

[Islamabad]

*Before Ashfaq Ahmed Khan, Director Enforcement*

Order in the matter of

**M/s Hashmi Can Company Limited**

Number and date of notice:	No. EMD/233/601/2002-5148
Dated	February 18, 2005
Date of Hearing:	July 28, 2005
Present:	<b><i>On Behalf of the Company:</i></b> Mr. Nadeem Akhtar, Advocate
Date	August 10, 2005

### **Order**

This Order shall dispose of the proceedings initiated against M/s Hashmi Can Company Limited (hereinafter referred to as “the Company”) under the provisions of Section 472 of the Companies Ordinance, 1984 (hereinafter referred to as “the Ordinance”).

2. The facts leading to this case briefly stated are that examination of the annual accounts of the Company for the year ended June 30, 2002 revealed that an amount of Rs 11.890 million was payable by the Company to Hashmi Can Provident Fund (hereinafter referred to as “the Fund”). This amount was not paid by the Company to the Fund in accordance with the provisions of Section 227 of the Ordinance. The trustees of the Fund were also required to invest all monies of the Fund in manner prescribed under Sub-section (2) of Section 227 of the Ordinance. However, they passed a resolution allowing the Company to withhold contributions and to pay 16% mark-up on the withheld amount. The trustees also prematurely encashed Defence Saving Certificates of the Fund and advanced this amount to the Company to make payments to its members.

3. In view of the above, penal proceedings were initiated against the directors and trustees of the Fund under Section 229 of the Ordinance and the matter was disposed off vide Order dated January 29, 2003 of the Executive Director (EMD) in which, he besides imposing penalties and other directions, directed the Company, in terms of Section 473 to pay the whole outstanding liability alongwith mark-up in twelve equal monthly installments. The Company was also directed to pay monthly contribution in future within the time prescribed under Sub-section (3) of Section 227 of the Ordinance. The Company filed an appeal before the Appellate Bench of the Commission (hereinafter called the "Bench") against the Order of Executive Director (EMD). The Bench passed the Order on April 09, 2003 in which, besides other, Enforcement Department was asked to direct the Company under Sub-section (1) of Section 472 of the Ordinance to make good the default by depositing total outstanding amount with the Fund within 30 days from the date of the notice. The Company went into appeal before Honourable Sindh High Court against the aforementioned Orders of Appellate Bench of the Commission. The appeals were later rejected by the Court.

4. Accordingly, a notice in terms of the provisions of Section 472 of the Ordinance was served on the Company on February 18, 2005 as under:-

- i) Make good the default by depositing total amount outstanding till date with 16% mark up per annum to the Fund, within 30 days of the date of this notice.
- ii) Submit to the Commission a certificate by the auditors of the Fund for the loss incurred by the Provident Fund due to premature encashment of Defence Saving Certificates, within 15 days of the date of this notice. Detailed working should be attached with the said certificate.

5. The reply to the notice was received from the legal advisor of the Company, Mr. Nadeem Akhtar of M/s Akhtar Mahmud & Company vide his letter dated March 05, 2005 wherein it was submitted that:

- The notice containing the directions has been issued to his clients without issuing them a show cause notice first.
- Untill 1998 the contributions were paid regularly to the Fund. After that period, Company was unable to pay the monthly contributions to the Fund due to paucity of funds due to several financial crises. The trustees, therefore, resolved in their meeting held on 26.01.1999 to charge markup @ 16% from the Company on unpaid contributions due to the Fund till such contributions were received. Moreover, they also resolved that Defense Saving Certificates should be en-cashed as and when required in order to meet the urgent requirements of the Fund for payment to its members. It was also stated that under Trust

Deed, the decision of a majority of any meeting of the Trustees, shall be final and binding on the Trustees.

