

Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ

A. RAHIM FOODS (PVT.) LIMITED and another---Appellants

Versus

K&N'S FOODS (PVT.) LIMITED and others---Respondents

Civil Appeals Nos. 444 and 445 of 2017, decided on 10th May, 2023.

(Against the judgment of the Competition Appellate Tribunal, Islamabad, dated 25.01.2017, passed in Appeal No. 03 of 2016).

(a) Constitution of Pakistan---

---Art. 185---Appellate jurisdiction of the Supreme Court---Scope---Concurrent findings of facts by courts below---Interference with---In the exercise of its appellate jurisdiction in civil cases, the Supreme Court as a third or fourth forum, as the case may be, does not interfere with the concurrent findings of the courts below on the issues of facts unless it is shown that such findings are on the face of it against the evidence available on the record of the case and is so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence---Mere possibility of forming a different view on the reappraisal of the evidence is not a sufficient ground to interfere with such findings.

Federation of Pakistan v. Ali Ihsan PLD 1967 SC 249; Abdur Rauf v. Babu Munir 1976 SCMR 436; Fateh Muhammad v. Muhammad Adil PLD 2007 SC 460; Khan Muhammad v. Muhammad Din 2010 SCMR 1351; Mohyuddin Hashmi v. Allama Iqbal Open University 2012 SCMR 1414 and Hussain Naqvi v. Zakara Chatha 2015 SCMR 1081 ref.

(b) Competition Act (XIX of 2010)---

---Ss. 31, 37 & 38 & Preamble---Constitution of Pakistan, Art. 18---Freedom of trade and business---Scope---Free and fair competition in trade and business is an intrinsic part of the fundamental right to freedom of trade and business guaranteed by Article 18 of the Constitution.

The preamble to the Competition Act, 2010 (the Act') sets out the objective of the Act and provides for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive forces. The Act aims to address the situations that tend to lessen, distort or eliminate competition, such as (i) actions constituting an abuse of market dominance, (ii) competition restricting agreements, and (iii) deceptive marketing practices. Free and fair competition is a fundamental concept in economics that involves providing a level playing field for all market participants. It is based on the principles of a free market where businesses compete on equal terms, and consumers make decisions based on price, quality, and preference. Free and fair competition is competition that is based on quality, price, and service rather than unfair practices. Predatory pricing, competitor bashing, and the abuse of monopoly-type powers, for example, are unfair practices. When competitors can compete freely on a 'level playing field,' economies are more likely to thrive. On the other hand, unfair competition is using illegal, deceptive, and fraudulent selling practices that harm consumers or other businesses to gain a competitive advantage in the market. However, free and fair competition is encouraged and enforced through legislation and regulation to promote economic efficiency, innovation, and consumer welfare. Violations of fair competition principles can lead to legal consequences, penalties, or other corrective measures. Competition is not only healthy for businesses, but pivotal for innovation. It sparks creativity and nurtures transformation and progress.

Article 18 of the Constitution provides that every citizen shall have the right to conduct any lawful trade or business and clause (b) of the proviso to the said Article states that nothing in this Article shall prevent the regulation of trade, commerce or industry in the interest of free competition. Therefore, regulation in the interest of free competition actualizes the fundamental freedom guaranteed under the Constitution to conduct lawful trade and business. As free and fair competition ensures freedom of trade, commerce and industry and therefore forms an intrinsic part of the fundamental right to freedom of trade and business guaranteed under Article 18 of the Constitution. The preambular objective of the Act is to ensure "free competition" in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from "anticompetitive behaviour". The "free competition" envisaged by the Constitution and aimed to be ensured by

the Act, therefore, means a competition through fair means, not by any means. To ensure fair competition in trade and business, Section 10 of the Act has prohibited certain marketing practices by categorising them as deceptive marketing practices, and Sections 31, 37 and 38 of the Act have empowered the Commission to take appropriate actions to prevent those practices.

(c) Competition Act (XIX of 2010)---

----S. 10(2)(d)---Deceptive marketing practices---Expression 'fraudulent use'in Section 10(2)(d) of the Competition Act, 2010---Meaning and scope stated.

The expression 'fraudulent use' in Section 10(2)(d) of the Competition Act, 2010 ('the Act')has made the intention of the defendant (user of another's trademark, firm name, or product labelling or packaging) relevant for holding him liable under the Act. However, as the Act has not defined the term 'fraudulent' and thus not given any particular meaning to it, the expression 'fraudulent use' in Section 10(2)(d) is to be understood in its ordinary sense of 'intentional and dishonest use' in contrast to a mere 'mistaken or negligent' use. Needless to mention that 'intention', being a state of mind, can rarely be proved through direct evidence, and in most cases, it is to be inferred from the surrounding facts and circumstances of the case.

The word "use" in Section 10(2)(d) of the Act includes the use of trademark, firm name, or product labelling or packaging which is confusingly similar (also referred to as deceptively similar) to that of another undertaking.

