



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S. HILAL FOODS (PVT) LIMITED
ON COMPLAINT FILED BY
M/S. DABUR INDIA LTD
M/S. DABUR PAKISTAN (PVT) LIMITED

F. NO: 349/Dabur/OFT/CCP/2020

Date(s) of Hearings:

15-12-2020

Present for Commission:

Ms. Rahat Kaunain Hassan
Chairperson

Mr. Mujtaba Ahmad Lodhi
Member

Present for:

M/s. Dabur Pakistan (Pvt) Limited

Barrister Asfandiyar Khan Tareen
Tareen Chambers

M/s. Hilal Foods (Pvt) Limited

Mr. Khurram Gul Ghory, Advocate
Zabar Consultants



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ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 141 of 2020 dated 06 November 2020 (hereinafter the 'SCN') issued to M/s Hilal Foods (Pvt.) Limited (hereinafter the 'Respondent') for *prima facie* violation of Section 10 of the Competition Act, 2010 (the 'Act'). The SCN was issued pursuant to the Enquiry Report dated 8 October 2020, initiated on the Complaints from M/s Dabur India Ltd and M/s Dabur Pakistan (Pvt.) Limited (hereinafter collectively referred as 'Complainants') alleging, *inter alia*, that the Respondent have disseminated false and misleading information in violation of section 10 of the Act.

FACTUAL BACKGROUND

A. Complaint, Enquiry and Show Cause Notice:

2. The Complainants have alleged that the Respondent has violated Section 10 of the Act by entering into deceptive marketing practices by distribution of false and misleading information through its letters dated 02 Feb 2019 and 14 June 2019 addressed to the Pakistan Broadcasters Association and through two publications carried in daily DAWN and daily Jang on 17 June 2019, which has caused harm to the business interest of the complainant.

3. Regarding the status of the trademark the Complainants submitted that the product 'Dabur Hajmola' is an Ayurvedic digestive tablet having a vibrant presence in Pakistan and worldwide, including India, United Kingdom, United States of America and United Arab Emirates. The Complainants asserted that its trademark is protected under the Paris Convention of 20 March 1883 and material provisions of the trademark laws of Pakistan *inter alia*, Sec 86 of the Trademark Ordinance, 2001. It was further asserted that the mark was registered in India on 2 Aug 1972. Regarding its operation in Pakistan, it was submitted that initially the business operations of 'Dabur Hajmola' were being run by Asian Consumer Care Pakistan (Pvt.) Limited incorporated in 2006. On 23 Nov 2015, Dabur Pakistan entered into license agreement with Dabur India under which the Dabur Pakistan was authorized to use the trademark of 'Hajmola' in Pakistan for manufacturing and selling products owned by Dabur India. On this account, Dabur Pakistan is an 'Authorized user' of the Trademark 'Hajmola'.



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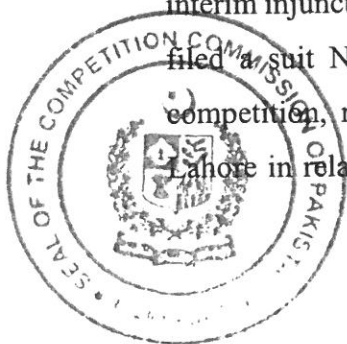
4. The Complainants further submitted that for several years the Complainants and the Respondent have been in litigation concerning use of the trademark 'Hajmola'. However till date no judgement or decree has been passed. Further, the Suit No. 14 of 1995 titled as 'Dabur India V. Hilal Confectionary' was filed before the Honorable High Court of Sindh for passing-off along with an application for *ad interim* injunction against the Respondent, wherein ad-interim injunction was granted to the Complainants on 21 May 1999. The Respondent preferred an appeal before the Divisional Bench of the Sindh High Court, Karachi in 1999. On 11 April 2000 the Divisional Bench passed an Order (hereinafter referred to as the "Divisional Bench Order") which stated:

"till the next date, however, the impugned order is suspended to the extent that the appellant would be entitled to sell its product under the brand name 'Hajmola' subject to furnishing a bank guarantee in the sum of Rs2.0 Million with the nazir of the court, however, it will not affect the respondent's right to use the label 'Hajmola' on their products and the appellant will not use the same label"

It was further asserted that no appeal was preferred against the above said order and the same was still in field. The Complainants claimed that the ad-interim injunction has conferred a concurrent right in favour of both the Complainant and Respondent.