- This arrangement between the Company and the Fund was within the knowledge of the Commission as this arrangement was evident from the balance sheet filed with the Commission since 1999 to 2002 and no objection was ever raised against his clients. The action was initiated upon a malafide complaint by some members of the previous management.
- The present management took over on November 02, 2001 and it inherited the liabilities towards the Fund which were piled up due to the actions of the previous management. The present management is doing its best to pay the contributions to the Fund as and when they become due. Due to financial constraints, the Company is not in a position to pay back the entire liability in one go. However a repayment plan is proposed for the discharge of entire liability by the end of financial year 2010. A detailed plan was attached with the reply in this regard.
- With regard to loss suffered by the Fund due to premature encashment of Defence Saving Certificates, the auditor's certificate from Rao and Company Chartered Accountants has been provided, ascertaining the loss at Rs. 580,000.

6. The reply of the legal advisor has been found irrelevant and un-satisfactory. As regard submission of the Learned Council that his client was not given a show cause notice, it is stated that Company was issued a notice in terms of Sub-section (1) of Section 472 for violation of Section 227 of the Ordinance as per the direction of the Appellate Bench. All the remaining submissions were earlier presented by him before the Bench which had already been considered by the Bench in their Order dated April 09, 2003. At this stage these arguments do not appear relevant. Moreover, the current notice under Section 472 has been issued to the Company to make good the default and not to the management to show reason of default which has already been established in the previous Orders of the Commission. The Company instead of complying with the direction to deposit the outstanding amount within one month of the notice, gave through its Consultants a monthly repayment plan spreading over more than five years. This appears to be an extremely unnecessarily long time for removal of a default and is against the interest of the employees of the Company. It appears that the management of the Company do not appear to be serious in payment of Fund's dues as liability has been piling up since the first Order of Commission in January 2003. The liability has now increased from Rs. 11.890 million to Rs. 14.527 million as on June 30, 2004. It has also been noticed that this

repayment schedule was earlier provided to the Executive Director in January 2003 at the time of passing of original Order by him which was not agreed by him at the time of passing of his Order.

7. The financial statements of the Company since passing of initial Order of Executive Director (EMD), have been examined in order to view its ability to payback the liability towards Provident Fund. Since June 30, 2002 Company's financial position has improved as the EPS has turned positive in 2003 after remaining negative for the past four years. However, EPS is still very low as it stood at Rs. 0.20 per share as on June 30, 2004 which is not very promising. However, the sales of the Company have increased by 30% since 2002. Cash balance has increased from Rs. 601,457 in the year 2002 to Rs. 2,386,910 in the year 2004. During past two years directors of the Company have provided interest free loans of Rs. 9,253,163 to the Company. Therefore, Company is now in a better financial position to arrange funds to payback the liability as compared to two years back. Moreover, it has also been observed that liability towards the Fund, which should have decreased or atleast remained static during this time, has increased from 11.890 in 2002 to 14.527 in 2004. During the financial year 2004, the employees' and Company's contribution for Fund stood at Rs. 935,056. Out of this amount, the Company has paid Rs. 652,159 to the Fund and rest of the amount has been transferred to long term liabilities.

8. In view of situation discussed above it was felt that although the financial position of the Company is improving, still it may not be able to repay the liability of Rs. 14.527 million towards the Fund in a period as short as thirty days. On the other hand allowing a five years repayment period is too long and also not justified as the amount is not so huge that its repayment should take such a long time. In the situation, it is felt that providing a reasonable time period to the Company for payment of outstanding liability, may prove better for the shareholders as well as employees of the Company, which has started showing capacity for improved future performance. In order to discuss a repayment plan which does not involve unnecessary delay and is also practical for the Company; an opportunity of hearing was granted to the Company on July 27, 2005. On the date of hearing Mr. Nadeem Akhtar appeared on behalf of the Company and reiterated that the Company is ready to repay the total outstanding amount to the Fund in five years time keeping in view the financial and liquidity position of the Company. It was further stated that the management has been trying very hard to improve the performance of the Company despite various financial and legal bottlenecks. However, in current financial scenario Company is not able to pay its liability in lump sum through internally generated funds. During the course of hearing he discussed the matter with the management of the Company over telephone and offered a revised payment plan, requesting that time may be granted until 30.06.2007 during which Company will payback the full amount to the Fund. He however requested that he may be allowed to consult his client to offer a final repayment plan. After consulting his client,

he vide his letter dated July 30, 2005, again requested to allow a time period uptill 30-06-2007 without the restriction of installments, during which time management will arrange payment of the whole amount through any of the following sources:

