

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.2845 OF 2015

Lotus Herbals Pvt.Ltd.

... Petitioners

v/s

Union of India and another

... Respondents

Mr Virag Tulzapurkar, Senior Counsel with Mr Sunil Zalmi, Mr Abhishek Bharati and Ms Aarohee Gursale i/b M/s MZD Lgal Consultancy for Petitioners.

Mr Y.R. Mishra with Mr D.B. Dube for Respondent No.1.

Mr N.H. Seervi with Mr Subir Kumar for Respondent No.2.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.**

DATE : 7TH OCTOBER 2015

P.C. :-

1. By this Petition, the Petitioners who are Private Limited Company and manufacturing, exporting, importing, trading and dealing in all kinds of herbal products, medicines, drugs, cosmetics, creams, shampoos, facial powders and other beauty products made from herbal products, have approached this Court challenging that the Respondent No.1 – Union of India, through the Department of

Consumer Affairs, Food and Public Distribution, has abdicated its functions and have vested them in Respondent No.2 – Council.

2. Mr Tulzapurkar, learned Senior Counsel appearing on behalf of the Petitioners would submit that Annexure 'R' to the Petition is a decision and which has been taken by the Respondent No.2 relying upon a Memorandum of Understanding (for short, MOU). That MOU, copy of which is at pages 267 to 277 of the Petition would indicate as to how the Respondent No.1 has empowered the Respondent No.2 – Council, which is virtually a private entity, to take binding decisions after adjudication into complaints against advertisements which are allegedly misleading. Mr Tulzapurkar therefore submits that this outsourcing of quasi-judicial functions by the Department of Consumer Affairs and a decision reached by the Council pursuant to such outsourcing and empowerment on the strength of MOU is stated to be binding on the Petitioners. In terms of the settled principles of law, the Respondent No.1 has no such authority and to delegate any of the adjudicatory functions.

3. According to Mr Tulzapurkar, in the first place, the Department of Consumer Affairs has no power to take cognizance of any complaints against advertisements on cable television networks. The Cable Television Networks (Regulation) Act 1995 (for short, the said Act) may recognize a Council such as Respondent No.2 and take cognizance of complaints against advertisements carried on cable television network. There is a specific authority under the the said Act and it alone can file a complaint for taking necessary action. Assuming without admitting that the Respondent No.1 has any such powers, those cannot be delegated. In the absence of clear powers and on some presumptions which are also not sustainable in law, delegation in terms of this MOU will not enable the Respondent No.2 to interfere either with the rights of the Petitioners to carry on its business nor will it directly or indirectly be able to interfere with the rights relating to the advertisement of products and goods through cable television network. It is this violation and serious apprehension that enables the Petitioners to approach this Court.

4. On the earlier occasion when this Petition was moved,

Mr Mishra accepted notice on behalf of the Respondent No.1. He submitted that he would take instructions. Since the Petitioners apprehend that the advertisement would not be carried from today by the cable television network that we have placed the matter urgently. It was allowed to be mentioned and papers were directed to be produced. However, Mr Mishra pleads no instructions.

5. As far as Respondent No.2 is concerned, Mr Seervai, learned Senior Counsel submitted that it is incorrect to assume that the fundamental rights guaranteed by the Constitution of India to any citizen have been interfered with or any adjudicatory powers or functions are delegated to the Respondent No.2 by the Competent Ministries or Departments in the Union of India. The Respondent No.2 is a Council and which has formulated certain Code and prescribed a standard for the advertisements and the contents thereof which are carried on the cable television network. It is incorrect to assume that only those members of the Respondent No.2 have submitted to the powers of this Respondent No.2. There are numerous complaints against non-members of the Council and

which also have been taken note of by this Council but these so called non-members have never complained about assumption of power. Once the Council does not perform any adjudicatory function nor takes any binding decision but makes recommendations to the concerned Departments of the Union of India, still it follows a procedure which is imminently fair, just and reasonable. Even when complaints are received against parties like Petitioners, before making any recommendation, the Council gives a notice to the affected party and calls for a reply. In the present case, the Petitioners have not been able to satisfy the Council that its advertisement and the contents thereof meets the required standards and is not misleading. The Petitioners never complained of any unfair treatment or lack of hearing. Once the nature of the functions of the Council are understood, then we do not have to interfere in our writ jurisdiction is the submission of Mr Seervai.

6. We have noted the rival contentions and with the assistance of the learned Senior Counsel, perused both the Cable Television Networks (Regulation) Act 1995 and the Consumer

Protection Act 1986. In all fairness, Mr Tulzapurkar invites our attention to the definition of the term 'Authorised Officer' appearing in section 2(a) of the Cable Television Networks (Regulation) Act 1995. We have already been shown the definition of the term 'Cable Television Network'. Our attention has also been invited to the Rules that are framed i.e. the Cable Television Networks Rules 1994. There is a Programme Code enumerated in Rule 6 and there is Advertising Code formulated vide Rule 7. No person shall transmit or retransmit through cable television network any advertisement unless such advertisement is in conformity with the prescribed Advertisement Code. Pertinently, the Petitioners are manufacturers of the product styled as skin cream which allegedly guarantees that the effects of ageing will be reduced by applying the cream. The person will have a young and firmer or fairer skin though he may have aged. We have no doubt that once the standards or the Code of self-regulation adopted by the Advertising Standards Council of India – Respondent No.2 regarding advertisements for public exhibition is allegedly violated, then in terms of the recommendations and on receipt thereof, the Competent Authority

under the Cable Television Networks (Regulation) Act 1995 and the Cable Television Networks Rules 1994 will take necessary action and in accordance with law. We have no doubt that in the event the entire process undertaken by the Council and its recommendations are being relied upon and adversely to the interest of any advertiser, broadcaster and manufacturer like the Petitioners, it would be open to urge that the complaint be adjudicated in accordance with law independent of such recommendations and not bound by the exercise of the recommendatory power of the Council. Presently, we do not see any such apprehension given the nature of the functions discharged and performed by the Council.

7. Equally, in the event, the Ministry or Department of Consumer Affairs proceeds on the basis of the recommendation of the Respondent No.2 and terms the same as a complaint with regard to any unfair trade practice or restrictive trade practice adopted by the trader or service provider or a complaint with regard to the defect or deficiency in the goods or specifically about its quality, then, it has to take the requisite steps in terms of Consumer

Protection Act 1986. The terms 'unfair trade practice' or 'restrictive trade practice' are defined in the said Act. Equally, the term 'complaint' and the terms 'service', 'consumer dispute' and 'deficiency' so also 'manufacturer' have been defined together with the term 'trader'. In such circumstances and even if the Central Government itself can take note of these recommendations and initiate the legal process within the meaning of this Act, then at that stage also, the Petitioners being affected would be in a position to meet all the allegations against them including those contained in the adverse recommendations of the Council.

8. We have no doubt in our mind that all actions would be initiated and taken in accordance with law. Once the nature of powers and in terms of the MOU are correctly and properly understood, then, this Writ Petition need not be entertained. It is accordingly disposed off.

(B.P. COLABAWALLA, J.)

(S.C.DHARMADHIKARI J.)