



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO

M/S OMNI COMM (PVT.) LIMITED

ON COMPLAINT FILED BY

M/S PAKISTAN SERVICES LIMITED

INTERIM ORDER UNDER SECTION 32 OF THE COMPETITION ACT, 2010

(F. NO: 279/PC HOTELS/OFT//CCP/2017)

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| Date of hearing: | 30-08-2018 |
| Commission: | Dr. Shahzad Ansar Member Dr. Muhammad Saleem Member |
| Assisted by: | Noman A. Farooqi Director General (Legal) |
| Present on behalf of: M/s Pakistan Services Limited | Syed Bulent Sohail Advocate, High Court Hasan & Hassan(Advocates) |
| M/s Omni Comm (Pvt) Ltd | Nasir Ayub Khan Advocate, High Court Sardar Mazhar Hanif ur Rehman, General Manager |



ORDER

1. This order shall dispose of the application dated 16th August 2018 (the '**IO Application**') filed by Pakistan Services Limited (the '**Complainant**') for interim relief filed under Section 32 of the Competition Act 2010 (the '**Act**') read with Regulation 25(3) of the Competition Commission General Enforcement Regulation 2007 (the '**GER**').
2. In the instant matter, the Competition Commission of Pakistan (the '**Commission**') vide the Show Cause Notice (the '**SCN**') dated 10th July 2018 issued to M/s Omni Comm (Pvt.) Limited (the '**Respondent**') notified that there exists a *prima facie* case of contravention of Section 10(1), in terms of Section 10 (2), Section 10(2) (a) and Section 10(2)(b) of the Act and called upon to show cause in writing within fourteen (14) days of the date of receipt of the SCN and also to appear and place before the Commission the facts and material in support of its contentions either in person or through an authorized representative on 7th August 2018 at the office of the Commission and to explain why an appropriate order under Section 31 of the Act may not be passed and/or a penalty for the aforesaid violation may not be imposed under Section 38 of the Act.
3. On 16th August 2018, at the first hearing the representative of the Respondent requested for an adjournment as their Counsel was not feeling well and they also presented copy of the order by Honorable Peshawar High Court, Abbottabad Bench, Peshawar, in Writ Petition No. 923-A/2018 dated 15th August 2018, restraining the Commission from passing final order in the instant matter, but can proceed with the Show Cause notice. However, no one was present on behalf of M/s Lucky Gold (Pvt.) Ltd despite service of notice and intimation by the Registrar of the Commission, therefore, the Bench proceeded *ex-parte* against M/s Lucky Gold (Pvt.) Limited in pursuance of proviso to clause (b) of subsection (2) of Section 30 read with clause (e) of sub-regulation (2) of Regulation 26 of the GER.

The Counsel for the Complainant showed some images regarding the ongoing violation(s) of Trade mark as he was directed to file formal application along with prescribed fee for seeking Interim relief which will be considered on the next date



of hearing. The Bench directed the Registrar for fixing the next date of hearing in the last week of August after the receipt of the application.

5. Through the instant IO Application, the Complainant reiterated the contents of its Complaint that the Respondent is engaged in dissemination of false and misleading information/claims representing it as a well-known hotel chain in Pakistan; whereas, it has no authorization or license to use the Complainant's registered and well-known trademark "**PC**" or "**Pearl Continental**"; thereby, it is deliberately engaged in deceptive marketing practices and Complainant's and the consumer's detriment in contravention of Section 10 of the Act.
6. The Respondent has prayed that the Commission may pass an interim order under Section 32 of the Act requiring the Respondents to refrain from displaying the unauthorized/unlicensed use of Complainant's registered mark and logo "PC"- "Pearl Continental" or "PC" at its premises in contravention of the provisions of the Act ,including but not limited to recovering any all display boards with the logo "PC" and remove the letters "PC" from all key chains, hotel menu cards, letter heads, cards and other materials meant for dissemination to customers in line with Section 10. And grant such other relief as may be deemed fit and proper in the circumstances. to prevent further irreparable loss and damage to the business and goodwill of the Complainant till the conclusion of the proceedings in the subject complaint.
7. The parties were informed vide notice dated 17th August 2018 that the IO Application shall be heard on 30th August 2018 and they are required to file their written submissions, if any, on the issue of interim relief under Section 32 of the Act. The written submissions were conveyed by both the parties. On 30th August 2018, the Complainant and the Respondent through their authorized representatives were heard on the IO Application. The submissions/contentions of the Complainant at the hearing and as contained in the IO Application are outlined in brief as follows:

