JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 4526/2021

M/s Strawberry Sports Management (Private) Limited through its Chief Executive Officer
Vs.
Federation of Pakistan and others

PETITIONER BY:	Mr. Noman Amin Farooqi, Advocate.
RESPONDENTS BY:	Ch. Ishtiaq Mehrban, Deputy Attorney General. Mr. Adnan Haider, Advocate for respondent No.2 to 7. Mr. M. Majid Bashir, Advocate for respondent No.8. Mr. Muhammad Haider Imtiaz, Law Officer, Competition Commission of Pakistan.
DATE OF DECISION:	30.10.2024

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BABAR SATTAR, J.- The petitioner is aggrieved by inquiry report dated 05.08.2021 **("Inquiry Report")** conducted by respondent No.2 in exercise of its authority under Section 37(2) of the Competition Act, 2010 **("Act")**, letters dated 22.10.2020 and 17.12.2020 pursuant to which the concerns raised by the petitioner in relation to the Inquiry Report were addressed, and letter dated 09.12.2021 pursuant to which it was communicated by Competition Commission of Pakistan **("CCP")** to the petitioner that the impugned Inquiry Report and the impugned letters are administrative communication, and not appealable under section 41 of the Act.

2. Learned counsel for the petitioner stated that the petitioner was aggrieved by action of respondent No.8 for refusing to deal with the petitioner in terms of providing an NOC

to convene a junior hockey league event, which fell foul of Section 3(3)(h) of the Act. He submitted that an application was filed before CCP on 26.11.2019 for it to take cognizance of abuse of dominant position by respondent No.8. Respondent No.2 authorized an inquiry on 03.12.2019 and at the culmination of such inquiry, the impugned Inquiry Report was issued without associating the petitioner with the inquiry or seeking any further information from the petitioner or taking into account the grievance of the petitioner that respondent No.8 was refusing to deal with the petitioner. He submitted that the impugned Inquiry Report was devoid of reasons and had been issued in breach of Section 37(2) of the Act read together with Section 24A of the General Clauses Act, 1897.

3. Learned counsel for the petitioner further submitted that the Inquiry Report had been compiled without affording the petitioner an opportunity to be heard, and was against the rights of the petitioner guaranteed under Article 10A, as well as by the principle of natural justice. He submitted that in compiling the Inquiry Report, CCP was exercising quasi-judicial authority, and therefore, an appeal against the decision to not conduct an inquiry into the conduct of respondent No.8 and to not deal with the petitioner in breach of section 3 of the Act was an appealable order. The petitioner filed an appeal against the Inquiry Report and the impugned letters, after it had withdrawn Writ Petition No. 2635 of 2021, to pursue the remedy of appeal before CCP, as recorded in order dated 27.07.2021 passed by this Court, which was returned by CCP for not being maintainable. On merits, he submitted that the Inquiry Report did not appreciate what constituted the "relevant market", in the facts of the

instant case. Respondent No.8 enjoyed absolute monopoly in sanctioning any field hockey event. These regulatory powers of respondent No.8 had not been taken into account while compiling the Inquiry Report, as refusal of respondent No.8 to issue an NOC to the petitioner, for purposes of organizing a junior hockey league, constituted a refusal to deal for purposes of section 3 of the Act, and therefore, amounted to abuse of dominant position by respondent No.8. Learned counsel for the petitioner also relied on case law with regard to the petitioner's right to a hearing and due process, which need not be listed here as principles of natural justice and due process, as guaranteed by Article 10A of the Constitution, are well established.

4. Learned Deputy Attorney General submitted on behalf of respondent No.1, that the matter involved exercise of regulatory authority for CCP and consequently, the Federation has no role in the instant matter.

