

**Before Mr. Abdul Rehman Qureshi, Commissioner (Company Law),
Securities and Exchange Commission of Pakistan**

-.-.-

In the matter of M/s. Gammon Pakistan Limited

Present:

- i) Dr. Khalid Ranjha
Sr. Advocate alongwith
- ii) Mian Muhammad Arif
Managing Director, Gammon Pakistan
Ltd.
- iii) Mr. Muhammad Salahuddin,
Director/Company Secretary
- iv) Mr. Amjad Hussain Malik, Director

Date of final hearing May 11, 2004

ORDER

This order shall dispose of the proceedings initiated under section 186 read with section 476 of the Companies Ordinance, 1984 (the "Ordinance") against the directors of M/s. Gammon Pakistan Limited (the "company").

2. The brief facts of the case are that the election of directors of the company was held in its Annual General Meeting (AGM) held on December 31, 2001 for a further period of three years commencing from July 14, 2002. The notice of AGM containing an agenda item for the election of directors of the company was published in the newspapers on December 8, 2001. The Commission received a complaint from one of the shareholders of the company that the company and its management was denying the transfer of 288,241 shares to the legal heirs of Late General (Retd) Habib Ullah Khan Khattak due to which the said legal heirs were being denied their right to vote in the election of directors. It was further stated that the company was holding its election much earlier than the due date. The Commission on the basis of this complaint, issued a notice under section 472 of the Ordinance calling upon the Chief Executive not to proceed in clear violation of the statutory provisions which did not provide holding of election at an earlier date because such an action can deprive the shareholders of their right to exercise their voting powers at the relevant time. The

company did not pay any heed to the advice of the Commission and proceeded to hold election. The company, however, vide letter dated December 27, 2001 was advised to proceed strictly in accordance with the provisions of sections 177 & 178 of the Ordinance in regard to the election of the directors. The election of directors was held on December 31, 2001 while the so called disputed shares were subsequently transferred in the names of the legal heirs of the Late General (Retd) Habib Ullah Khattak on February 27, 2003. After transfer of these shares some of the shareholders belonging to the family of Late General (Retd.) Habib Ullah Khattak again made a complaint to the Commission alleging that during election of directors of the company, the company's management, despite protest, denied voting rights to their group and out of nine directors elected not a single director from their group was taken on the Board despite the fact that they owned approximately 14% shares of the company. It was also stated that the following persons belonging to their group had filed notices to contest election of directors scheduled for December 31, 2001:-

- i) Lt. General (Retd) Ali Kuli Khan Khattak
- ii) Mr. Ahmed Kuli Khan Khattak
- iii) Mr. K.V. Rehman
- iv) Mr. Jamil Ahmed Shah

But the notices from these persons were rejected by the company on frivolous grounds that these were filed under sub-section (1) of section 184 of the Ordinance instead of sub-section (3) of section 178 of the Ordinance. The matter was examined and it was observed that the grounds for rejection of notices for the election of directors by the management were not solid. In fact they were kept out of the field purely on technical grounds such as not mentioning the relevant provision of the Ordinance. A show cause notice under section 186 read with section 476 of the Ordinance was, therefore, issued to all the directors including the Secretary of the company, on account of the following:-

- (i) Rejection of nomination papers of Lt. Gen. (Retd.) Ali Kuli Khan Khattak, Mr. Ahmed Kuli Khan Khattak, Mr. K.V. Rehman and Mr. Jamil Ahmed Shah on invalid grounds.

- (ii) Convening of election of directors in the annual general meeting held on December 31, 2001 by show of hands in contravention of the provisions of sub-section (5) of the Section 178 of the Ordinance.

3. In response to the show cause notice, all the directors, except Mr. Amjad Hussain Malik, vide their letter dated January 01, 2004 stated that they propose to submit a comprehensive reply to the show cause notice. It was further submitted that in case you reckon that further explanation is needed, they would certainly like to avail the opportunity of being heard through a counsel. They, however, submitted a detailed reply to the show cause notice vide letter dated January 6, 2004. In their written reply they stated that the show cause notice is the subject matter of a previous show cause notice dated February 28, 2003 to which an exhaustive and complete reply had already been submitted through their counsel Dr. Khalid Ranjha, Advocate. It was also stated that electoral process is defined in section 178 of the Ordinance whereas appointments/nominations are taken care under sections 180, 182 & 183 read with section 184 of the Ordinance. Since Lt. Gen. (Retd.) Ali Kuli Khan and other three persons whose nominations were rejected by the company had filed their nominations under section 184 of the Ordinance, the management presumed that they did not intend to become part of the electoral process and accordingly the notices of their intention to contest election were rejected. As regards, allegation regarding holding of election through show of hands, the allegation was totally denied.

4. In order to provide an opportunity of hearing, the case was initially fixed for hearing on February 24, 2004 but at the request of directors it was adjourned as their legal advisor Dr. Khalid Ranjha, Advocate was not available on that date. The next date was fixed for March 9, 2004. No one appeared on the date of hearing. However, another chance was provided and the case was fixed for hearing on March 25, 2004, which was further adjourned to April 15, 2004 as a letter was received from Dr. Khalid Ranjha on April 13, 2004 stating that he was busy due to Senate session. The case was again fixed for hearing on May 11, 2004. Dr. Khalid Ranjha, Advocate, appeared on behalf of all the directors and Company Secretary except Mr. Amjad Hussain Malik, one of the directors. The learned counsel submitted that any person who seeks to contest for the office of director of a company is required to give notice of his intention to offer himself for election as a director in terms of the provisions of sub-section (3) of section 178 of the Companies Ordinance, 1984. There are separate

and independent provisions for appointment/nomination which have been taken care of under sections 180, 182, 183 and 184 of the Ordinance. The notice of intimation to offer for election of directors is to be filed under Section 178 (3) of the Ordinance, whereas consent to act as a director is to be given and filed under Section 184 of the Ordinance. He further stated that the persons whose notices were rejected had filed their consent under Section 184 of the Ordinance which was not the relevant Section. It clearly indicated that their interest was in nomination/appointment as a director but not to contest election of directors and hence their notices were rightfully rejected. He further stated that the proper course of action for the persons whose notices were rejected was to redress their grievances through the High Court which is competent forum in such cases as provided under Section 179 of the Ordinance.

5. As regards the allegation regarding holding of election by way of show of hands in contravention of the provisions of sub-section (5) of section 178 of the Ordinance, he contended that the allegations is absolutely incorrect as the directors were duly elected by casting of votes as envisaged in sub-section (5) of section 178 of the Ordinance. In this connection, he invited attention to the minutes of annual general meeting held on December 31, 2001 which clearly establish that the directors including Mr. Amjad Hussain Malik, who did not belong to the management, were elected by casting of votes. He also produced affidavits from 24 shareholders who attended the said meeting in persons confirming on oath that the said election of directors was held by casting of votes and not by show of hands.

6. Dr. Khalid Ranjha was of the view that the show cause notice has been issued under Section 186 read with Section 476 of the Ordinance which is within power of the Registrar of Companies and the case does not fall within jurisdiction of the Commission.

7. I have given due consideration to the arguments offered by the learned Counsel and has also examined the documents provided alongwith the reply. The main thrust of the learned Counsel was that the notices to contest election of directors by Lt. Gen. (Retd.) Ali Kuli Khan Khattak, Mr. Ahmed Kuli Khan Khattak, Mr. K.V. Rehman and Mr. Jamil Ahmed Shah were not filed under the relevant provisions of the Ordinance and the provisions were misquoted. The learned Counsel was asked

to provide any ruling in support of his contention whereby on the basis of wrong reference of a section, such notices were rejected but he was unable to provide any such ruling and he stuck to his position. I am of the view that simply reference to a wrong section is totally immaterial as the candidates who had filed notices to contest election were not existing directors of the company and they had indicated intention to contest in response to the notice of general meeting wherein election of directors were to be held after three years. The rights and duties of shareholders and directors are specifically laid down and are provided under the Ordinance and in my view the shareholders who invest in a company must be given the right of proportionate representation on the board of directors of their company. It is not in good taste to disqualify the brethren members who intend to contest election on the basis of their undisputed shareholding just on technical grounds. The principle of majority rule is no doubt a time honoured and democratic but a frustrated minority shareholder may turn to the Law for help; and it is obvious that the Law must provide some remedies to meet those cases in which majority power has been abused. There cannot be power including the power of control over other people's investments without corresponding responsibility. If unfair and wrongful acts and decisions are condoned, the minority will be prejudiced and in a company "locked in". Such a situation, in my view must be avoided particularly in a listed company. I feel that the shareholders having a stake in a company should have been encouraged rather having been deprived by rejection of their consent on technical grounds. It is true that principle of majority rule is generally followed in corporate matters, yet it is of utmost importance that the rights of the minority shareholders are protected so that they do not feel deprived of their legitimate rights.

8. The rejection of notices to contest election is a serious matter, and such matter falls within the preview of High Court as provided under Section 179 of the Companies Ordinance, 1984. Accordingly, the persons whose notices were rejected by the company should have sought appropriate relief from the competent Court under the said provisions of law.

9. As regards arguments given against the allegations of election of directors by show of hands, I accept the same particularly on the basis of minutes of the relevant

meeting and the affidavits submitted by a number of shareholders affirming on oath that election were held by casting of votes and not by show of hands.

10. As regards the plea that the Commission does not have the powers to adjudicate the case, the attention is drawn towards the provision of Section 476 (2) of the Ordinance under which the Commission, by an order in writing, can delegate its powers to any officer of the Commission and such powers have been duly delegated to the Commissioner.

11. At the end, it is emphasized that the last election of directors of the company was held on 31-12-2001 for a period of three years and therefore a considerable period of time has already been elapsed. At this point of time, it does not appear to be appropriate to interfere in the matter when the next election is due by the end of current year which is a matter of seven months only.

(Abdul Rehman Qureshi)
Commissioner (CL)

ANNOUNCED
Islamabad, June 3, 2004