5. Apart from above, the Complainants also filed an application before Sindh High Court to cancel /remove the Respondent's registration of the Trademark 'Hajmola', wherein the Court has ordered the registrar of Intellectual Property Organization (hereinafter the 'IPO') to maintain *status quo*, whereas no appeal was preferred against the interim order and same is still in field.

6. In year 2014, the Respondent filed a suit, bearing No. 1140 of 2014 against one licensee of the Complainants namely, Asian Consumer Care (the 'ACC') before the Sindh High Court, Karachi for infringement, passing-off, unfair competition etc., along with the application of interim injunction, bearing C.M.A No. 9196 of 2014 wherein the Sindh High Court passed an interim injunction to restrain the ACC from using the trademark *Hajmola*. The Respondent also filed a suit No. 167 of 2015 for permanent injunction, infringements, passing-off, unfair competition, rendition of accounts and damages before the Intellectual Property Tribunal, Lahore in relation to the trademark *Hajmola* wherein an ad-interim relief was granted to the



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Respondent on 07 April 2015. However on 15 July 2015 the Tribunal modified the injunctive order to the extent that it would not have any impact upon the first Dabur Suit filed before Sindh High Court. Consequently, through order dated 11 June 2016 the case was adjourned *sine die* till the final disposal of Suit No 14 of 1995 by Sindh High Court.

7. In 2018, the Respondent filed another suit for infringement, passing-off and unfair competition etc., before the Intellectual Property Tribunal Islamabad bearing Suit No. 34 of 2018, titled Hilal Foods Vs. Dabur Pakistan (Pvt.) Limited etc., against two licensees of Complainants namely Dabur Pakistan (Pvt) Limited and ACC wherein the Tribunal granted an ad-interim injunctive relief with the following operative part;

“Meanwhile, subject to notice, the defendants and their agents, affiliates, employees and representatives are restrained from the Trademark/services mark of the plaintiff namely “Hajmola Marks” by using, manufacturing, distributing, marketing, selling, supplying and importing alone and/or any other deceptively similar manner.”

However, later upon the Complainant’s disclosure of the suit pending adjudication in Sindh High Court, the Tribunal modified its ad-interim injunctive Order by specifically mentioning that the same will not have any bearing upon the Order dated 11 April 2000 passed by the Divisional Bench of the Honourable Sindh High Court. In any case the *ad interim* injunction order by Tribunal remained in force on till 7 October 2019 as the Tribunal returned the plaint since matter was pending before the Sindh High Court.

8. The Complainants asserted that despite the fact that the matter regarding the status of the trademark was pending adjudication before Honorable Sindh High Court, nevertheless the Divisional Bench Order permitted both the parties to use the trademark *Hajmola* on their labels as interim arrangement. So conferring a concurrent right in favour of both the parties. It was further asserted that in spite of the above the Respondent had deliberately disseminated false and misleading information i.e. that it had exclusive rights to use the Hajmola mark causing serious harm to the Complainants. The Complainants summarized the allegations regarding false and misleading information on the part of Respondent as follows;

On 02.02.2019, the Respondent wrote a scandalous letter to the executive director of the Pakistan’s Broadcaster Association, with false,



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derogatory and misleading statement causing serious harm to the Complainants. The objectionable statements of the letter are reproduced as verbatim below
“being the registered owner of the trademark, our client holds the exclusive rights (emphasis added) of using, manufacturing, importing selling, marketing, distributing, trading and dealing with any goods imprinted with registered trademark Hajmola in any manner whatsoever.”