5. Learned counsel representing respondents 2 to 7, submitted that in terms of section 37 of the Act, CCP was under an obligation to form a preliminary opinion as to whether a case for breach of provisions of the Act was made out in a complaint. It was after forming such opinion the regulatory action was to be taken in terms of sections 30 and 31 of the Act. He submitted that where CCP formed an opinion that no violation was *prima facie* made out, it was under no obligation to conduct adjudicatory hearings while filing a complaint on the basis that no breach of provisions of the Act were made out. He submitted that the Inquiry Report had framed the appropriate questions and addressed the same and had concluded that respondent

No.8 was under no legal obligation to issue an NOC to the petitioner who wished to convene a junior hockey league in Pakistan. And refusal to do something that Respondent No.8 was not obliged to do by law did not constitute a refusal to deal for purposes of section 3 of the Act. He submitted that CCP had formed an opinion in view of section 37 of the Act on the basis of the Inquiry Report. The opinion that there was no basis to initiate regulatory proceedings into the affairs of respondent No.8 did not constitute an order for purposes of the Act and such opinion was therefore not appealable in terms of section 41 of the Act. He submitted that no illegality had been pointed out in the manner in which the Inquiry Report was compiled. The relevant market in the instant case did not exist as no junior hockey league had ever been organized in Pakistan and this was properly articulated in paras 21 and 22 of the Inquiry Report. He submitted that as no market for junior hockey league presently existed in Pakistan, there was no question of the petitioner being denied entry into such market due to refusal by respondent No. 8 to deal with the petitioner. The manner in which sports were organized in the country was partly a consequence of law and the manner in which Pakistan Sports Board **("PSB")** had been set up and partly a consequence of policy. It was not for CCP to delve into such policy where no anticompetitive practice had been pointed out.

6. Learned counsel for respondent No.8 submitted that PSB had been established through the Sports (Development and Control) Ordinance, 1962, pursuant to which the PSB was mandated with the role of development and control of sports throughout Pakistan. He submitted that pursuant to Pakistan

Sports Board Rules, 1981 **("PSB Rules")**, PSB had the power to grant affiliations to sports organizations and register federations. He submitted that Pakistan Hockey Federation **("PHF")** had been granted affiliation by PSB in exercise of such powers. He submitted that PHF satisfied the requirements set out by PSB, including, *inter alia*, affiliation with its respective international federations. Neither the requirements set out by PSB nor did the constitution of PHF require it to organize a junior hockey league or grant an NOC to any independent third party interested in organizing such hockey league. He submitted that PHF continues to organize and promote the sport of field hockey in accordance with requirements of the PSB as well as the National Sports Policy, 2001. He submitted that the petitioner was interested in organizing a commercial event and wished for PHF to patronize the same, which PHF was under no obligation to do. He submitted that the petition was liable to be dismissed.

7. Let us first look at the relevant statutory provisions. Section 3 of the Act defines what constitutes abuse of dominant position i.e. an abuse meant to prevent, restrict, reduce or distort competition in the relevant market and includes under Section 3(3)(h) the refusal of an undertaking with a dominant position in the market to deal with another undertaking. CPP has been established as the regulator to foster competition in the market, to prevent abuse of dominant position by any undertaking and to deal with other anticompetitive practices and prohibited agreements. Section 37 of the Act provides that on receipt of a complaint from any undertaking, if it is apparent from the facts that the contravention of provisions of Chapter II of the Act are made out, CPP may conduct an inquiry. Where

CCP forms an opinion that the facts suggest that a contravention is made out and it is in public interest to initiate regulatory action, it will proceed in accordance with provisions of Section 30 of the Act. Section 30 then provides that "*where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in Section 31 as it may deem appropriate."* CCP is required under Section 30(2) to issue a notice to the relevant undertaking against which proceedings are being initiated prior to passing any regulatory or penal order under Section 31 of the Act. Where such order in terms of Section 31 has been passed against an undertaking for abuse of dominant position or for entering into a prohibited agreement or undertaking's deceptive market practice or entering into a merger in breach of provisions of law, such order can be challenged before the Appellate Bench of the Commission in terms of Section 41 of the Act. Section 41(1) of the Act states the following:

> *Appeal to the Appellate Bench of the Commission. (1) An appeal shall lie to an Appellate Bench of the Commission in respect of an order made by any Member or authorized officer of the Commission. The person aggrieved by such order may, within thirty days of the passing of the order submit an appeal, to the Appellate Bench of the Commission.*

8. It is the petitioner's contention that the opinion formed by CCP that no contravention of Section 3 of the Act has been made out by the petitioner in its complaint filed against respondent No.8 constitutes an order for purposes of Section 41 of the Act. It has further been argued that it is not only the orders passed under Section 31 of the Act that are appealable, but also any orders passed by CCP or a member or authorized officer of CCP.

