

Central Consumer Protection Authority
Room No. 545, Krishi Bhawan, New Delhi - 110001

Case No: J-25/1/2021-CPU Section

In the matter of: Case against Hindustan Unilever Limited regarding Misleading Advertisement of Horlicks (Drink Powder).

CORAM:

Smt. Nidhi Khare, Chief Commissioner
Shri. Anupam Mishra, Commissioner

Appearance on behalf of Hindustan Unilever Limited.:

Ms Shalini Sinha (General Manager, Legal), Ms Suchana Mukherjee (Legal Team), and Adv. Indrajit Sinha.

Date: 02.08.2024

ORDER

Central Consumer Protection Authority (hereinafter referred to as CCPA) suo-moto observed that Hindustan Unilever Limited (hereinafter referred to as opposite party) was publishing misleading advertisements of the Horlicks (Drink Powder) in newspapers and also broadcasting on Television, Facebook, YouTube, and on its website (<https://www.horlicks.in> or <https://www.horlicks.in/in/en//9-in-10-micronutrient-deficiency-study.html>).

2. The Interim Order dated 28th May 2024 was issued to the opposite party with the following directions:

- A. To bring in the independent external expert who initially conducted the clinical trial at a premier Indian institute under the Indian Council of Medical Research, the National Institute of Nutrition, Hyderabad in the next date of hearing.
- B. To substantiate on the following w.r.t. Clinical Trial conducted by the National Institute of Nutrition, Hyderabad:-
 - i. The design and the parameters along with the protocol of the study.

- ii. The selection of the sample size, the age of the children and the sex ratio.
- iii. The formulation of the Horlicks which was used in the clinical trial along with the formulation of the placebo used.
- iv. Whether the clinical trial was recurring? The Duration of the trial conducted again? Whether the same results are found each time?
- v. With respect to the claims:
 - a. Taller: The formula for calculating the height velocity, how the mean height is calculated.
 - b. Stronger: parameter and formula of Whole Body Bone Area and Bone Mineral Density. Also the effect of BMI on Whole Body Bone Area.
 - c. Sharper: Selection of Knox Cube Test

3. The opposite party by mail dated 28th May 2024 submitted an application regarding the jurisdiction of the CCPA and maintainability of the present proceedings, and states that:

- i. Proceedings before the Food Safety Appellate Tribunal, Ranchi, Jharkhand under the Food Safety and Standards Act, 2006 ("FSS Act, 2006") in which the exact same issue is in question. The basis of the proceedings is a report of the Food Analyst, State Food and Drug Laboratory, Namkum, Ranchi wherein it has been alleged that the sample of Horlicks Original in question does not conform to the prescribed norms meant for packaging and labelling of foods and restriction of advertisement within the scope of sections 23 & 24 and 26 & 27 of the FSS Act, 2006 read with regulation 2.3.1 (5) of the Food Safety and Standard (Packaging and Labelling) Regulations, 2011.
- ii. Adjudicating Authority under the FSS Act, 2006 has erroneously passed an order imposing penalty on the Applicant by an Order dated 30.05.2017, which at present is under challenge by way of an Appeal before the Learned Court of Additional Judicial Commissioner III, Ranchi who has been notified in terms of Section 70 of the FSS Act, 2006 as the Food Safety Appellate Tribunal to hear appeals from the decisions of the Adjudicating Officer under Section 68 of the FSS Act, 2006.

- iii. Once the authorities under the FSS Act, 2006 have taken an action against the Applicant for alleged misleading or deceiving advertisement, the learned CCPA would not have the jurisdiction under the Consumer Protection Act, 2019 to proceed with respect to the same advertisement, alleging that the same is misleading. Even otherwise, the principles of res sub judice would apply with equal force to the facts and circumstances of the present case.
- iv. And made the Prayer that CCPA may pass an order holding that the initiation and continuation of the instant proceedings is without jurisdiction and the same is liable to be terminated forthwith and the show cause notice dated 13 January 2021 to be withdrawn.

4. Another opportunity for a personal hearing was scheduled on 30th May 2024, to which the opposite party by mail dated 30.06.2024 requested to postpone the hearing. CCPA by accepting their request postponed the hearing on 11th June 2024 at 3:00 PM.

5. Ms Shalini Sinha (General Manager, Legal), Ms Suchana Mukherjee (Legal Team), and Adv. Indrajit Sinha appeared in the hearing on 11th June 2024 on behalf of the opposite party. During the hearing, CCPA asked the opposite party regarding the presentation by the external expert to which the opposite party made the following oral submissions:

- i. By directing towards their maintainability application, the opposite party requested the CCPA to hear the application before proceeding in the case's merits.
- ii. Reiterated the status of the case pending against the opposite party before the Food Safety Appellate Tribunal, Ranchi, Jharkhand. States that there is an interim stay granted by the appellate tribunal which continues and the matter is coming up for hearing on 15th June 2024.
- iii. Requested CCPA to adjourn the matter for a reasonable time of 4-6 weeks on the very reason to avoid conflicting orders as the subject matter of Misleading advertisement (Taller, Stronger and Sharper) is the same in both proceedings before Food Safety Appellate Tribunal, Ranchi, Jharkhand and CCPA.
- iv. Further states that, once the matter is covered by the Food Safety and Standards Act 2006 given the overriding nature of the provisions of that Food

Safety and Standards Act 2006 and in light of declaration under Section 2 or Section 89 of the said Act the jurisdiction of any other authority on the said matter is barred.

6. Section 89 of the Food Safety and Standards Act 2006 states that—

“Overriding effect of this Act over all other food related laws.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

7. Section 18 of the Consumer Protection Act 2019 states—

“Powers and functions of Central Authority.—(1) The Central Authority shall—

(a) protect, promote and enforce the rights of consumers as a class, and prevent violation of consumers rights under this Act;

(b) prevent unfair trade practices and ensure that no person engages himself in unfair trade practices;

(c) ensure that no false or misleading advertisement is made of any goods or services which contravenes the provisions of this Act or the rules or regulations made thereunder;

(d) ensure that no person takes part in the publication of any advertisement which is false or misleading.”

8. From the above, CCPA observes that Section 89 of the Food Safety and Standards Act 2006 does not bar the action taken by the CCPA on the misleading advertisement of the Horlicks (Drink Powder) making claims of Taller, Stronger and Sharper. Action taken by the CCPA is as per the Consumer Protection Act 2019 to protect the interest of the consumers as a class from the impact of said alleged misleading advertisement which is not similar to the cause of action of the case against the opposite party pending before the Food Safety Appellate Tribunal, Ranchi, Jharkhand.

9. Further it is be noted that the issue of maintainability must have been raised by the opposite party at the first hearing before the CCPA not at such a later stage.

Further CCPA has passed an Interim order dated 28th May 2024 as per the oral submissions made by the opposite party in which they assured to present an external expert before the CCPA to substantiate their claims in the next date of hearing, the opposite party did not complied with the said interim order.

10. On the basis of the principle of natural justice, CCPA by accepting the request of the opposite party adjourns the hearing in the matter for five weeks from 11th June 2024. Further, CCPA will seek the comments of the Indian Council for Medical Research (ICMR) regarding the results of the clinical trial conducted at the National Institute of Nutrition, Hyderabad a premier Indian institute under the Indian Council of Medical Research.

11. The next date of the hearing will be informed accordingly.



Nidhi Khare
Chief Commissioner



Anupam Mishra
Commissioner