ii). On 14-06-2019 in continuation of its previous letter, the Respondent wrote another letter with following objectionable portion,
“....in presence of restraining order passed by Honorable High Court of Sindh, the learned Intellectual Property Tribunal, Islamabad and registration of trademark Hajmola in the name of our client, none other than our Client is permitted to publish or otherwise use the trademark Hajmola in any commercial advertisement or marketing campaign and no commercial advertisement can be allowed to be permitted to be aired or otherwise published”

iii). In continuation of its anti-competitive agenda the Respondent has published two highly offensive publications on 17.06.2019 in daily Dawn and Jang. The objectionable portion as relied by the Complainants is reproduced as below;

“....all rights over the said trademark Hajmola is exclusively reserved in favour of our client as such trademark Hajmola can only be used by our client or with our client’s consent. The unauthorized adoption, use or trade in any product bearing the said mark Hajmola or any variation thereof is an infringement of our client’s right and constitute violation of criminal and civil laws.

Hilal Foods (Pvt) Limited has always acted vigilantly to protect its aforesaid trademark Hajmola against illegal and unauthorized use in course of trade by imitators and in this pursuit our client has always taken prompt legal actions for injunction, account of profit, damage and other ancillary reliefs against any such infringing use and has obtained restraining orders from High Court as well as from Intellectual Property Tribunal established under IPO Act 2012.”



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9. The Respondent, while responding to the allegations leveled by the Complainants asserted that it was the registered proprietor of the Trademark 'Hajmola' in Pakistan under TMR No.78160 dated 4 Nov 1982 and holds exclusive proprietary rights by virtue of section 39 of the Trademark Ordinance, 2001. Further the Complainant's allegations were labeled as erroneous on the premise that the deceptive marketing practices, as envisaged by the Act, is neither meant to thwart judicial process nor can be used as a shield to cover-up the infringement activities. It was further maintained that the Complainant's assertions regarding the Respondent cannot even be considered as *prima facie* claims, as the publications on the part of Respondent contains nothing but truth. It was also added that the Complainants have concealed the material facts from the Commission. In this regard, it was highlighted that on 27 June 2019 the Complainant has made a disparaging, defamatory, false and misleading publication under the title of counter public notice.

10. The Respondent further asserted that it has been using the trademark 'Hajmola' with different product recipes and flavors which inter alia includes Khatti Meethi Hajmola imli, Khatti Meethi Hajmola Adrak and Khatti Meethi Hajmola Aam and accordingly their trademarks have also been secured. Application numbers along with date of registration of these marks is describe in tabular form as following;

Application Number	Trademark	Date of Registration	Classification of goods
170106	Hilal Aam	14.04.2001	30
170107	Hajmola Imli	14.04.2001	30
170108	Hajmola Adrak	14.04.2001	30

11. The Respondent also asserted that due to its extensive use of the trademark 'Hajmola' and the registration of the same in its favour, any use of the said trademark in any manner by any other person for any goods shell lead to inevitable confusion and infringement of Respondent's exclusive rights to Trademark 'Hajmola'.

12. The Enquiry Committee on the premise of Divisional Bench Order, as referred to in para No.4 ante, opined that since both the Respondent and the Complainant has been permitted by the Court to use the Trademark *Hajmola*, the claim of exclusivity regarding the trademark



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'Hajmola' either by respondent or complainant would tantamount to disseminate false and misleading information among general public.

13. On the above said premise the Enquiry Committee further concluded that the Respondent is in violation of Section 10(1) and in terms of section 10(2) (a) & (b) of the Act of 2010.

14. The Commission after considering the *prima facie* findings of the Enquiry Report, deemed it appropriate to initiate proceedings under Section 30 of the Act while providing the parties an opportunity of being heard. The relevant parts of SCNs are reproduced hereunder:

“5. . WHEREAS, in terms of the Enquiry Report in general and paragraphs 2.5 to 2.11 in particular, it has been alleged by the Complainant that despite the permission granted to both the parties in SHC Order to use trademark “HAJMOLA” on their respective labels as an interim arrangement, the Undertaking disseminated false and misleading information in newspapers and through PBA claiming sole and exclusive affiliation with the trademark, has the potential to damage to inflict harm upon the goodwill and business interest of the Complainants which, *prima facie*, constitutes violation of Section 10(1) of the Act; and