(d) Competition Act (XIX of 2010)---

----S. 10(2)(d)---Deceptive marketing practices---Criterion for determining confusing similarity in the use of another's product labeling and packaging stated.

Criterion to determine the confusing similarity is well-established in our jurisdiction in passing-off and trademark-infringement actions, which also applies in deciding disputes under Sections 10(2)(d) of the Competition Act, 2010. It is whether an unwary ordinary purchaser is likely to be confused or deceived into purchasing the article of the defendant carrying the contentious mark, name or get-up as that of the plaintiff (complainant). The criterion is thus that of such an ordinary purchaser 'who knows more or less the peculiar characteristics of the article he wants; he has in his mind's eye a general idea of the appearance of the article and he looks at the article not closely, but sufficiently to take its general appearance'. It is not that of a careful purchaser neither is it of a 'moron in a hurry'. The purchaser is unwary in the sense that he does not when he buys the article 'look carefully to see what the particular mark or name upon it is' but not that he does not even know the peculiar characteristic of the article he wants to buy. An ordinary customer is not supposed to precisely remember every detail of the mark, name or get-up of the article he intends to buy. The standard is therefore also described as that of a purchaser of average intelligence and imperfect recollection. Further, to determine the confusing or deceptive similarity from the point of view of an unwary ordinary purchaser, the leading characteristics, not the minute details, of the two marks, names or get-ups (labelling or packaging) are to be considered. As the competing marks, names or get-ups when placed side by side, may exhibit many differences yet the overall impression left by their leading characteristics on the mind of an unwary purchaser may be the same. An unwary ordinary purchaser acquainted with the one and not having the two side by side for comparison, may well be confused or deceived by the overall impression of the second, into a belief that he is buying the article which bears the same mark, name or get-up as that with which he is acquainted.

Jamia Industries v. Caltex Oil PLD 1984 SC 8; Insaf Soap v. Lever Brothers PLD 1959 Lah. 381; Ram Kumar v. Wood & Co. AIR 1941 Lah. 262; Lever v. Goodwin (1887) 36 Ch.D. 1; Pasquali Cigarette v. Diaconicolas and Capsopolus 1905 T.S. 472; Morning Star v. Express Newspapers [1979] F.S.R. 113; Lever v. Goodwin (1887) 36 Ch.D. 1; Corn Products v. Shangrila Products AIR 1960 SC 142 and Amritdhara Pharmacy v. S. D. Gupta AIR 1963 SC 449 ref.

(e) Competition Act (XIX of 2010)---

----S. 10(2)(d)---Deceptive marketing practices, action for---Pre-requisites---Registration of trademark (or for that matter, registration of firm name, or product labelling or packaging) is not necessary for the applicability of the provisions of Section 10(2)(d) of the Competition Act, 2010---Neither the common law action of passing-off requires such registration nor does the language of Section 10(2)(d) of the Act provide for any such requirement.

(f) Trade Marks Ordinance (XIX of 2001)---

---S. 46---Trademark-infringement---Passing-off, tort of---Difference between the objectives of a passing-off action and a trademark-infringement action---Passing-off action essentially aims to protect 'property in goods' on account of its reputation (goodwill), not the trademark thereof, whereas the trademark-infringement action is meant to protect 'property of trademark' as a trademark itself is a property.

Tabaq Restaurant v. Tabaq Restaurant 1987 SCMR 1090 ref.

(g) Competition Act (XIX of 2010)---

---S. 10(2)(d)---Deceptive marketing practices---Using a competitors product labelling and packaging in a deceptive marketing manner---In the present case, to determine the liability of appellant-company under Section 10(2)(d) of the Competition Act, 2010 ('the Act'), the Competition Commission ('the Commission') specifically mentioned the criterion applied, that is, whether 'the striking similar packaging and labelling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant'---Commission further observed that it would examine the appearance of the product packaging and labelling 'as a whole which may collectively include visually confusing resemblances in elements of colour scheme, layout style, design, images, labels, font usages etc., instead of each individual similarity in isolation'---By applying this criterion the Commission recorded the findings of facts and held appellant-company liable for the contravention of Section 10(2)(d) of the Act---Competition Appellate Tribunal ('the Tribunal'), affirmed the criterion applied and the findings of facts recorded by the Commission---Supreme Court observed that in determining the liability of appellant-company under Section 10(2)(d) of the Act, the criterion applied by the Commission and affirmed by the Tribunal was legally correct, and the Commission and the Tribunal had correctly decided that the facts of the case fell within the prohibition of Section 10(1) read with Section 10(2)(d) of the Act---Appeals were dismissed.

(h) Competition Act (XIX of 2010)---

---Ss. 10(2)(a) & 10(2)(d)---Deceptive marketing practices---Meaning of distribution of false or misleading information in Section 10(2)(a) of the Competition Act, 2010 stated.

Section 10(2)(a) of the Competition Act, 2010 ('the Act') has codified the common law on injurious falsehood claims. In common law, 'misrepresentation' is a common ground in both the actions for passing-off and injurious falsehood, but it is understood and applied in a different sense in each action. The general difference between misrepresentation in a passing-off action and misrepresentation in an injurious falsehood action is that in the former action, the misrepresentation is made by the defendant concerning his own goods while in the latter it is made concerning the goods of the plaintiff. In a passing-off action, the defendant by misrepresentation primarily attempts to take the undue benefit of the reputation (goodwill) of the goods of the plaintiff though he thereby also causes damage to the business of the plaintiff indirectly; but in an injurious falsehood action, the direct and express purpose of the misrepresentation is to cause damage to the reputation (goodwill) of the goods of the plaintiff though it may also impliedly or indirectly benefit the business of the defendant.

Christopher Wadlow, *The Law of Passing-Off* (5th Ed. 2016) p 16.; *White v. Mellin* [1895] A.C. 154 HL; *Kaye v. Robertson* [1991] F.S.R. 62 CA and *Schulke and Mayr v. Alkapharm* [1999] F.S.R. 161 ref.

There is nothing in the language of Section 10(2)(a) of the Act that suggests that the legislature has changed therein the meaning of 'misrepresentation' as understood in common law action for injurious falsehood. On the contrary, the use of the words 'false or misleading information' in Section 10(2)(a) shows that the legislature has intended to retain the same meaning; for in common law both the terms 'false' and 'misleading' are used in injurious falsehood actions for a representation to be taken as 'misrepresentation'. Further, the use of the phrase 'harming the business interests of another undertaking' in Section 10(2)(a) of the Act, and not in Section 10(2)(d), denotes that the said phrase has been used in the sense of causing express and direct harm to the business interests of the complainant undertaking as it is understood in an injurious falsehood action. And the non-mentioning of this phrase in Section 10(2)(d) of the Act shows that the damage caused to the business interests of the complainant undertaking is taken to be an implied and indirect effect of the fraudulent use of its

trademark, etc., as it is understood in a passing-off action, which the legislature has considered unnecessary to be expressly mentioned.

Kaye v. Robertson [1991] F.S.R. 62 CA and White v. Mellin [1895] A.C. 154 HL ref.

(i) Competition Act (XIX of 2010)---

---Ss. 12 & 43---Competition Commission of Pakistan ('the Commission')---Appeal filed by the Commission before the Supreme Court against an order passed by the Competition Appellate Tribunal ('the Tribunal')---Maintainability---Adjudicatory body (such as the Commission) deciding a matter in exercise of its quasi-judicial powers between two rival parties under a law cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum under that law or by a court of competent jurisdiction and such body thus does not have locus standi to challenge the decision of that higher forum or court.

Although the role of the Competition Commission ('the Commission') under the Competition Act, 2010 ('the Act') is primarily of a regulatory body, it is quasijudicial as well under some provisions of the Act. The provisions of clauses (a) and (d) of Section 10(2) of the Act, envisage the quasi-judicial role of the Commission while deciding upon the divergent claims and allegations of two competing undertakings. And, an adjudicatory body deciding a matter in exercise of its quasi-judicial powers between two rival parties under a law cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum under that law or by a court of competent jurisdiction and such body thus does not have locus standi to challenge the decision of that higher forum or court. The appeal filed by the Commission in the present case against the decision of the Tribunal setting aside partially its quasi-judicial order is therefore not maintainable. Appeals were dismissed.

Wafaqi Mohtasib v. SNGPL PLD 2020 SC 586 ref.

Hasan Irfan Khan, Advocate Supreme Court assisted by Saqib Asghar, Advocate for Appellant (in C.A. 445 of 2017).

Azid Nafees, Advocate Supreme Court along with Syed Rifaqat Hussian Shah, Advocate-on-Record for Appellant (in C.A. 444 of 2017).

Barrister Haris Azmat, Advocate Supreme Court and Azid Nafees, Advocate Supreme Court for Respondents (in C.A. 445 of 2017).

Hasan Irfan Khan, Advocate Supreme Court and Azid Nafees, Advocate Supreme Court for Respondents (in C.A. 444 of 2017).

Date of hearing: 10th May 2023.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---'No man is allowed to pass off his goods as the goods of another person; no manufacturer of goods is allowed to represent to the public that the goods which he is selling are the goods of a rival manufacturer.'¹ This is one of the basic principles of business morality, honesty and fair dealing that forbid deceptive marketing practices and unfair competition in commercial and economic activities. In this backdrop, the present case requires the interpretation of the phrase 'fraudulent use of another's trademark, firm name, or product labelling or packaging' as used in clause (d) of Section 10(2) of the Competition Act 2010 ("Act"). Further, clause (a) of Section 10(2)(a) of the Act, which includes 'distribution of false or misleading information that is capable of harming the business interests of another undertaking' in the prohibited deceptive marketing practices, also needs some elaboration.

2. Briefly, the facts of the case are that K&N's Foods (Pvt) Limited ("K&N's Foods") filed a complaint against A. Rahim Foods (Pvt) Limited ("Rahim Foods") with the Competition Commission of Pakistan ("Commission"), asserting involvement of Rahim Foods in deceptive marketing practices in contravention of the provisions of Section 10 of the Act. In the complaint, K&N's Foods mainly alleged that Rahim Foods was copying the K&N's Foods product labelling and packaging for the sale of its several frozen and processed meat products. It also alleged copying of its trademark term "Combo Wings" by Rahim Foods for one of the products, that is, the chicken wings. Two officers of the Commission, under the delegated powers, conducted an enquiry into the matter complained of. After collecting and considering the respective evidence of the parties, the enquiry officers submitted their report confirming the allegations and proposing the initiation of proceedings against Rahim Foods under Section 30 of the Act.

3. Upon this report of the enquiry officers, the Commission initiated proceedings against Rahim Foods under Section 30 of the Act. The Commission gave notice to Rahim Foods stating therein the gist of the enquiry officers' findings of facts that appeared to the Commission to be contraventions of the provisions of Section 10 of the Act and asking it to show cause as to why an appropriate order under Section 31(c) of the Act may not be passed against it and a penalty under Section 38 of the Act may not be imposed upon it. Rahim Foods was also provided with an opportunity to place before the Commission the facts and material in support of its contentions. Rahim Foods filed its reply to the said notice disputing the findings of the enquiry officers, together with the material in support of its contentions, and also filed an application for rejection of the enquiry report. The Commission identified the following issues for deciding the matter:

(A) Whether the Respondent's [Rahim Foods] product labelling and packaging is misleadingly similar to that of the Complainant's K&N Packing and if so, whether such confusing resemblance is deceptive and amounts to "fraudulent use of another's ..product labelling or packaging" within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;

(B) Whether the use of the term/mark 'Combo Wings' by the Respondent [Rahim Foods], in the absence of authorization from the Complainant [K&N's Foods], amounts to ""fraudulent use of another's trademark..." within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;

(C) Whether the Respondent's [Rahim Foods] product labelling and packaging and/or use of the mark 'Combo Wings' amount to the distribution of false or misleading information that is capable of harming the business interest" of the Complainant [K&N's Foods] within the meaning and scope of Section 10(2)(a) and hence a contravention of Section 10(1) of the Act.

On considering the material collected by the enquiry officers as well as the material produced by the parties before it and the relevant provisions of the Act, the Commission decided all three issues in the affirmative by its order dated 08.02.2016. In its discussion on issue (B), the Commission observed that as the trademark "Combo Wings" had not been registered at the time of lodging of the complaint by K&N's Foods, its use by Rahim Foods did not constitute a contravention of Section 10(1) read with Section 10(2)(d) of the Act, but decided this issue in affirmative with the following observations:

32. However, the use of the term "Combo Wings" by the Respondent [Rahim Foods], when seen in conjunction with the overall layout and design of the copied and duplicated K&N Packaging, demonstrates the Respondent's intention to pass off its products as those of the Complainant [K&N's Foods]. To such extent only, and as part of its overall scheme of deception, the use of the term in question falls within the scope of Section 10(2)(d) of the Act, as fraudulent use of another's product labelling....

Pursuant to its findings on the said issues, the Commission imposed the following penalties on Rahim Foods for contravention of the provisions of Section 10, under Section 38 of the Act:

- i. Pakistani Rupees 10 Million (PKR 10,000,000) for the contraven-tion of Section 10(1) read with Section 10(2)(a) of the Act;
- ii. Pakistani Rupees 10 Million (PKR 10,000,000) for the contravention of Section 10(1) read with Section 10(2)(d) of the Act;

In the exercise of its powers under Section 31(c) of the Act, the Commission further directed Rahim Foods to cease the use of the contentious copycat packaging for its frozen and processed meat products and to ensure that the products were repackaged in a manner that was distinct in its overall layout so as to be easily distinguishable from that of the K&N's Foods products.

4. Rahim Foods appealed the order of the Commission before the Competition Appellate Tribunal ("Tribunal"), under Section 42 of the Act. On reappraisal of the material available on the record of the case, the Tribunal affirmed the findings of the Commission that Rahim Foods had used the K&N's Foods product labelling and packaging in a deceptive marketing manner, and held that Section 10(2)(d) of the Act empowers the Commission to provide protection to the manufactures against practices of copycat packaging and parasitic copying. The Tribunal observed that Section 10(2)(d) confers jurisdiction on the Commission regarding fraudulent use of another's trademark, firm name, or product labelling or packaging 'whether the same is registered or not'. The Tribunal, however, held that as Rahim Foods had not distributed any false or misleading

information regarding the K&N's Foods products, the penalty imposed by the Commission upon Rahim Foods for the contravention of Section 10(2)(a) of the Act was not warranted. With these reasons, the Tribunal allowed the appeal of Rahim Foods partially and set aside the order of the Commission with regard to imposing a penalty for the contravention of Section 10(2)(a) of the Act, while maintaining the order of the Commission to the extent of imposing a penalty for the contravention of Section 10(2)(d), by its judgment dated 25.01.2017 ("impugned judgment"). Hence, Rahim Foods and the Commission filed these appeals against the impugned judgment under Section 44 of the Act.

5. We have heard the arguments of the learned counsel for the parties, examined the record of the case and read the case law cited by them.

Non-interference by Supreme Court with concurrent findings of facts

6. In the exercise of its appellate jurisdiction in civil cases, this Court as a third or fourth forum, as the case may be, does not interfere with the concurrent findings of the courts below on the issues of facts unless it is shown that such findings are on the face of it against the evidence available on the record of the case and is so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence.² A mere possibility of forming a different view on the reappraisal of the evidence is not a sufficient ground to interfere with such findings. It is underlined that the appellate jurisdiction conferred on this Court under Section 44 of the Act is also of a civil nature, hence the same rules apply. No such grave infirmity has been pointed out in the findings of the Commission on the facts of the case, which were also concurred by the Tribunal. We are therefore not inclined to interfere with the factual matrix of the case and will decide the questions of law as to the applicability of the provisions of clauses (a) and (d) of Section 10(2) of the Act to those findings of facts, which are as follows:

- i. that the K&N's Foods product packaging had been introduced in 2003 in Pakistan, prior to that of Rahim Foods, and had acquired a reputation and distinctiveness in the relevant market of frozen and processed meat products in Pakistan;
- ii. that the K&N's Foods product packaging and the trademark of one of its products "Combo Wings" were not registered when the complaint was made under the Act in 2012;
- iii. that Rahim Foods launched its products of frozen and processed meat products in 2008, with product labelling and packaging that was clearly distinguishable from that of the K&N's Foods products;
- iv. that Rahim Foods re-designed its products' packaging and copied the K&N's Foods product packaging in 2012 for marketing its products with such a confusing similarity that ordinary consumers would be deceived as to the origin of the two products at the time of exercising a choice of purchase;
- v. that Rahim Foods was aware of it that its re-designed packaging would cause deceptive confusion in the mind of the consumers; and
- vi. that by so doing Rahim Foods stood to gain an undue benefit and unfair advantage at the expense of K&N's Foods, which it would not otherwise have obtained.

The Commission and the Tribunal both have also concurred on the point that the above facts fall within the prohibition of Section 10(1) read with Section 10(2)(d) though they have differed on the applicability of Section 10(2)(a) of the Act. They have also expressed divergent views on the requirement of registration of a trademark to attract the provisions of Section 10(2)(d) for "fraudulent use of another's trademark".

7. In order to examine the legality of these views, we examine the meaning and scope of clauses (a) and (d) of Section 10(2). The provisions whereof are reproduced hereunder for ready reference:

10. Deceptive marketing practices.--(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to ---

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;

(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;

- (c) false or misleading comparison of goods in the process of advertising; or
- (d) fraudulent use of another's trademark, firm name, or product labelling or packaging.

A bare reading of the above provisions of Section 10 of the Act shows that subsection (1) of Section 10 prohibits the undertakings³ from entering into deceptive marketing practices and subsection (2) thereof has defined the acts that constitute such practices.

Constitutional underpinning

8. Before embarking upon the discussion on the meaning and scope of clauses (a) and (d) of Section 10(2) of the Act, it would be expedient to understand the legislative policy in promulgating the Act. The preamble to the Act sets out the objective of the Act and provides for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive forces. The Act aims to address the situations that tend to lessen, distort or eliminate competition, such as (i) actions constituting an abuse of market dominance, (ii) competition restricting agreements, and (iii) deceptive marketing practices. Free and Fair competition is a fundamental concept in economics that involves providing a level playing field for all market participants. It is based on the principles of a free market where businesses compete on equal terms, and consumers make decisions based on price, quality, and preference. Free and fair competition is competition that is based on quality, price, and service rather than unfair practices. Predatory pricing, competitor bashing, and the abuse of monopoly-type powers, for example, are unfair practices. When competitors can compete freely on a 'level playing field,' economies are more likely to thrive. On the other hand, unfair competition is using illegal, deceptive, and fraudulent selling practices that harm consumers or other businesses to gain a competitive advantage in the market. However, free and fair competition is encouraged and enforced through legislation and regulation to promote economic efficiency, innovation, and consumer welfare. Violations of fair competition principles can lead to legal consequences, penalties, or other corrective measures. Competition is not only healthy for businesses, but pivotal for innovation. It sparks creativity and nurtures transformation and progress.

9. Article 18 of the Constitution of Pakistan provides that every citizen shall have the right to conduct any lawful trade or business and clause (b) of the proviso to the said Article states that nothing in this Article shall prevent the regulation of trade, commerce or industry in the interest of free competition. Therefore, regulation in the interest of free competition actualizes the fundamental freedom guaranteed under the Constitution to conduct lawful trade and business. As free and fair competition ensures freedom of trade, commerce and industry and therefore forms an intrinsic part of the fundamental right to freedom of trade and business guaranteed under Article 18 of the Constitution. The preambular objective of the Act is to ensure "free competition" in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from "anti-competitive behaviour". The "free competition" envisaged by the Constitution and aimed to be ensured by the Act, therefore, means a competition through fair means, not by any means. To ensure fair competition in trade and business, Section 10 of the Act has prohibited certain marketing practices by categorising them as deceptive marketing practices, and Sections 31, 37 and 38 of the Act have empowered the Commission to take appropriate actions to prevent those practices. With this constitutional underpinning in the background, we now proceed to examine the meaning and scope of clauses (a) and (d) of Section 10(2) of the Act.

Codification of common law on injurious falsehood and passing-off actions

10. The acts of distributing false or misleading information that is capable of harming the business interests of another undertaking and fraudulent use of another's trademark, firm name, or product labelling or packaging, which constitute deceptive marketing practices as per clauses (a) and (d) of Section 10(2), were in themselves wrongful acts even before the promulgation of the Act. The common law actions of 'injurious falsehood' and 'passing-off' were the well-known remedies for these wrongs. The Act has codified the common law on these two actions in clauses (a) and (d) of Section 10(2) and entrusted the adjudication of the same to the specialised forums - the Commission and the Tribunal. The main objective of codifying common law is to create a coherent and clear system of laws that is readily accessible and understandable to the public. Codification adds consistency, accessibility, clarity, uniformity and predictability. Any such codification may or may not amend

or modify the common law. It is, therefore, useful to examine and point out whether the codification of the common law actions of 'injurious falsehood' and 'passing-off' in clauses (a) and (d) of Section 10(2) of the Act, respectively, have undergone any changes.

Changes made in common law actions of injurious falsehood and passing-off

11. Codification of common law on "injurious falsehood" action under Section 10(2)(a) and "passing-off action" under Section 10(2)(d) of the Act are concerned, we note that there are some changes in the constituent ingredients thereof. A common law action on injurious falsehood (which is also named as slander of title, slander of goods, trade libel or malicious falsehood) requires the proof of 'malice' in addition to 'misrepresentation' and 'damage' for holding the defendant liable. The provisions of Section 10(2)(a) of the Act do not mention this requirement. Conversely, the 'malice' of the defendant which is not required to be proved in a common law action for passing-off, has been made relevant in the provisions of Section 10(2)(d) of the Act by using therein the expression 'fraudulent use'. Goodwill, misrepresentation and damage are the three essential elements of a passing-off action under common law, which are usually referred to as its 'classic trinity', and the liability for passing-off under common law is not affected by the defendant's state of mind.⁴ The expression 'fraudulent use' in Section 10(2)(d) has made the intention of the defendant (user of another's trademark, firm name, or product labelling or packaging) also relevant for holding him liable under the Act. However, as the Act has not defined the term 'fraudulent' and thus not given any particular meaning to it, the expression 'fraudulent use' in Section 10(2)(d) is to be understood in its ordinary sense of 'intentional and dishonest use' in contrast to a mere 'mistaken or negligent' use. Needless to mention that 'intention', being a state of mind, can rarely be proved through direct evidence, and in most cases, it is to be inferred from the surrounding facts and circumstances of the case. It appears that in the present case the Commission, while relying upon one of its previous orders,⁵ has referred to this legal position by using the expression subjective intent and objective manifestation of intent.

Meaning of the word 'use' in Section 10(2)(d) of the Act

12. The word 'use' in the phrase of Section 10(2)(d), that is, 'fraudulent use of another's trademark, firm name, or product labelling or packaging', also requires elaboration: whether it only relates to the use of the same trademark, firm name, or product labelling or packaging, or it includes the use of the similar trademark, firm name, or product labelling or packaging and whether it covers the 'parasitic copying' of another's trademark, firm name, or product labelling or packaging. Since Section 10(2)(d) of the Act has codified the common law on passing-off action, we need to see how the use of another's trademark, firm name, or product labelling or packaging is understood and applied in such common law action and whether the language of Section 10(2)(d) suggest any change.

13. In this regard, it is notable that though the common law of passing-off action and the statutory law of infringement of registered trademarks deal in different ways with deceptive marketing practices, their basic principle is common. It is that 'a trader may not sell his goods under false pretences, either by deceptively passing them off as the goods of another trader so as to take unfair advantage of his reputation in his goods, or by using a trade sign the same, or confusingly similar to, a registered trade mark.'⁶ The misrepresentation alleged in a passing-off action is therefore also judged on the same or confusingly similar standard as it is done in a trademark-infringement action.⁷ Further, the criterion to determine the confusing similarity (also referred to as deceptively similar), which is described hereinafter, is also common in both these actions.⁸

14. As 'nobody has any right to represent his goods as the goods of somebody else',⁹ it is unlawful for a trader to pass off his goods as the goods of another by using the same or confusingly similar mark, name, or get-up. In a passing-off action, 'the point to be decided', as said by Lord Parker,¹⁰ 'is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff'. There is nothing in the language of Section 10(2)(d) of the Act that the meaning of the word use has been restricted therein to the use of the same trademark, firm name, or product labelling or packaging. We, therefore, hold that the word "use" in Section 10(2)(d) of the Act includes the use of trademark, firm name, or product labelling or packaging which is confusingly similar (also referred to as deceptively similar) to that of another undertaking.

Criterion for determining confusing similarity

15. So far as the criterion to determine the confusing similarity is concerned, the same is well-established in our jurisdiction in passing-off and trademark-infringement actions, which also applies in deciding disputes under Section 10(2)(d) of the Act. It is whether an unwary ordinary purchaser is likely to be confused or deceived into purchasing the article of the defendant carrying the contentious mark, name or get-up as that of the plaintiff (complainant).¹¹ The criterion is thus that of such an ordinary purchaser 'who knows more or less the peculiar characteristics of the article he wants; he has in his mind's eye a general idea of the appearance of the article and he looks at the article not closely, but sufficiently to take its general appearance'¹². It is not that of a careful purchaser neither is it of a 'moron in a hurry'¹³. The purchaser is unwary in the sense that he does not when he buys the article 'look carefully to see what the particular mark or name upon it is'¹⁴ but not that he does not even know the peculiar characteristic of the article he wants to buy. An ordinary customer is not supposed to precisely remember every detail of the mark, name or get-up of the article he intends to buy. The standard is therefore also described as that of a purchaser of average intelligence and imperfect recollection.¹⁵ Further, to determine the confusing or deceptive similarity from the point of view of an unwary ordinary purchaser, the leading characteristics, not the minute details, of the two marks, names or get-ups (labelling or packaging) are to be considered.¹⁶ As the competing marks, names or get-ups when placed side by side, may exhibit many differences yet the overall impression left by their leading characteristics on the mind of an unwary purchaser may be the same. An unwary ordinary purchaser acquainted with the one and not having the two side by side for comparison, may well be confused or deceived by the overall impression of the second, into a belief that he is buying the article which bears the same mark, name or get-up as that with which he is acquainted.

Registration of trademark, etc, is not necessary for Section 10(2)(d)

16. The question, whether registration of trademark (or for that matter, registration of firm name, or product labelling or packaging) is necessary for the applicability of the provisions of Section 10(2)(d) of the Act, is not difficult, as neither the common law action of passing-off requires such registration nor does the language of Section 10(2)(d) provide for any such requirement. The statutory law and common law stand together on this point. We, therefore, endorse the view of the Tribunal on this point. One must remember, in this regard, the difference between the objectives of a passing-off action and a trademark-infringement action. A passing-off action essentially aims to protect 'property in goods' on account of its reputation (goodwill), not the trademark thereof, whereas the trademark-infringement action is meant to protect 'property of trademark' as a trademark itself is a property.¹⁷

17. In the present case, to determine the liability of Rahim Foods under Section 10(2)(d) of the Act, the Commission specifically mentioned the criterion applied,¹⁸ that is, whether 'the striking similar packaging and labelling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant'. The Commission further observed¹⁹ that it would examine the appearance of the product packaging and labelling 'as a whole which may collectively include visually confusing resemblances in elements of colour scheme, layout style, design, images, labels, font usages etc., instead of each individual similarity in isolation'. By applying this criterion the Commission recorded the findings of facts and held Rahim Foods liable for the contravention of Section 10(2)(d) of the Act. The Tribunal affirmed the criterion applied and the findings of facts recorded by the Commission. Given the meaning and scope of the provisions of Section 10(2)(d) of the Act expounded above, we find that in determining the liability of Rahim Foods under Section 10(2)(d) of the Act, the criterion applied by the Commission and affirmed by the Tribunal was legally correct. And the Commission and the Tribunal have correctly decided that the facts of the case fall within the prohibition of Section 10(1) read with Section 10(2)(d) of the Act.

18. We may mention here that the terms 'parasitic copying' or 'copycat packaging', used by the Commission and the Tribunal in their orders refer to the 'confusing or deceptive similarity' of the product packaging and labelling. 'Copycat packaging', as mentioned by the Tribunal in its order quoting from an academic source,²⁰ 'is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader) ... The risk posed by copycat packaging is consumer confusion,

and consequentially, distortion of their commercial behaviour'. The use of these terms by the Commission and the Tribunal, therefore, does not amount to mentioning and applying any other standard for determining the liability of Rahim Foods under Section 10(2)(d) of the Act.

Meaning of distribution of false or misleading information in Section 10(2)(a)

19. Next, we take up the point on which the Commission and the Tribunal have differed, that is, the applicability of the provisions of clause (a) of Section 10(2) of the Act, to the facts of the present case. As per the said clause, the distribution of false or misleading information that is capable of harming the business interests of another undertaking is also a deceptive marketing practice. The Commission opined that though the distribution of false or misleading information may take place in numerous forms, the parasitic copycat packaging which causes deceptive confusion to the consumers also amounts to the distribution of misleading information capable of harming the business interest of another undertaking within the meaning of Section 10(2)(a) of the Act, in addition to being culpable under Section 10(2)(d) of the Act. The Commission observed that a contravention of Section 10(2)(d) will almost in every case lead to a consequent contravention of Section 10(2)(a) of the Act unless there exist exceptional circumstances in a particular case that warrant otherwise. On the other hand, the Tribunal held that as Rahim Foods had not distributed any false or misleading information regarding the K&N's Foods products, the contravention of Section 10(2)(a) of the Act was not made out.

20. To decide which view, whether of the Commission or of the Tribunal, is correct, we again have to look at the position of common law on the injurious falsehood claims; for Section 10(2)(a) of the Act has, as mentioned above, codified the common law on such claims. In common law, 'misrepresentation' is a common ground in both the actions for passing-off and injurious falsehood, but it is understood and applied in a different sense in each action. The general difference between misrepresentation in a passing-off action and misrepresentation in an injurious falsehood action is that in the former action, the misrepresentation is made by the defendant concerning his own goods while in the latter it is made concerning the goods of the plaintiff. In a passing-off action, the defendant by misrepresentation primarily attempts to take the undue benefit of the reputation (goodwill) of the goods of the plaintiff though he thereby also causes damage to the business of the plaintiff indirectly; but in an injurious falsehood action, the direct and express purpose of the misrepresentation is to cause damage to the reputation (goodwill) of the goods of the plaintiff though it may also impliedly or indirectly benefit the business of the defendant.²¹

21. There is nothing in the language of Section 10(2)(a) of the Act that suggests that the legislature has changed therein the meaning of 'misrepresentation' as understood in common law action for injurious falsehood. On the contrary, the use of the words 'false or misleading information' in Section 10(2)(a) shows that the legislature has intended to retain the same meaning; for in common law both the terms 'false'²² and 'misleading'²³ are used in injurious falsehood actions for a representation to be taken as 'misrepresentation'. Further, the use of the phrase 'harming the business interests of another undertaking' in Section 10(2)(a) of the Act, and not in Section 10(2)(d), denotes that the said phrase has been used in the sense of causing express and direct harm to the business interests of the complainant undertaking as it is understood in an injurious falsehood action. And the non-mentioning of this phrase in Section 10(2)(d) of the Act shows that the damage caused to the business interests of the complainant undertaking is taken to be an implied and indirect effect of the fraudulent use of its trademark, etc., as it is understood in a passing-off action, which the legislature has considered unnecessary to be expressly mentioned.

22. In the present case, Rahim Foods made 'misrepresentation' concerning its own products by fraudulent use of the K&N's Foods products labelling and packaging primarily to take advantage of the reputation (goodwill) of the products of K&N's Foods, not concerning the products of K&N's Foods to cause the express and direct harm to the business interests of K&N's Foods. Therefore, we find that the view of the Tribunal is legally correct on the non-applicability of the provisions of Section 10(2)(a) of the Act to the facts of the present case.

No locus standi of an adjudicatory body to contest for upholding its quasi-judicial decision

23. It may also be pertinent to mention here that K&N's Foods, which may have been aggrieved of the decision of the Tribunal on the point of non-applicability of the provisions of Section 10(2)(a) of the Act, has not impugned the decision of the Tribunal by preferring an appeal to this Court, and it is the Commission that has

challenged the decision of the Tribunal on that point by filing the appeal. In this regard, we may observe that though the role of the Commission under the Act is primarily of a regulatory body, it is quasi-judicial as well under some provisions of the Act. The provisions of clauses (a) and (d) of Section 10(2) of the Act,²⁴ in our view, envisage the quasi-judicial role of the Commission while deciding upon the divergent claims and allegations of two competing undertakings. And, as held by this Court in Wafaqi Mohtasib case,²⁵ an adjudicatory body deciding a matter in exercise of its quasi-judicial powers between two rival parties under a law cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum under that law or by a court of competent jurisdiction and such body thus does not have locus standi to challenge the decision of that higher forum or court. The appeal filed by the Commission in the present case against the decision of the Tribunal setting aside partially its quasi-judicial order is therefore not maintainable.

24. For the above reasons, these appeals are found meritless and are therefore dismissed.

MWA/A-22/SC Appeals dismissed.