In the written submissions made on 16th August 2018, the Complainants state that despite the issuance of the SCN, the Respondents continue to conduct business under the tradename/brand name of the Complainants resulting in



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transmission of misleading information to the consumers. This submission is supported by the presence of evidence including pictures of the premises taken on 2nd August 2018, post the issuance of SCN to the Respondents.

- b) The Complaints highlight the fact that Respondents are unresponsive to the SCN violating the law and undermining the writ of the Commission. As the Order will take its due course and considerable time. Hence, to prevent the ongoing infringements and deceptive marketing practices the Commission must restrain the Respondents.
- c) Continued deceptive marketing practices would cause serious harm to the Complaints as well as the consumers. It is in public interest to stop the unlicensed/unauthorized use of Complainants registered tradename.
- d) The Complainant in their response dated 29th August 2018 to the Respondents reply made the following submissions. The Complainants acknowledged that the subject of the writ petition in the Peshawar High Court is confined to the exclusive application of the Trademarks Ordinance 2001. Whereas the Competition Act falls under the category of special laws which displace general laws reliance was placed on *Gulistan Textile vs. Soneri Bank*, reported as *2018 CLD 2013*. The dispute under the Ordinance is a distinct cause of action.
- e) The Honorable Peshawar High Court, Abbottabad Bench, Abbottabad, in W.P. No. Writ Petition No. 923-A/2018 dated 15th August 2018 has not restrained the Commission from proceeding in the matter and only restrained the Commission from passing of the final Order. In this regard the Complainant's counsel placed reliance on *General (R) Pervez Musharaf vs. Pakistan*, reported as *PLD 2014 Sindh 389*.
- f) The Complainant expressly denied any permission given to Respondents to use "PC" logo. Contrary to the Respondents submission.

Further in its reply, the Complainants reiterates the submissions and prayer sought in the Interim Application.



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- h) At the Interim hearing on 30th August 2018, the counsel for the Respondent has pointed out that details of litigation between the parties is at page 113 of the complaint and referred the order the Honorable Peshawar High Court, Abbottabad Bench dated: 10th April 2015. Additional Registrar of the Peshawar High Court, Abbottabad was appointed as Local Commission who had submitted its report after visiting the premises. It was submitted by the Counsel for the Respondent that upon the report of the Local Commission the pending appeal was disposed of.
- i) The Bench inquired about any market survey by the Enquiry Officers of the Commission in this respect which was replied in affirmative and informed the bench about the survey which was undertaken in year 2017. The Complainant also informed the bench about the presence of boards and use of the logo "PC" on the market survey conducted by the Complainant on 2nd August 2018. He has also appraised the bench that principle of *res judicata* does not apply on this scenario. Moreover, the Writ Petition which has been filed by the Respondent is yet to be admitted for regular hearing as only pre-admission notice has been issued. Prayed for appropriate order by the bench on the Interim application filed by the complainant under section 32 of the Competition Act, 2010 as the infringement is continuing.

8. The written and oral submissions of the Respondent are summarized as follows:

- a) In response to the Complainants written submission for interim relief. The Respondents submitted their replies on 28th August 2018. They noted that the SCN has been challenged in the Peshawar high Court, Abbottabad Bench. Challenging the Complainant locus standi to file the Application.
- b) The Respondents deny that there is any deception on their part. As the name of the hotel is outcome of the decision of the Honorable High Court. Also an IO would have adverse effects on the ongoing Contempt of Court petition, resulting in complications.

They deny presence of nay deceptive practices and there has been no damage to the Complainant.



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- d) They deny the use of Complainants registered trademark. Despite giving consent initially.
- e) At the hearing on 30th August 2018. The Counsel for the Respondent told the bench about the civil suit filed by the complainant which had been decided in favor of respondent as an appeal had also been disposed of in the light of the report of the Local Commission appointed by the High Court. Moreover, a contempt is also filed which is pending since 2016. No customer has filed any complaint against the hotel services and in fact customer is not affected.
- f) The Counsel for the Respondent, however, admitted that the Franchise agreement is no longer in force as the same was cancelled/terminated. No violation of any trade mark is being carried out by the Respondent.
- g) The Director General (Legal), present on the Notice referred a case in which the court has held similarity includes the font as well. In support of his submissions he placed reliance on *ORO Industries vs. Muhammad Hanif*, reported as 2018 CLD 546, where the Honorable Sindh High Court, issued an interim injunction and restrained the Respondent from using the mark 'ZORRO' as the same was deceptively similar to the mark of the petitioner i.e. 'ORO'. In the matter of *Raja Asir Munir vs. DHL Pakistan (Pvt.) Limited and others*, reported as 2018 CLD 725, the Competition Appellate Tribunal found that use of words 'IDHS' in the same style and colour and font by the Appellate was deceptively similar to the trademark of DHL and accordingly upheld the Order of the Commission. The Director General (Legal) also referred to the *Order dated 17th August 2018 of the Commission in the matter of Show Cause Notice issued to M/s Options International (SMC-Pvt.) Ltd.* The Respondent at this stage further submitted that whatever the use of logo by them, it's with the consent of the parties, however, failed to submit any documentary evidence in this respect.

In addition, the Respondent admitted the use of the trade name and mark of the complainant is not intentional but we are using this with the express permission of the Complainant.



9. After hearing the Parties at length and considering the assistance rendered by the Director General (Legal), we are of the view that the Act was promulgated with the scope to provide free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviors, which *inter alia* include deceptive marketing practices prohibited under Section 10 of the Act. As is evident that the interim Order under Section 32 of the Act can only be passed upon satisfaction of following conditions:

- (i) *Final Order in the proceedings is likely to take time,*
- (ii) *a situation exists or is likely to emerge,*
- (iii) *As a consequence of the above situation serious or irreparable damage may occur, and*
- (iv) *interim Order is necessary in the public interest,*
- (v) *after providing an opportunity of hearing to the concerned undertakings*

10. In the light of the evidence, submissions and precedent, we are of the opinion that the issuance of the final order in the instant matter may take time.

11. With reference to the second condition, a *prima facie* findings of the Enquiry Report along with the evidence are available on the record, which *inter alia* include the registration certificates and the images of the Hotel owned and operated by the Respondent, presented by the Complainant's Counsel, which shows that the Respondent is using the registered trademark of the Complainant is being used by the Respondent. This, we are of the considered view, *prima facie* constitutes a contravention of Sections 10(2)(d), 10(2)(b), 10(2)(a) read with Section 10(1) of the Act. In this regard we are in agreement with the case law cited by the Director General (Legal) for assistance of the Bench.

12. With reference to the third condition, we are guided by the observations made in one of the earlier decisions of the Commission i.e. *In the matter of Complaint filed*

by DHL reported as 2013 CLD 1014:

It is a cardinal principle of law and fair commercial trading, that deceptive measures should not be adopted to adversely affect



goodwill and recognition earned by other organization. The only reason for such conduct is to gain an advantage on the goodwill attached to the Complainant's trademark, which is indeed capable of harming Complainant's business interest; as it is in the case of all Respondents.

13. This also stands as a foundation for the recent Order passed by the Commission in the matter of show cause notice issued to **M/S Options International (SMC-Pvt.) Limited**. It was observed that the continued use of the Complainants trademark by the Respondent may cause “*serious or irreparable damage to the business and goodwill of the Complainant*”. **In the matter of show cause notice issued to Shainal Al-Syed Foods for deceptive marketing practices** reported as **2018 CLD 1115**, wherein the Commission while placing reliance on a judgment of the Delhi High Court reported as **Colgate Palmolive vs. Anchor Heal and beauty (27) PTC 478 DEL**. It was observed that “*If the first glance of the article gives the impression as to deceptive or near similarities in respect of those ingredients in case of confusion and amounts to passing off ones own goods as those of the other with a view to encash upon the goodwill and reputation of the latter*”
14. The Commission may issue an Interim Order under Section 32 of the Act, where the issuance is in the public interest which is also the fourth condition. Although the term “public interest” is not defined under the Act, however, we have taken guidance from the judgment of the Honorable High Court in the case **Nasrullah vs. Province of Baluchistan reported as 2000 PLC (C.S) 769**, wherein the Honorable Court observed as follows:

“...action that can be taken to protect the legal rights of the general public or a class of public with whom justice is required to be done by a competent authority keeping in view the relevant rules and laws available on the subject...”

With regards to compliance with the fourth element of public interest we are guided by the Order of larger Bench of the Commission in the matter of **M/s Options International (Pvt.) Limited** wherein it was enunciated as follows:



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“...Commission is entrusted with the role of protecting the consumers from anti-competitive behaviors which inter alia include the deceptive marketing practices being prohibited under Section 10 of the Act. Further, the Commission is right in its steed to restrain the undertakings from resorting to unfair competitive practice such like using someone else’s trademark and that too a registered trademark without any authorization or license, which may not only harm the business interest of the owner of trade mark but will also deceive the consumers in making them believe that the products which they have purchased belonged to or is associated with the owner of trademark which in fact is not the case”.

16. As mentioned earlier, the Commission is entrusted with the role of protecting the consumers from anti-competitive behaviors which *inter alia* include the deceptive marketing practices being prohibited under Section 10 of the Act. Further, the Commission is right in its steed to restrain the undertakings from resorting to unfair competitive practice such like using someone else’s trademark and that too a registered trademark without any authorization or license, which may not only harm the business interest of the owner of trade mark but will also deceive the consumers in making them believe that the products which they have purchased belonged to or is associated with the owner of trademark which in fact is not the case. Hence, we are of the considered view that the fourth condition also stands satisfied in the instant matter.

17. In view of the above, we are constrained to issue the following directions to the Respondent as well as M/s Lucky Gold (Pvt.) Limited:

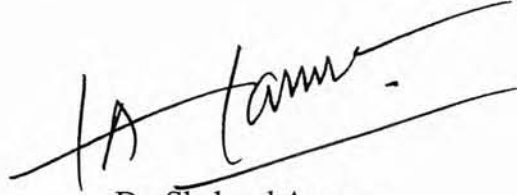
- (a). Till the issuance of the final Order and conclusion of the proceedings under Section 30 of the Act under the SCN, the Respondent and M/s Lucky Gold (Pvt.) Limited are directed to refrain from using the trademarks of the Complainant i.e. **“PC”** or **“Pearl Continental”**; and



The Respondent is directed not to claim any association or affiliation with the Complainant during the course of its business activities, till the

conclusion of the proceedings under Section 30 of the Act and until further Orders.

18. The Respondent is directed to file the compliance report with reference to the directions given in Para 19 above within seven (7) days from the date of this Order with the Registrar of the Commission, without fail.
19. Needless to say, the observations made hereinabove are tentative in nature and without prejudice to further proceedings in the instant proceedings.
20. In terms of the above, the IO Application stands allowed and the Registrar of the Commission is directed to transmit copies of this Order to the concerned parties.



Dr. Shahzad Ansar
Member



Dr. Muhammad Saleem
Member



Islamabad the 19th November 2018