6. WHEREAS, in terms of the Enquiry Report in general and paragraphs 5.4 to 5.8 in particular, it appears that the Respondent is in violation of SHC Order, which is still intact, by distributing false and misleading information regarding exclusivity and affiliation of the brand “HAJMOLA” which is, *prima facie*, in violation of Section 10(1) of the Act in general, read with sub-Section 10(2)(b) of the Act; and;

7. WHEREAS, in terms of the Enquiry Report in general and paragraphs 5.4 to 5.11 in particular, it appears that the conduct of the Respondent by spreading false and misleading information in newspapers and through PBA is capable of harming the business interests of the Complainant which is, *prima facie*, in violation of Section 10(1) of the Act in general, read with sub-Section 10(2)(a) of the Act; and;



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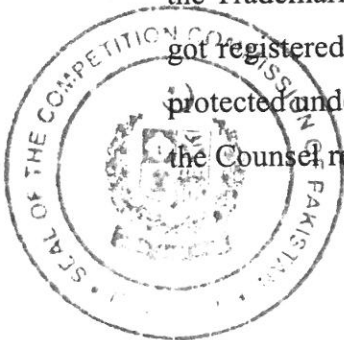
8. *WHEREAS, in view of the foregoing it appears that that the Respondent's advertisement campaign is without a reasonable basis and tried to mislead the public with exclusive affiliation with the trademark "HAJMOLA", and it is capable of harming the business interest of the Complainant which, prima facie, constitutes a violation of sub-Section (1) of Section 10 and in particular clauses (a) & (b) of sub-Section (2) of Section 10 of the Act; and"*

B. Written Reply, Oral Representation and Hearing

15. The Respondent, vide the SCN, was called upon to respond in writing within fourteen (14) days to file the written reply and to avail the opportunity of being heard on 1 December 2020. However, on the request of the Respondent the hearing was adjourned and fixed on 15 December 2020. The oral and written submissions of the Complainant and Respondents are summarized as under:

16. On 15 December 2020, the counsel for the Complainant started his arguments with the submission that the Divisional Bench Order conferred concurrent rights on both the parties to use the trademark 'Hajmola'. It was argued that the claim of exclusive ownership to the trademark *Hajmola* by the Respondent had given the ordinary consumer an impression that any other entity using the trademark 'Hajmola' did not abide by the law thereby tarnishing the Complainant's reputation and good will. The counsel relied on the Commission Order in the matter of Show Cause Notice issued to M/s At-Tahur (Pvt.) Limited on Complaint by M/s Pakistan Dairy Association dated 27 December 2019 and the Order in the matter of Show Cause Notice issued to M/s University of Management Technology for Deceptive Marketing Practices dated 26 March 2019. The Counsel of Complainant also asserted that they are the prior user of trademark 'Hajmola' which was originally registered in India in 1972. In this regard reliance was placed on Section 86 of the Trademark Ordinance, 2001.

17. The counsel for the Respondent responded to the allegations leveled by the Complainant and stated that it holds an exclusive right to the trademark 'Hajmola' by virtue of the law i.e., the registration of the same under Trademark Act, 1940. It was further added that the Trademark Act, 1940 was territorial in nature and was only protecting the trademarks that got registered in Pakistan. Moreover, the rights conferred under the Trademark Act 1940 is protected under the Trademark Ordinance 2001. In response to the allegations of publications, the Counsel relied on the injunctive order granted by Intellectual Property Tribunal Islamabad



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dated 18-12-2018 and stated that when the publications were issued the above said injunctive orders were in place. It was also alleged that the Complainant has no right to use the trademark 'Hajmola' under the prevalent intellectual property regime in Pakistan. The Counsel also argued that in Divisional Bench Order the High Court of Sindh has used two different legal terminologies for the Complainant and Respondent i.e. label and brand respectively and the trademark does not extend to the label.

