

Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 11 of 2016

Mr. Imran Rafiq, Nominee Director NIT
(Hashmi Can Company Limited)

Appellant

Versus

The Commissioner (SMD) SECP.

Respondent

Date of hearing:

14/07/16

Present:

For Appellant:

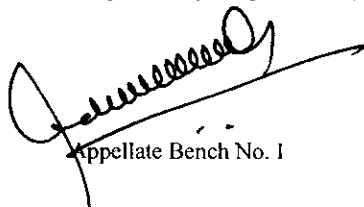
Ms. Amna Usmani (Masood Khan & Co, Advocates)

For Respondent:

1. Ms. Ayesha Riaz- Additional Director (SMD)
2. Mr. Haroon Abdullahi Abbas- Deputy Director (SMD)

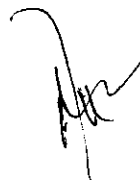
ORDER

1. This order shall dispose of Appeal No. 11 filed against the order dated 05/04/16 (the Impugned Order) passed by the Respondent under section 160 read with section 100 of the Securities Act, 2015 (the Act).
2. Brief facts of the case are that Hashmi Can Company Limited (the Company) was put on the defaulter counter of PSX on 03/01/07 due to failure to hold Annual General Meetings (the AGMs), failure to pay two years annual listing fee and failure to join Central Depository System (the CDS). In consequence, trading of Company shares was



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suspended on 16/02/12. The Respondent issued a direction on 01/09/15 under section 100 of the Act to the Appellants to undo the afforested defaults however, directors of the Company including Appellant failed to comply with the direction.

3. In view of failure to comply with the direction, a Show Cause Notice (the SCN) dated 16/10/15 under section 160 read with section 100 of the Act was served on the directors of the Company as to why the penal action may not be taken against them under section 159 of the Act. The case was fixed on 17/12/15, 20/01/16, 26/01/16, 09/02/16 and 03/03/16 however, despite ample opportunities no one appeared on behalf of Appellant. In the circumstances, the Respondent imposed a penalty of Rs. 500,000 on the directors including Appellant in the following manner:

S. No.	Name of Respondents	Amount
1.	Mr. Munawar Malik	500,000
2.	Mr. Imran Rafiq (Nominee Director NIT)	500,000
3.	Mr. Zaheer Malik	500,000
4.	Mrs. Mussrat Bano Malik	500,000
5.	Ms. Humera Malik	500,000
6.	Mr. Naseer A. Malik	500,000
7.	Mr. Asif Mufti	500,000
Total		3,500,000

4. The Appellant preferred this separate appeal against the Impugned Order before the Appellate Bench. The Counsel of Appellant reiterated the submissions made through the appeal and emphasized that the Appellant was a nominee director of NIT and he has time and again raised voice and asked the management of the Company to comply with the regulations and other legal requirements. The Appellant tried his best to safeguard the interest of NIT as nominee director and NIT being an investor institution never objected his role and conduct. The Counsel further stated that the Company was shut down without intimating the Appellant and said issue was taken up with the Company vide letter dated 21/02/11. The letter dated 05/09/12 was also referred by the Counsel for

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perusal of Appellate Bench. The said letter was written by the Appellant to the chairman of the Company wherein it was suggested to hold board meeting at some other venue to avoid non-compliance of the regulations. Another letter dated 02/10/15 contains the similar narration was also written to the chairman of Company by the Appellant.

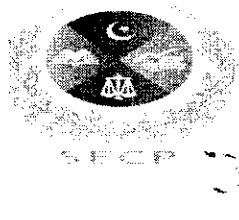
5. The Respondent has acknowledged in written comments that Appellant has made his efforts to ask the management of the Company to comply with the requirements of regulation and other laws and it is evident from the record that he has been raising his concerns with respect to affairs of the Company from 2009 to onward. The comments of the Respondent suggested that subject to satisfaction of Appellate Bench, relief may be granted to the Appellant.
6. We have heard the parties i.e. Appellant and Respondent and perused the record of appeal.
7. The Appellant has built his case on a sole ground that being a nominee/non-executive director he had very limited role into the affairs of Company and has raised his concerns through letters/dissenting notes whenever any irregularity or illegality with respect to Company, came into his knowledge. Therefore, he cannot be held responsible for contravention of section 100 of the Act or any other regulation.
8. We have perused the relevant law and it states that directors of a company whether nominated or elected are responsible to ensure compliance with law. However, the role of a nominee director is more critical than executive director because he sits on Board of Directors (the BOD) to represent and safeguard the interest of the institution who nominated him. It is also settled position in law that a non-executive director has no active role in the day to day affairs of the company, however, he has the right to object non-compliance committed by management of Company during BOD meetings through his dissenting note and if his concern is not addressed and noted in a required manner than he has to proceed in accordance with clause eight of Code of Corporate Governance (the Code). The relevant part of clause eight of the Code is reproduced here for ready

reference:

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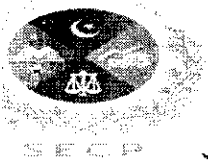
"In the event that a director of a listed company is of the view that his dissenting note has not been satisfactorily recorded in the minutes of a meeting of the Board of Directors, he may refer the matter to the Company Secretary. The director may require the note to be appended to the minutes, failing which he may file an objection with the Securities and Exchange Commission of Pakistan (SECP) in the form of a statement to that effect. The objection may be filed with the SECP within 30 days of the date of confirmation of the minutes of the meeting."

9. In extra ordinary circumstance and where affairs of a company are being managed contrary to law, non-executive directors should have act as a whistle blower to indicate violations committed by company management. Firstly, Appellant was required to raise his concern through dissenting notes and thereafter if his concerns were not taken into the account, he was required to intimate the violations of Company management to the Commission. The documents annexed with the appeal including minutes of 182nd BOD meeting and letter dated 16/10/09 reflects that the Appellant has only raised his concerns with the management of the Company. Appellant has partially complied with the requirements of aforesaid clause whereof an inference could be drawn that Appellant had no intention to violate the law, however, he failed to fully comply with law in discharge of his duties as nominee director of the Company.
10. During the course of hearing we felt that there is need to issue a detailed guideline with respect to election, appointment, duties and responsibilities of executive, non-executive, nominee and independent directors along with consequences of violation in their respective role. By doing this, in future full compliance of laws and regulations may be ensured. Therefore, we direct the Respondent to prepare and issue a guideline after approval of the Commission keeping in view the relevant laws, regulations, rules and the Code. We further, direct to place the final guideline on Commission website at a conspicuous position and copy of such guideline may be delivered at the registered office of the public listed companies.

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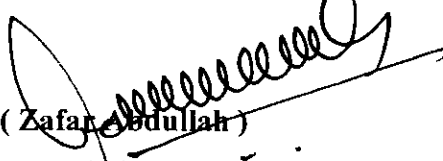
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11. In the above circumstances, it is undisputed fact that the Appellant was a nominee director and has time and again asked the management of the Company to comply with legal requirements, however, they failed to comply with. Therefore, by considering Appellant partial compliance, we hereby allow the appeal and set aside the Impugned Order to the extent of Appellant. We further direct the Appellant to avoid similar non-compliance in future; otherwise strict action shall be taken in accordance with law.

12. Parties to bear their own cost.


(Zafar Abdullah)
Commissioner (SCD)


(Tahir Mahmood)
Commissioner (CLD)

Announced on: 28 JUL 2016