And the Inquiry Report and the decision to not initiate proceedings under Section 30 of the Act is such an order against which the remedy of appeal must lie.

9. The understanding of the petitioner with regard to the scheme of the Act appears to be misconceived. Section 37 of the Act regulates the manner in which CCP is to conduct inquiries either in its own motion or on a reference made by the Federal Government or on the basis of a complaint made by an undertaking. Where an undertaking files a complaint, CCP is to ensure that the complaint is not frivolous or vexatious or based on insufficient facts, and further that the facts as stated appear to constitute a contravention of provisions of Chapter II. Once such negative and positive requirements, as stated in Section 37(2) stand satisfied, CCP is to further determine whether initiating regulatory proceedings under Section 30 are necessary in public interest in terms of Section 30(4) of the Act. Once these requirements are met, proceedings can be initiated under Section 30 while issuing a notice and affording the undertaking in relation to whose conduct proceedings are being initiated a right to be heard before any regulatory or penal action is taken.

10. The manner in which regulatory powers are to be exercised under Section 37 came before the Supreme Court in ***Competition Commission of Pakistan Vs. Dalda Foods Limited, Karachi*** **(2023 CLD 1298)**. It was held by the Supreme Court that, "*while passing an order under Section 37 of the Act, the CCP is not required to give a detailed reasoned explanation to the undertaking as to the inquiry, but should have deliberated on the issue so as to come to the conclusion that the*

inquiry is necessary, the gist of which reasoning should be communicated to the undertaking in writing." The question before the Supreme Court in ***Dalda Foods*** was the manner in which the regulatory discretion to initiate proceedings was to be exercised and how the reasoning was to be documented. The Supreme Court while holding that CCP was under an obligation to act in a just, fair and reasonable manner and had to form a prime facie view that the facts satisfied a potential violation test in terms of Section 37 of the Act, stringent obligations to document in detail the reasoning for forming such opinion could not be imposed on CCP as that could dilute or scuttle the regulatory authority of CCP, which, in any event, was under an obligation to issue an appropriate notice to the undertaking whose conduct or actions were being scrutinized, in terms of Section 30 of the Act.

11. In the instant case the petitioner is not the undertaking whose conduct is under scrutiny. The petitioner is the complainant alleging that respondent No.8 is abusing its dominant position. The petitioner has been afforded an opportunity to make out its case by filing a complaint before CCP, and by the inquiry committee appointed by CCP affording the petitioner an opportunity to substantiate its complaint by engaging with the inquiry committee. After affording substantial opportunity to the petitioner, and after hearing the viewpoint of respondent No.8, the inquiry committee concluded that no contravention of provisions of Chapter II of the Act were made out in the facts of the case. The power of CCP to form such opinion is a subset of its regulatory power and CCP cannot be burdened with the obligation to exercise such powers in the

manner of adjudicatory power. During the stage of ascertaining the content of the complaint, CCP is forming a prima facie regulatory opinion and not exercising quasi-judicial or adjudicatory functions. The latter kicks in once proceedings in terms of section 30 are initiated, at which stage an appropriate notice is issued to the undertaking whose conduct is being scrutinized. It, therefore, cannot be argued that the opinion formed on the basis of an inquiry in terms of section 37 of the Act culminates in an order for purposes of Section 40(1) of the Act.

12. The submission by the petitioner that its rights under Article 10A have been violated is also without merit. It is not the petitioner's civil rights or liabilities that are in question in proceedings where its complaint against another undertaking is being looked into. The scope of Article 10A where right of hearing must lie was enumerated by the Supreme Court in ***Justice Khurshid Anwar Bhinder vs. Federation of Pakistan (PLD 2010 Supreme Court 483).*** After summarizing the case law on the question as has developed in Pakistan and while relying on the law from other jurisdiction, it was held by the Supreme Court 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."* Included, *inter alia,* in the circumstances where no right to hearing can be inferred are circumstances where nothing unfair can be inferred, and when an order does not deprive a person of his right or liberty and also where an authority is vested with wide discretion. It was explained that the exclusionary cases, as

explained, do not override the right of a party to due process and fairness, but explain the circumstances in which requirements of fairness do not require a prior hearing. In a matter where before taking any administrative or regulatory action, a regulator is under an obligation to form a preliminary opinion that some illegality has transpired requiring administrative or regulatory action, such opinion forming cannot be subjected to the requirements of a formal adjudicatory process. Doing so could very well result in paralyzing the regulator, which receives umpteen complaints against other parties.