C. Maintainability of Show Cause Notice

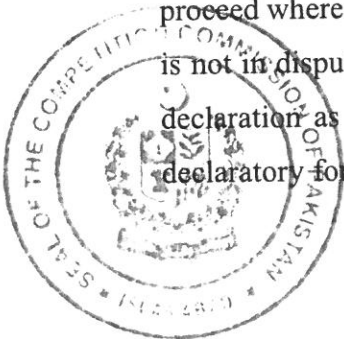
18. The Bench deems it appropriate to first decide the maintainability of the proceedings under section 30 of the Act. Generally, under intellectual property law the intellectual property, an intangible creation of human intellect, can either be acquired through '*intent to use application*' submitted to the concerned intellectual property organization or if there is an adverse claim it can be acquired through the evidence of '*prior use*'. In terms of enforced competition regime in Pakistan, the scope of the Commission is derived from the promulgated law i.e. the Act. In section 30 of the Act, the legislature in all its wisdom has used the word 'contravention' with reference to the violation of substantive provisions of the Act. The expression so used are reproduced is below;

"30. Proceedings in case of contravention.—(1) where the Commission is satisfied that there has been or is likely to be a contravention of any provision of chapter II....."

19. In case of section 10(2)(d) of the Act, the prohibition entails about the responsibility of the undertakings to not to engage in deceptive marketing practices by fraudulently using the trademark. For ease of reference the prohibition contained in section 10(2)(d) of the Act is reproduced below:

"(d) Fraudulent use of another's (emphasis added) Trademark, firm name, or product labelling or packaging."

The word another's has deliberately been used by legislature so that Commission may only proceed where the fact of ownership of trademark, firm name, product labelling and packaging is not in dispute. Under Section 10 of the Act, there is no room for the Commission to issue declaration as to the legal status of the owner of the trademark. The Commission is not a declaratory forum nor a registration authority to be approached, when there is a dispute as to



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the ownership of the trademark. There is not a single provision in the Act that empowers the Commission to engage in pursuit of determining the right or legal status of the owner of an intellectual property. The prohibition or violation entailed in section 10(2)(d) of the Act can in no way be construed to have the effect of creating or declaring the rights.

20. Apart, from the above the bench is also of the considered view that being a specie of 'property rights', the intellectual property rights are '*right in rem*'. Rights conferred on the owner of the intellectual property are enforceable against anyone and binds the world at large. The non-absolute claim regarding the trademark, firm name, or product labelling and packaging is of no ordinary value, if the non-absolute claim has been accepted on the part of Commission, it will lead to declaration of such right. The granting of the proprietary rights in intellectual property is the sole domain of the Intellectual Property Organization (the '**IPO**'), and the Commission cannot make any determination in this regard.

21. In view of above, it's also pertinent to note that the fact of absolute ownership can only be presumed by the Commission if the trademark is registered one. Previously the Commission has held the same view in its order in *Tara Crop Sciences* case reported as 2016 CLD 105 as following;

"54., it is beyond the competence of the Commission to determine or even advise on the allocation of trademarks. The only mandate it has with respect to trademarks and Section 10 (2) (d) of the Act is the protection of registered trademarks....."

22. The very foundation whereupon the complaint is grounded is an interim order of Division Bench of Sindh High Court. The Complainant's right to use the trademark *Hajmola* stems through the same order and the Respondent's right to use its registered trademark *Hajmola* is also *sub judice* before the Sindh High Court. In order to take cognizance of a matter based on interim orders, the Commission will have to wade through questions yet to be settled by the Sindh High Court, and will require determination of intellectual property rights which is beyond the scope of the Commission. In our view the initiation of the enquiry was not made out in the first place.

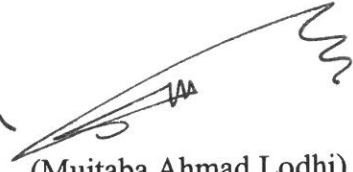


23. Therefore, the Commission does not have any reason or grounds to continue with these proceedings. Accordingly, the Show Cause Notice No. 141 of 2020 dated 06 November 2020 and the Enquiry Report dated 8 October 2020 are set aside.

24. Ordered accordingly.



(Rahat Kaunain Hassan)
Chairperson



(Mujtaba Ahmad Lodhi)
Member



ISLAMABAD THE 26th AUGUST 2021