- His clients shall try to persuade some financial institutions and there is a possibility that they may succeed in getting the desired loan facility.
- His clients will try to sell 0.5 acres out of 3.00 acres of Company's land on which there is a stay Order of Sindh High Court. His clients will file an application in the Court for vacation of stay in order to sell the said land and to make lump sum payment.

From the above it may be seen that he even did not agree to an un-conditional repayment schedule within a period of 24 months.

9. Before proceeding further, it is necessary to advert to the provision of law, under which the notice to undo the irregularity was given. Section 472 of the Ordinance, to the extent relevant, is reproduced as follows:

***472. Enforcing compliance with provisions of Ordinance***

- (1) If a company, having made default in complying with any provision of this Ordinance or committed any other irregularity fails to make good the default or undo the irregularity, as the case may be, within thirty days after the service of a notice on the company requiring it to do so, the Authority may, of its own motion or on an application made to it by any member or creditor of the company or a reference by the registrar and, in the case of a listed company, besides other persons as aforesaid, on a reference by the stock exchange, make an order directing the company and any officer thereof, as the case may be, to make good the default or undo the irregularity or otherwise make amends, as the circumstances may require, within such time as may be specified in the order.
- (2) Any such order may provide that all costs of and incidental to the application or reference shall be borne by the company or by any officer of the company responsible for the default.

10. Considering the circumstances and the liquidity position of the Company I am of the view that it would be in the best interest of the workers and its shareholders that the Company continues to earn profit and as well as liquidate its liability towards employees provident fund. In view of the commitments of the Company towards improving its performance, it appears that the Company will not be in a position to pay the entire outstanding liability in one go in thirty days without adversely effecting its performance. At the same time the repayment plan submitted by the Company which

spreads over a period of 5 years or over two years with certain conditions is not justified. Therefore, in the circumstances of the case, I proceed to order as follows:

- i. Company will pay the total outstanding liability of the provident fund standing as at June 30 2004 within 18 months in six quarterly installments starting from October 30, 2005 and ending on January 31, 2007;
- ii. Each installment shall not be less than 15% of the total liability as at June 30, 2004;
- iii. A report shall be submitted by the Company to the Commission on the 7th of the month following the close of the relevant quarter along with the proof of payment of the installment;
- iv. The Company shall submit auditors' certificate by February 28, 2007, verifying the repayment of the entire outstanding amount including mark-up thereon to the fund.

11. With regard to loss suffered by the Fund due to premature encashment of Defence Saving Certificates by the trustees, a separate Order will be passed after providing opportunity of hearing to the defaulters.

12. In the end it may be emphasized that non-compliance of the above directive, the Company shall be liable to action under Section 495 of the Ordinance, which provides that where any directive is given or order is issued by the Court, the officer, the Commission, the registrar or the Federal Government under any provision of this Ordinance, non-compliance thereof within the period specified in such direction or order shall render every officer of the company or other person responsible for non-compliance thereof punishable, in addition to any other liability, with fine not exceeding fifty thousand rupees and, in the case of a continuing non-compliance, to a further fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues. If non-compliance or failure continues after conviction under sub-section (1), the officer or other person who is a party to such non-compliance or failure shall be liable to punishment with imprisonment which may extend to six months and fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues, and shall further cease to hold office in the company and be disqualified from holding any office in any company for a period of five years.

**Ashfaq Ahmed Khan**  
Director (Enforcement)

**Announced:**  
August 10, 2005  
ISLAMABAD