13. In the instant case, the requirements of fairness were satisfied as the petitioner was given ample opportunity to make out a case by the inquiry committee that respondent No.8 had abused its dominant position. Despite such opportunities, the petitioner failed to make out such case and the reasons for forming such opinion have been documented in the Inquiry Report. It can, therefore, not be argued that CCP dealt with the petitioner unfairly or that there existed, in terms of section 37 of the Act, an independent right to an adjudicatory hearing before CCP decided to file the complaint.

14. The other contention of the petitioner that the opinion formed, in terms of section 37 of the Act, constituted an order for purposes of section 41 is also without merit. The plain language of section 37 of the Act does not require CCP to pass an order before concluding that complaint does not necessitate regulatory proceedings in terms of Section 30 of the Act. To argue otherwise would amount to reading into section 37

something that the legislature has not provided, against settled principles of statutory interpretation (see for example ***Federation of Pakistan Vs. Durrani Ceramics (2014 PTD 2016), Jamat-i-Islami Pakistan Vs. Federation of Pakistan (PLD 2000 SC 111), Standard Printing Press Vs. Sind Employees' Social Security Institution (1988 SCMR 91)*** and ***M/s Telenor Pakistan (Pvt.) Ltd. Vs. Federation of Pakistan (2022 PTD 1097)***).

15. It is also settled law that the right of appeal cannot be implied and has to be provided by statute (see for example ***I.C.I. Pakistan Ltd. Vs. Salahuddin and others (1991 SCMR 15)***, ***Pakistan Vs. Abdul Hayee Khan (PLD 1995 SC 418)***, ***Multan Electric Power Company Ltd. Vs. Muhammad Ashiq (PLD 2006 SC 328)*** and ***State Vs. Obaid Khan (Deceased) (PLD 2024 SC 810)***). Section 41 of the Act does not provide an appeal against an opinion formed by CCP that a complaint filed by an undertaking and the facts alleged therein do not constitute the violation of provisions of chapter II of the Act, making such decision appealable.

16. It is the petitioner's case that PHF, as the organizer and promoter of the sport of hockey recognized by PSB and affiliated with the International Hockey Federation and regional hockey federations is the dominant player in the market for field hockey. And its refusal to grant an NOC to the petitioner to convene a junior hockey league, constitutes a refusal to deal with the petitioner, and amounts to abuse of dominant position within the meaning of section 3 of the Act. CCP in the Inquiry Report has concluded that there is no existing market for junior hockey

league in Pakistan, as no such league has ever been organized. CCP has also concluded that neither the constitution of PHF nor any other statutory requirement obliges PHF to grant NOCs to independent third parties who wish to organize events related to field hockey in Pakistan. It can therefore neither be concluded that PHF is occupying a dominant position in the market for junior hockey league, nor can it be inferred that PHF is abusing its position by refusing to issue an NOC to the petitioner, and consequently patronize it in convening junior hockey league as a commercial sporting event. The learned counsel for the petitioner has failed to point out how such opinion suffers from illegality, irrationality or procedural impropriety that requires intervention by this Court in exercise of its extraordinary constitutional powers. This Court is also cognizant that as the statutory regulator, CCP has the expertise to form opinions within the domain prescribed by the legislature in terms of provisions of the Act and the exercise of such regulatory power, where it does not infringe on the fundamental rights of the citizens, ought not be subjected to searching scrutiny by this Court.

17. The petitioner has failed to make out a case that the impugned Inquiry Report and the impugned letters suffer from any illegality. The petition is, therefore, **dismissed** for being without merit.

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed.