7, and Philips Electronics NV v Remington Consumer Products Ltd [2002] ECR 1-0000; wherein



it was held that “the essential function of a trademark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality”. It is also pertinent to high light that in the judgments of Arsenal Football Club v. Matthew Reed [2003] RPC 9 and Loendersloot [1997] E.C.R. I-6227 it was observed that “for that guarantee of origin, which constitutes the essential function of a trade mark, to be ensured, the proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it.”

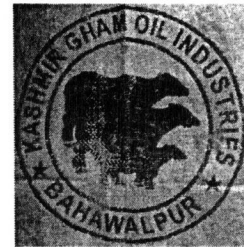
22. The trademarks of the Complainant and Respondent No.2 are reproduced below for ease of reference:



Complainant



Taiz Roo – Respondent No. 2



Kashmir Gham – Respondent No. 2



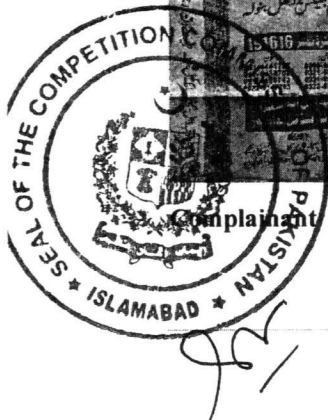
Complainant



Taiz Roo – Respondent No. 2



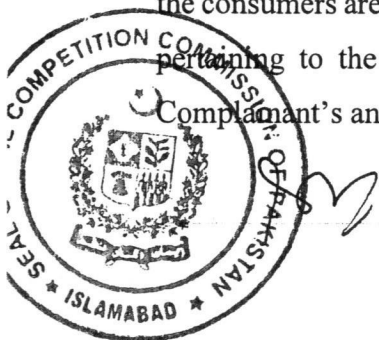
Kashmir Gham – Respondent No. 2



On a cursory look from a consumer, which is mostly the case, the minimal difference in the name and logo of the Complainant and Respondent No.2 would not be noticed. A more detailed and critical consideration might enable a consumer to spot the negligible differences (particularly the 2 v 3 buffalo devices). However, the similarity of the colour scheme, packaging, font and design are likely to allow average consumers to conclude that the products are in fact being produced by the same manufacturer. The effect would be even more pronounced given the uncomplicated nature of the product in question. Even without going into the financial peculiarities of the matter (e.g. money spent on marketing), it is probable to deduce that a business which has been continuously active in a particular market for almost two decades will have a certain amount of goodwill attached to its name and packaging. In other words, it is highly probable that the copied trademark may be confused for the original, allowing Respondent No. 2 to derive benefits from the actions and efforts of the of the Complainant without paying or sharing the costs.

23. While it may be argued that Respondent No. 2 has developed its own brand name for its products and that the Complainant does not have the sole ownership of use of the particular colour, it is important to note that in instances of deceptive marketing the overall general impression of the products packaging, logo, etc., has to be taken into account, as the overall impression contributes considerably to the risk of consumer confusion. Therefore, it cannot be denied that artistic work of the logo and packaging/trade dress has indeed has significant resemblance with that of the Complainant and is clearly copied from the latter.

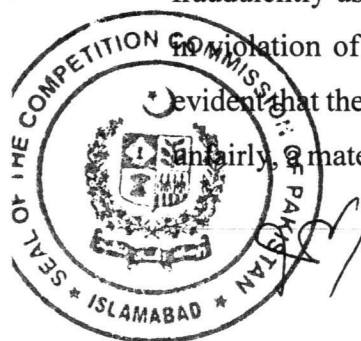
24. Marketers traditionally focus on designing advertising campaigns and other promotional strategies to promote a particular brand name. However, with evolving consumer preferences and laws, presentation; trade dress have become just as essential for making products and services distinctive and for building brand recall and loyalty. The cultural diversity of the Pakistan market makes a compelling case for the importance of product identification by way of packaging and visual impression. This has resulted in third parties creating lookalikes of popular products with similar packaging in order to grab consumers' attention and generate demand for their own products in the market. In our considered view, the consumers are clearly susceptible and at a serious risk of falling prey to deceptive confusion pertaining to the origin and quality of the products, due to the striking similarity in the Complainant's and the Respondents No 2's trade dresses.



25. Furthermore in respect to the aspect of fraudulent use , In the matter of violation of trademarks of DHL, 2013 CLD 1014 it was held

“52. As for the fraudulent use of Complainant’s trademark, we are aware that there is no definition of the term „fraudulent” or „fraud” in the Act nor can one perhaps attempt to give one single definition. However, while interpreting Section 10 of the Act; one needs to be conscious that the interpretation of fraudulent use of trade mark has to be in the context of deceptive marketing and would thus have a broader scope. Rather than making it too complex by focusing on subjective „intentions” of the Respondents, in our considered view, it is best if we adopt simplistic approach i.e. if it can be demonstrated that the Respondents by use of the trade mark, intended to deceive the customer/consumer to gain an advantage. Keeping in view the nature of contravention, it is not the subjective intent but the objective manifestation of that intent that will establish the fraudulent use. In the US, in actual practice the courts look at the surrounding facts and circumstances in relation to misrepresentation and apply the elements strictly and leniently as believed and warranted by the courts. In the present case, there can be little doubt that the Respondents knew or should have known that the representation i.e. use of Complainant’s trademarks was indeed unauthorized and hence false - in that, the result of misrepresentation gave the Respondents a benefit and an advantage that they would not otherwise have obtained. Also, the result was intended and anticipated (whether nefarious or not) such a conduct/practice in our considered view would be termed as fraudulent in terms of clause (d) read with sub-section (2) of Section 10 of the Act.”

26. Keeping in view the foregoing, there is no doubt in our mind that Respondent No.2 is fraudulently using said trade mark/packaging for the purpose of marketing its similar product in violation of Section 10(2)(d) of the Act read with Section 10(1) of the Act. It is further evident that the marketing strategies adopted by Respondent No.2 have the potential of creating unfair, material perception on part of actual or potential consumers in favour of Respondent



No.2, which in turn, is capable of harming the image, goodwill, sales and other business interests of the Complainant in violation of Section 10(2)(a) of the Act read with 10(1) of the Act.

REMEDIES AND PENALTY


27. For the reasons discussed above and in line with our mandate to protect the consumers from anti-competitive behavior, including deceptive marketing practices, we hereby hold the conduct of the Respondent No. 2 in violation of Section 10(1) of the Act read with Section 10(2)(a) and (d).

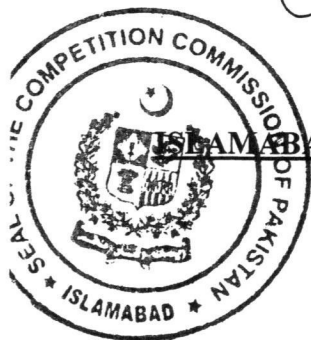
28. Keeping in view the conduct of Respondent No. 2 and the circumstances of the case, we are inclined to impose a penalty of PKR 2 (Two) Million on the former.

29. The Respondent No. 2 is further directed to cease and desist from using the trademark of the Complainant, or use the packaging material similar to that of the Complainant or any other undertaking, in future. Respondent No.2 is further directed to create a mark, packaging, marketing material etc. that are distinct from Respondent No.1 within 30 days of this order. The Respondent No. 2 is further directed to file a compliance report within thirty five (35) days from the date of this order with the Registrar of the Commission.

30. In terms of the above, the SCN No. 54 of 2020 is hereby disposed of.


Ms. Rahat Kaunain Hassan
(Chairperson)


Ms. Shaista Bano
(Member)



ISLAMABAD THE 15th DAY OF AUGUST 2021