BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 147 of 2008

Date of decision : 24.7.2009

1. Weizmann Limited
2. Weizmann Financial Resources (Cochin) P. Ltd.
3. Om Mitra Securities Limited
   (Now Dindia Infrastructure Finance Ltd.)
4. Mitra Fidelity Ltd.
   (Now Tapi Energy Projects Ltd.)
5. Anju Siraj
6. Dharmendra G. Siraj
7. S.G. Siraj
8. Isha Siraj
9. