



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

COMPLAINT FILED BY

OLX CLASSIFIEDS PAKISTAN

Against

PAK WHEELS (PVT.) LIMITED

(FILE NO. 294/PakWheels/OFT/CCP/2017)

Date of Hearing:

23-01-2020

Commission:

Dr. Muhammad Saleem
Member

Dr. Shahzad Ansar
Member

Ms. Bushra Naz Malik
Member

Present

Mr. Noman A. Farooqi

Assisted by:

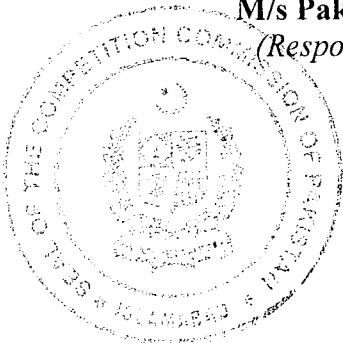
Mr. Ahsan Ikram
Assistant Director (Legal)

M/s. OLX Classifieds Pakistan
(Complainant)

Mr. Hasan Irfan Khan,
Advocate Supreme Court

M/s Pak wheels (Pvt.) Ltd.,
(Respondent)

Mr. Rana Sajjad Ahmed,
Advocate



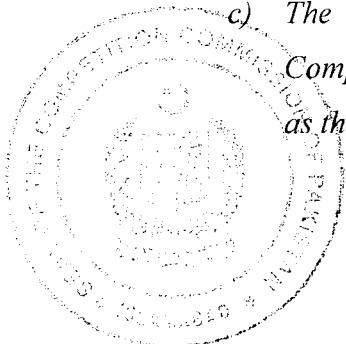
ORDER

1. This Order shall dispose of the Objection Petition dated 30th November 2019, whereby M/s OLX Classifieds Pakistan (hereinafter the '**Complainant**'), has raised objections on the Technical Report dated 17th September 2019 (the '**Report**').
2. Before deliberating on the issue at hand, it is important to give a brief background of the proceedings to this day.

A. Complaint, Enquiry and Show Cause Notice:

3. The Complainant filed a complaint against M/s PakWheels (Pvt) Limited (the '**Respondent**'), with the Competition Commission of Pakistan (the '**Commission**') for alleged violation of Section 10 of the Competition Act, 2010 (the '**Act**'). The allegations in succinct are reproduced herein below:

- a) *The Complainants alleged that during early part of 2017 they came to know that the Respondent had, without authorization, copied and reproduced on its website several advertisements/ listings, photographs and descriptions originally posted on the Complainants' website also containing the Complainants' trademark OLX Logo. The Respondent had reproduced the same on its own website www.PakWheels.com and continues to do so.*
- b) *that not only the text portions of their advertisements are identical to those found on the Complainants' website, but even the photographs of the products are found to be identical, besides bearing the watermark of the Complainants' trademark OLX Logo. The Respondent carelessly even forgot to remove or replace the Complainants' trademark OLX Logo before publishing the copied listing on its own website www.PakWheels.com.*
- c) *The acts of the Respondent show that it was not authorized by the Complainants or any other person to post the said listing on its own website as the seller/ user of the products.*



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4. In pursuance of Section 37(2) of the Act, the Commission constituted an in the matter and the enquiry was concluded vide Enquiry Report dated 27th November 2018 (hereinafter the ‘**Enquiry Report**’). The conclusions and recommendations of the Enquiry Report were as under:

5.1 *This enquiry report aimed at examining whether the allegations of the Complainants against the Respondent for infringing their trademark OLX, OLX Logo, descriptions and photographs of the listings, constitute, prima facie, violation of Section 10 of the Act or not.*

5.2 *In light of the analysis and given facts, it appears that the Respondent has, prima facie, fraudulently used the Complainants’ registered trademark OLX, copyrighted OLX Logo, descriptions and photographs from Complainants’ listings without consent or authorization, in violation of Section 10(1) of the Act, in terms of Section 10(2)(d) of the Act.*

5.3 *Similarly, the Respondent is, prima facie, found engaged in distributing false and misleading information to the consumers related to the properties and place of production, in violation of Section 10(1) of the Act, in terms of Section 10(2)(b) of the Act.*

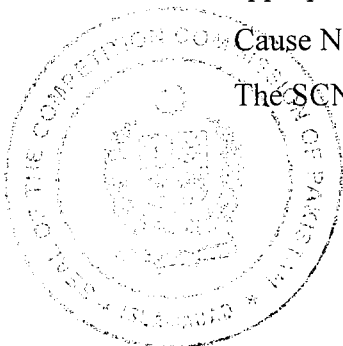
5.4 *Furthermore, the Respondent’s conduct is also found to be capable of harming the business interests of the Complainants, in violation of Section 10(1) of the Act, in terms of Section 10(2)(a) of the Act*

5.5 *The deceptive marketing practices have a direct impact on the public at large and therefore, it is in the interest of the general public and fair competition in the market that the undertakings should be stopped from marketing their products in an unfair and misleading manner and be encouraged to resort to marketing practices which are transparent and give consumers true and correct information.*

5.6 *Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider to initiate proceedings under Section 30 of the Act against M/s PakWheels (Pvt) Limited for, prima facie, violation of Section 10 of the Act.*

5. After review of the Enquiry Report and the conclusions and recommendations made therein, the Commission in pursuance of Section 37(4) of the Act deemed it appropriate to initiate proceedings under Section 30 of the Act by issuing the Show Cause Notice No. 12 of 2019 dated 31st May 2019 (the ‘**SCN**’) to the Respondent.

The SCN in its relevant parts is reproduced hereunder:

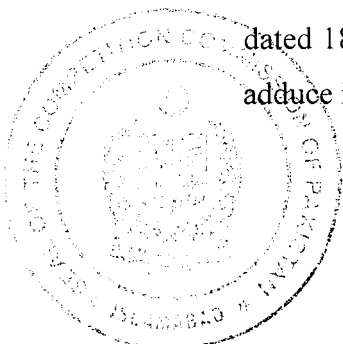


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4. *Whereas, in terms of the Enquiry Report in general and paragraphs 2.23 to 2.38, it has been alleged that the Undertaking without any authorization copies from the complainant website and reproduced on its own website several advertisements, listings, photographs and descriptions some of which contains complainant's trademark OLX not only the text portion of their advertisements are the same, but even the photographs of the products are found to be identical to the Complainant's watermark, which prima facie constitutes violation of Section 10(1) of the Act; and*
5. *Whereas, in terms of the Enquiry Report in general and paragraphs 4.30 in particular, it appears that the Undertaking fraudulently used the complainant's registered trade mark OLX, copyrighted OLX logo, description and photographs without the consent or authorization of the complainant, which prima facie constitutes 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 paragraph 4.35 in particular, it appears that the Undertaking's conduct of copying the trademark, description and photographs of the listing of the Complainant's website, and subsequently using the same on its own website, gives a prima facies impression that the undertaking is either affiliated with the complainant or listing has been published by the complainant on the undertakings on line platform. The foregoing, prima facie is in violation of 10(1) read with 10(2)(d) of the Act;*
7. *Whereas, in terms of enquiry report in general and paragraphs 4.36 to 4.37 in particular, it appears that the use of complainant's trademark and copy rights, as well as copying of the listings, descriptions and photographs from the complainant's website and its subsequent use on the undertaking's own website is capable of damaging business interest of complainant, and in prima facie violation of Section 10(1) read with Section 10(2)(a) of the Act.*

B. Hearings in the Matter and issuing commission under Section 33 of the Act:

6. Upon issuance of Show Cause Notice in the instant case, the proceedings under Section 30 of the Competition Act, 2010 (the 'Act') were initiated. The parties were called upon for first hearing on 18th June 2019, whereby, we considered it necessary to analyse the technical nature of the evidence produced by the Complainant at initial enquiry stage. Keeping in view the technical nature of the evidence, a Technical Committee (the 'Committee') was constituted vide its order dated 18th June 2019, whereby the said Committee was entrusted with the task to adduce its expert opinion *vis-à-vis* technical nature of the evidence available on the



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record and produce a detailed report within seven days regarding technical aspects of the websites of both the parties.

7. The Committee, after evaluating the evidence, submitted to the Bench that a visit to the Respondent's premises would be inevitable for proper verification of technical evidence. Consequent to this, in pursuance of Section 33 of the Act, vide order dated 28th August 2019, we constituted a commission with the direction to visit the premises of Respondent and carry out technical analysis. It was also directed to record the statement of the persons available on the premises while retrieving the information and submit report within seven days.

C. Report of the commission issued under Section 33 of the Act:

8. In pursuance of the above order, a Robkar (notice) dated 30th August 2019, was issued to the Respondent, wherein the Respondent was required to cooperate with the commission appointed under section 33 of the Act. The said commission visited the premises of the Respondent on 3rd September 2019, and finalized the Report.
9. In the Report, the commission produced results of various exercises it had performed during inspection such as Google Analytical Examination, Log File Examination, Server Analysis, Dry Test on the Complainant and Respondent's websites and Bots Examination. The commission reached the following conclusion in its Report:

"1. Based on the analysis performed on the acquired data, IS & T forensic team finds that apparently M/S PakWheels (Pvt.) limited is not involved in copying and reproducing advertisement/listing originally posted on the Complainant's webpage.

.....

3. The analysis of analytical reports revealed that M/S PakWheels (Pvt.) limited in neither crawling nor copying any data from M/S OLX Classified (Pvt.) Limited....



4. In depth analysis of Server Log, Encryption Log, Newrelic Agent Log, Payment Gateways, Production Log and Simple Storage Services Utilities showed no event where M/S OLX Classified (Pvt) Limited server were pinged/crawled or communication between both servers (www.olx.com.pk and www.pakwheels.com) was done.

5. There was no sign of data dumping on M/S PakWheels (Pvt.) Limited database or any data parsing batch reports were detected on the www.pakwheels.com servers.

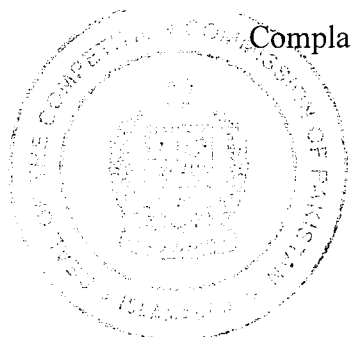
6. Based on dry test performed on both www.olx.com.pk and www.pakwheels.com websites for verification of content filtering mechanism, findings are summarized as 'an ad with OLX trademark was uploaded to www.pakwheels.com website, ad uploaded immediately and subsequently removed by M/S PAKWHEELS (Pvt.) Limited after few hours. Likewise, an ad with PakWheels watermark was uploaded to www.olx.com.pk website, ad uploaded successfully and not removed even after six days by M/S OLX Classified Pakistan.

.....
9. The Ad example provided by M/S OLX Classified (Pvt.) Limited clearly shows that the AD was posted by a human nor by a bot, as it is very difficult to extract the relevant categories from a dump and then committing it in database in desired format....”

D. The Objection Petition filed by the Complainant:

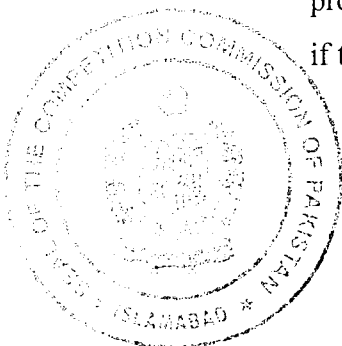
10. The Complainant, feeling aggrieved with the said Report, an objection petition on 30th November 2019, and objected the Report on various grounds. Therefore, through this order we shall dispose of the objection petition.

11. Mr. Hassan Irfan Khan, Advocate Supreme Court, appearing on behalf of the Complainant has made the following submissions:



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- (a). While formulating its findings, the commission has gone beyond its mandate. The commission was not authorized to create or implant a new evidence. Vide the order dated 28th August 2019, the commission was formulated and entrusted with the mandate only to provide expert opinion on the evidence available on the record. However, through performance of Dry Test, the commission has gone beyond its Terms of Reference (TOR)/mandate and brought new evidence on the record, which was utterly unauthorized.
- (b). The counsel for petitioner/Complainant argued that the Commission is not the court of law, hence, it can exercise only those powers which the Act, has expressly conferred on it. Likewise, a commission, constituted under Section 33 of the Act, would have only those powers which the Commission has delegated to it. Bringing new evidence on the record when it was not mandated to do so, would amount to going beyond authority so delegated. Therefore, the Report is liable to be struck off.
- (c). The facts recorded by the commission in the Report were incorrect. As per order dated 28th August 2019, the commission was required to adduce its expert opinion only on the material available on the record and to analyse technical aspects of the websites of both the parties. In this context, the commission was supposed to visit site servers of both the undertakings. However, the commission had visited only the Respondent's premises and did not visit the Complainant's site server. Therefore, the facts relied by the commission were incorrect. Further, it was also argued that carrying out technical analysis without information, knowledge and joining of any representative of the complainant would be prejudicial and violative of the law.
- (d). This Bench vide its order dated 28th August 2019 required the commission to submit its report within seven (7) days, however, the commission failed to produce its report within stipulated time. Hence, it became time barred. Even if the commission had failed to perform its function within stipulated time,



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the appropriate course for the commission, could have been; seeking extension in time from the Bench, which actually was not sought. Therefore, the Report possesses no legal value.

- (e). The counsel for the petitioner/Complainant has vehemently contested that two orders of the Commission dated 18th June 2019, and 28th August 2019, are not in conformity with each other. Vide order dated 18th June 2019, the Bench had expressed its own intention and need to seek expert opinion on technical nature of the evidence on record. Whereas, vide its order dated 28th August 2019, the Bench had mentioned that the expert opinion was sought on the request of the Complainant and consent of the Respondent. This contradiction is further evident in the Notice (Robkar) dated 30th August 2019, to the Respondent wherein a commission appears to be constituted on the request of the Complainant and with concurrence of the Respondent. However, the counsel asserted that, as a matter of fact, no request or consented for expert opinion had ever been made by him. Whatever had happened, it was done by the Bench on its own and for its own assistance.
- (f). It was argued by the Complainant's Counsel that even otherwise, the order dated 28th August 2019, was passed by the Bench in the absence of the parties and without giving any opportunity of hearing to the parties. As a matter of law, the counsel argued that, the order dated 28th August 2019, was substantive in nature and, as per General Clauses Act, it was supposed to be issued after giving opportunity of hearing to the parties.
- (g). The Counsel for the Complainant in his objection petition has vehemently contended constitution of the commission and argued that no further investigative exercise can be carried out once enquiry under section 37 of the Act has been completed. Once Enquiry is concluded, the only course of action available to the Commission would be conducting hearing and listening to the parties. He relied in this regard on Section 37(4) of the Act and Regulation 26 of the Competition Commission (General Enforcement) Regulations, 2007 (the **GER**), and so, argued that subsequent enquiry report such as the Report, would



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be *void ab initio* after the initial enquiry report dated 27th November 2018 had been issued.

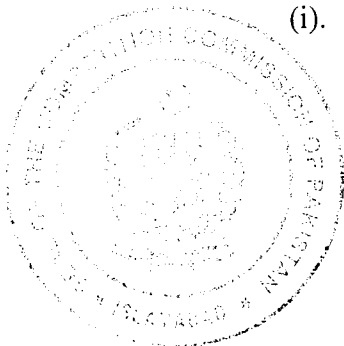
12. The Director General (Legal) in attendance made the following submissions for our assistance:

(a). The Commission, during the adjudication is possessed with the powers provided under the Act. The legislature in its wisdom has granted certain functions to the Commission under Section 28 & 29 of the Act. The functions *inter alia* are:

- (i). To initiate proceedings and pass orders for violation of the Act (Section 28(1)(a))
- (ii). To conduct studies for promoting competition in all sectors of commercial and economic activity (Section 28(1)(b))
- (iii). To conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of the Act (Section 28(1)(c)).
- (iv). To give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made thereunder (Section 28(1)(d)).
- (v). To engage in competition advocacy (Section 28(1)(e)).
- (vi). To take all other actions as may be necessary for carrying out the purposes of the Act (Section 28(1)(f)).

(b). The powers vested in the Commission to carry out these functions are provided in various provisions of the Act, they are:

- (i). To initiate proceedings by issuing show cause notice(s) and providing an opportunity of hearing for violation of Chapter II prohibitions of the Act (Section 30).



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- (ii). To pass any of the Orders, in case of violation of Chapter II Violations, as provided under Section 31.
- (iii). To pass interim order in the proceedings under Section 30, where the situation so requires (Section 32).
- (iv). For the purpose of any proceedings or To exercise various powers as are provided under Section 33 of the Act during the enquiry or proceedings under Section 30 of the Act, which *inter alia* are:
 - (a). summoning and enforcing the attendance of any witness and examining him on oath;
 - (b). discovery and production of any document or material object producible as evidence;
 - (c). accept evidence on affidavits;
 - (d). requisitioning of any public record from any court or office; and
 - (e). issuing of a commission for the examination of any witnesses, document or both.
- (v). Power to enter and search the premises and impound certain documents and information stored in the computer systems under Section 34.
- (vi). In case of refusal to allow the entry and search, the Power to forcibly enter the premises and carry out the search and impound documents, material and information stored in computer systems under Section 35.
- (vii). Calling through special or general order, any information periodically or as and when required by the Commission, which is considered necessary for the purposes of the Act under Section 36.
- (viii). The Commission may conduct enquiries on its own (*suo motto*), on a reference made to it by Federal Government or on a formal complaint filed by the undertaking or registered association of consumers under Section 37.



- (ix). The Commission may impose penalties as prescribed under Section 38 of the Act. For violation of Chapter II prohibitions, the Commission may impose a penalty upto Rs. 75 Million or upto 10% of the annual turnover of the undertaking concerned.
- (x). For the purposes of recovery of penalties so imposed by the Commission, the Commission is possessed with the same powers as a civil court under the Code of Civil Procedure, 1908; following powers in addition are also available to the Commission under Section 40:
- (a). attachment of immovable or sale of any moveable property, including bank account of any person or undertaking.
 - (b). appointment of receiver for the management of moveable or immovable property of the person or undertaking;
 - (c). recovery of the amount as arrears of land revenue through district revenue officer;
 - (d). require any of the following, by notice in writing, the person to deduct and pay the sum specified in the notice on or before such date as may be specified, namely:
 - (i). from whom any money is due or may become due to the undertaking,
 - (ii). Who holds, or controls the receipt or disposal of or may subsequently hold, or control the receipt of on account of the undertaking, or
 - (iii). Who is responsible for the payment of any sum to the undertaking.

The Commission during adjudication can exercise the powers under Section 33 as well as Section 34 of the Act, if the situation so requires. Since, the scope of proceedings before the Commission under the Act are inquisitorial in nature, therefore, the legislature in all its wisdom has provided for various powers to it, which may be used during the proceedings under Section 30 of the Act.

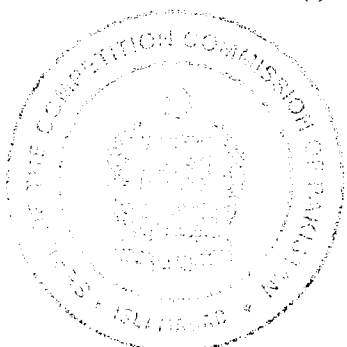
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- (d). Further, while exercising the powers under Section 33 of the Act i.e. issuing commission for the purposes of examination of any witness or record during the proceedings under Section 30 of the Act; like in the instant matter, no prior notice or intimation or opportunity of hearing is required; as no adverse action is taken. In this regard reliance is placed on **PLD 2010 SC 483, Justice Khurshid Anwar Bhinder and others vs. Federation of Pakistan and another**, wherein a 14 Member Bench of the Apex Court held as follows:

It may not be out of place to mention here that by now it is well established that “*where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. Thus, the rule may be discarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests.*” (Swadish Cotton Mills v Union of India AIR 1981 SC 818, (1981) 51 Comp Cas 210 SC, (1981) 2 SCR 533. Note: Decisions in Maneka Gandhi v Union of India Air 1978 SC 597, (1978) 1 SCC 248, Mohinder Sindh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405, Union of India v Tulsiram Patel AIR 1985 SC 1416, (1985) 3 SCC 398. The ‘*audi alteram partem*’ rule would be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands. (Peralberg v Varty (Inspector of Taxes), [1971] 1 WLR 728 (CA), [1971] 2 ALL ER 552 (CA). A *prima facie* right to opportunity to be heard may be excluded by implication in the following cases:


- (i). **When an authority is vested with wide discretion** (H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed, at p.391 H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed., at 9.392)



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- (ii). **When the maxim ‘expression unius est exclusion alterius’ is involved** (Colquhoun v Brooks 21 QBD 52 at 9.62 Humphrey’s Executor v. United States (1935) 295 US 602)
- (iii). **Where absence of expectation of hearing exists** (Y.G. Shivakumar v B.M. Vijaya Shankar (1992) 2 SCC 207, AIR 1992 SC 952)
- (iv). **When compulsive necessity so demands** (Union of India v. W.N. Chadha (Supra))
- (v). **When nothing unfair can be inferred** (Union of India v, W.N. Chadha (supra))
- (vi). **When advantage by protracting a proceeding is tried to be reaped** (Ram Krishna Verma v State of U.P. (1992) 2 SSC 620, AIR 1992 SC 1888).
- (vii). **When an order does not deprive a person of his right or liberty** (Indian Explosive Ltd. (Fertiliser Division), Panki, Kanpur v State of Uttar Pradesh (1981) 2 Lab LJ 159)
- (viii). **In case of arrest, search and seizure in criminal case** (Union of India v W.N. Chadha 1993 CeLJ 859, 1993 Supp(4) SCC 260, AIR 1993 SC 1082)
- (ix). **In case of maintaining academic discipline** (1992) 2 SCC 207
- (x). **In case of provisional selection to an academic course** S.R. Bhupeshkar v Secretary, Selection Committee, Sarbarmathi Hostel, Kilpauk, Medical College Hostel Campus, Madras AIR 1995 Mad 383 (FB)
- (xi). **In case of enormous malpractices in selection process,** Biswa Ranjan Sahoo v Sushanta Kumar Dinda (1996) 5 SCC 365, AIR 1996 SC 2552)

The Director General (Legal), based on the above the judgment of the August Court emphasized that the August Court has clearly held that *“the ‘audi alteram partem’ rule would be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands”*.




In the instant matter, there was a chance that prior notice may result in removal or destruction of the evidence, which was to be verified by the commission appointed under Section 33 of the Act, hence, in the instant matter, there was no requirement of providing an opportunity as it falls within the exceptions provided in the referred judgment of August Court.

(e). With reference to the scope of the powers to be exercised by the commission appointed under Section 33 of the Act, it was submitted that the contents and the scope may be compared with the report submitted by the commission. If the commission went beyond the scope then the report submitted by the commission may be set-aside.

13. After hearing the submissions made before us and the documents referred during the hearing, we deem it appropriate to deliberate on certain issues for the purpose of deciding the objection petition. The issues are:

(i). *Whether the Commission had power to form/initiate a commission?*

(ii). *Whether opportunity of hearing was necessary before constituting a commission?*

(iii). *Whether the commission had acted outside the bounds of its mandate?*

(iv). *Whether the Commission had power to form/initiate a technical committee?*

14. Now in the subsequent paragraphs, we will deliberate on the above issues in light of the submissions made before us.

(i). *Whether the Commission had power to form/initiate a commission?*

15. The Complainant has argued that, unlike a court of law, the Commission has got no inherent power under the Act. Therefore, the Commission cannot initiate a second enquiry especially after initiation of proceedings under Section 30 of the Act, and more particularly where the Regulation 26 of the GER has already laid course to be adopted (i.e. conducting hearings) by the Commission once initial enquiry under Section 37 is completed. There exist no other provision in the Act which would provide inherent power's to the Commission to initiate further



enquiry. We are conscious of the fact that in the instant matter, the Complainant in its objection petition has objected the constitution of the commission under Section 33 of the Act; however, we note that, the counsel made a dramatically contrasting statement that the constitution of the commission is not being challenged rather the objection only pertains to the extent of its conclusion. Another objection raised by the counsel for the Complainant was that the commission under Section 33 of the Act was constituted by the Bench on its own and no request was ever made by him in this regard. Perusal of the record shows that this aversion of the counsel is correct. Therefore, we acknowledge that constitution of the commission was done by the adjudicating Bench on its own motion and not on the request by the Counsel for the Complainant. Nonetheless, we are of the view that the question, whether the commission under Section 33 of the Act was constituted upon the request of the Counsel for the Complainant or by the adjudicating Bench on its own, would cast no material effect on the conclusions of the commission's report.

16. The primary objection seems to be that whether the Commission/adjudicating bench has the power to constitute a commission under Section 33 of the Act or whether an enquiry can be initiated during the proceeding under Section 30 of the Act?
17. Keeping in mind the principal objection of the Complainant, we deem it appropriate to resort to Section 28 of the Act, from where the Commission derives its inherent powers. For precise reference, clause (f) of Sub section 1 of Section 28 is reproduced herein below;

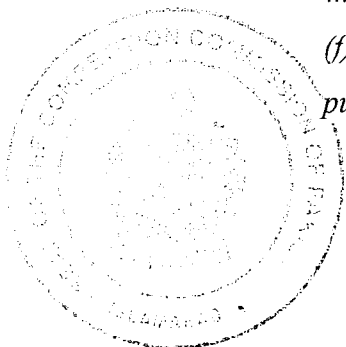
“28. Function and powers of the Commission:-

(1) The functions and powers of the Commission shall be—

...

...

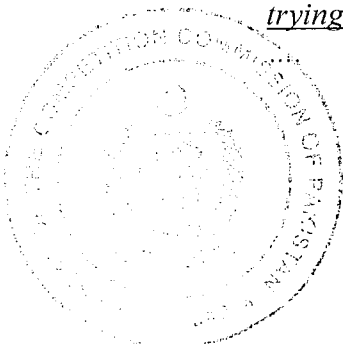
(f) to take all other actions as may be necessary for carrying out the purposes of this Act.”



18. Before we proceed further as to what kind of actions may be taken by the Commission under the Act and refer to the relevant provisions of the Act vis-à-vis the functions and powers of the Commission thereof, we deem it appropriate to highlight and clarify the nature of proceedings under the Act. It now needs no emphasis that the Commission was established under the Competition Ordinance, 2007 continued its operation throughout and was given permanence through enactment of the Act with the exclusive statutory mandate "to provide free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviours". It is also worth mentioning that upon conclusion of the enquiry under the Act and in pursuance of the provisions of Section 37(4) of the Act, the Commission may initiate proceedings under Section 30 where **it is in the public interest so to do** (emphasis added). Hence, from the language used in the Act, it is clear that the intent of the legislature behind the Act i.e. to create a level playing field in order to enhance economic efficiencies and to protect consumers from the anti-competitive behavior, is that the Commission has to proceed in the public interest. Thus the Commission is entrusted with the responsibility of looking after the interest of general public vis-à-vis anti-competitive conduct and to create a level playing field in order to enhance economic efficiency in all spheres of commercial and economic activity and that too in the public interest. The proceedings before the Commission are of inquisitorial in nature and not adversarial; as the Commission is carrying out its functions in the public interest. The legislature, in all its wisdom, therefore, carefully crafted the framework under the Act, and we deem it appropriate to refer to the provisions of Section 33 of the Act in this regard, in particular, clauses (e) & (b) of sub-section (1) of Section 33 of the Act, which for ease of reference is reproduced herein below:

"33. Powers of the Commission in relation to a proceeding or enquiry:-

(1) The Commission shall, for the purposes of a proceeding or enquiry under this Act, have the same power as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908), while trying a suit, in respect of the following matters, namely:



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(b) discovery and production of any document or other material object producible as evidence;

...

(e) issuing of a commission for the examination of any witness, document or both.”

19. Bare perusal of the above provision leaves no doubt that the legislature, in all its wisdom, has used the word “proceeding” along with “enquiry” in Section 33 (1) mentioned above. This means that the Commission, even after initiation of proceedings under Section 30 of the Act retains the power to investigate or gather evidence, if it deems necessary in the public interest. This intent of the legislature to empower the Commission with the inquisitorial / investigative authority during the proceedings under Section 30 of the Act is further evident from the provisions of Section 34(1) of the Act, which in its relevant parts is reproduced herein below:

“34. Power to enter and search premises:-

(1) Notwithstanding anything contained in any other law for the time being in force, the Commission, for reasonable grounds to be recorded in writing shall have the power to authorize any officer to enter and search any premises for the purposes of enforcing any provision of this Act.”

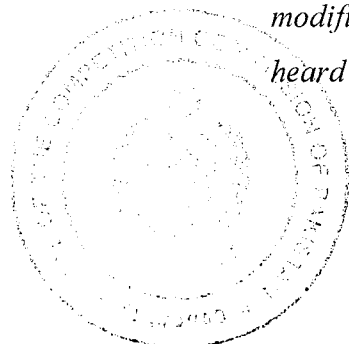
20. By using the word “any provision” in Section 34, this power can be extended even to Section 30 as well, which shows that if the legislature had intended to restrict the Commission’s power to investigate only to the extent of Section 37, then it would have certainly mentioned “Section 37” instead of the word “any provision”. Therefore, based on existence of these sections, the Commission has reason to assume its power to constitute any specific enquiry even at the stage of Section 30 proceedings in order to gather the evidence necessary to reach a just conclusion.
21. In view of the above clear and unambiguous provisions of the Act, we are of the firm view that the Commission may, during the proceedings under Section 30 of the Act, in addition to exercising its powers under Section 33 to constitute commission etc., may also constitute an enquiry or carryout a search and inspection under Section 34 of the Act. Hence, any objection contrary to the aforesaid legal position is turned down.



(ii). Whether opportunity of hearing was necessary before constituting a commission?

22. The counsel for the Complainant has objected that he was not given an opportunity of hearing before constituting commission. Relying on section 24-A of General Clauses Act, 1897, the counsel argued that it is the right of the Complainant to be provided with an opportunity of hearing before passing any order. This objection of counsel has given rise to the question of procedural fairness arising in the nature of the proceedings in issue. Whether it was unfair not to grant an opportunity of hearing to the petitioner before constituting a commission? Before analysing how the higher courts have dealt with this question, it is first important to make it clear that the order dated 28th August 2019; passed by us was just meant to bring actual facts before us; which in pursuance of the previous issue is vested in us statutorily. It was not, in fact, a final order which could have brought adverse consequences to either of the parties. However, we feel necessary to make it clear that, if hearing was conducted before passing the said order then it would have caused damage to facts gathering exercise. The parties in the case might have been in a position to inflict technical changes to the evidence required. Therefore, in exigency of procedure, we considered it appropriate to carry out fact gathering exercise through appointment of commission. The question; how an order should be construed which the Commission has passed for investigation or verification in the matter, has been highlighted by the Director General (Legal) in his submissions while referring to the judgment of **PLD 2010 SC 483, Justice Khurshid Anwar Bhinder and others vs. Federation of Pakistan and another**, wherein the Court held that

“ since the audi altrem partem rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying or plainly contrary to the common sense of the situation. ‘Audi alteram partem’ rule as such is not case in a rigid mould and judicial decisions establish that it may suffer situational modification. Where right to prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt



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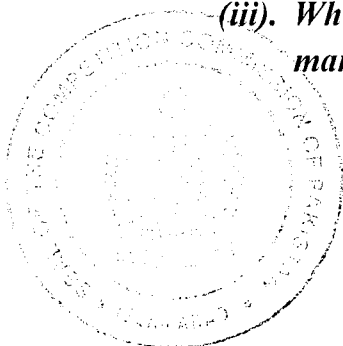
action, such right can be excluded. This, the rule may be discarded in an emergent situation where immediate action brooks no delay prevent some imminent danger or injury or hazard to paramount public interest. The 'audi altrem partem' rule would be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands."

23. A similar view was taken in a recent judgment **2019 CLD 861, Depilex Smileagain Foundation v. SECP**, wherein, an order of investigation was passed by Securities and Exchange Commission of Pakistan and the petitioner challenged the said Order and averred that order in question lacked procedural fairness-as no notice was issued before passing the order of investigation. The Honourable Lahore High Court held that,

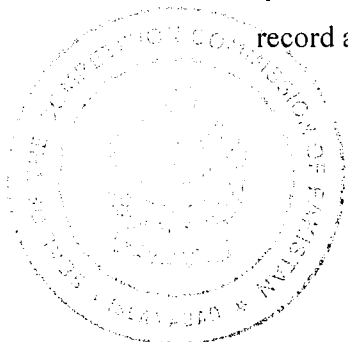
"The order to investigate, the simpliciter, does not involve adjudication of any rights claimed, determination of any question or any conclusive decision thereof."

24. Hence, the court held that the issue of procedural fairness would be subject to certain exception such as when fairness in the form of disclosure would be prejudicial to the public interest or when legislature expressly requires fairness in some situations but is silent about others or when prompt action is needed or when procedural defect would make no difference to the outcome. Based on this reasoning, we are of the view that there existed no unfairness by not issuing a prior notice to the Complainant. Even if there had been procedural unfairness as claimed by the Complainant, it would be inconsequential as the action was taken by the Bench on its own in the public interest, in its inquisitorial capacity, merely to collect the facts and information. Therefore, objection of the petitioner/Complainant in this regard bears no merit.

(iii). Whether the commission had acted outside the bounds of its mandate?

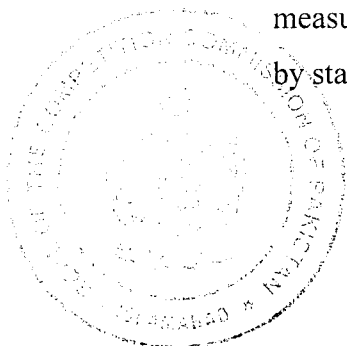


25. During his argument, the learned counsel for petitioner/complainant asserted that the commission appointed under Section 33 of the Act was required to visit premises of both Complainant and the Respondent, however, it had visited only Respondent's premises. Further, the commission performed a Dry Test on websites of both respondent and complainant, therefore, it went beyond its mandate. To address this assertion, we deem it appropriate to first cast a look upon what was the actual issue, what the mandate was and how the procedure was carried out.
26. Perusal of Para 2.30 of initial Enquiry Report dated 27th November 2018, showed that the Complainant primarily had alleged that the Respondent has used automated means to access servers of Complainant's website and copied, extracted and reproduced data on its own website. Along with his complaint, the Complainant also produced a list of 2500 website links as a supporting evidence whereby the Complainant's watermarked logo was purportedly displayed on the Respondent's website. While reviewing the listing provided by the Complainant it was noticed that the dates against the entries was not provided. However, the Enquiry Committee stated in para 4.21 of the Enquiry Report that, due to some constraints, it was unable to verify excerpts produced by the Complainant as evidence. Despite this fact, the Enquiry Committee was also able to find instances on the Respondent's website where a listing contained photograph watermarked with OLX Logo. This fact lead the Enquiry Committee to believe that, probably, the Respondent had either hosted itself the listing bearing OLX watermark or failed to block listing and watermarked OLX logos posted by consumers. Therefore, the Enquiry Committee reached the conclusion that the Respondent had copied and reproduced descriptive listings of automobiles from the website of Complainant. Keeping in view technical nature of the evidence and the confusion in the Enquiry Report, We were constrained to constitute a Technical Committee vide its order dated 18th June 2019, to verify, if the Respondent had actually copied material from Complainant's website through automated means and posted it on its website. Further, whether the Respondent had IT system in place efficient enough to stop the consumers from posting malicious and infringing contents its website. These were the technical queries which the Commission termed as verification of evidence available on the record and so mandated the Technical Committee.




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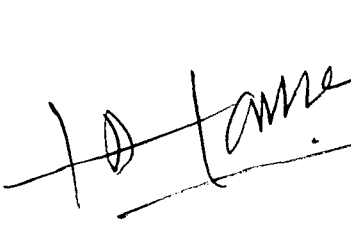
27. After analysing websites of both the parties, the Technical Committee expressed a need to visit premises of the Respondent only. The foregoing is also justified as the allegation for violation of Section 10 of the Act is on the Respondent and not on the Complainant. Accordingly, the order dated 28th August 2019, was passed wherein a commission under Section 33 was appointed and mandated to visit Respondent's premises only to verify the evidence. It is pertinent to mention here that the mandate of the Technical Committee was different from the mandate of the commission appointed under Section 33 of the Act. The Complainant's inference that the mandate of Technical Committee was same as that of the commission appointed under Section 33 of the Act is contrary to the facts. In our view, the mandate of Technical Committee was automatically superseded by assigning a fresh mandate to the newly appointed commission under Section 33 of the Act. The Technical Committee did not go less or beyond its mandate. However, a question whether the commission appointed under Section 33 of the Act went beyond its mandate, needs consideration.
28. The commission had used different techniques to address these questions for example BOTS which would have traced, if any, automated means adopted by the Respondent to copy data from Complainant's server. Further, tools such Google Analytic Examination to check whether the Respondent had copied any information from the Complainant's website. In addition to that, Dry Test, to figure out if the Respondent had not posted infringing content itself then, whether it has IT system in place efficient to stop malicious and infringing contents. The conclusion of the report submitted by the commission reveals that the Respondent had neither any automated tools in operation to copy data from Complainant's server nor reproduced any advertisement/listing originally posted on the Complainant's website. Dry Test was the only point of contention, for which the counsel for the Complainant has alleged that the commission have gone beyond its mandate. Perusal of the Report submitted by the commission reveals that Dry Test was originally performed to check whether the Respondent has in place some measures to stop consumers from posting infringing content. The Report concluded by stating that infringing material was deleted from the Respondent's website,

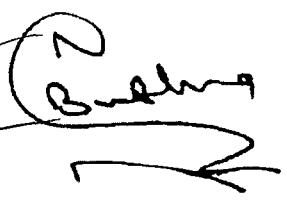


which meant the Respondent had already in place measures to stop infringement. However, performing Dry Test on Complainant's website and reaching some conclusion with regard to complainant was not mandated to the commission under Section 33 of the Act. Since, the commission's Report is merely an opinion of the experts and not a document within the meanings of Qanoon-e-Shahadat Order, 1984; therefore, we do reserves the authority to either take into account the report or not.

29. However, in all fairness, we are of the firm opinion that the Report of the Commission under Section 33 of the Act to the extent of conducting Dry Test on Complainant's is excluded from the consideration by us in the instant proceedings. Accordingly, the objection petition is partially accepted.
30. The Office of Registrar is directed to fix the date of hearing in the main matter in consultation with the representatives of the Parties, at the earliest.
31. Order accordingly.


(Dr. Muhammad Saleem)
Member


(Dr. Shahzad Ansar)
Member


(Ms. Bushra Naz Malik)
Member

ISLAMABAD THE 23rd DAY OF JANUARY 2020

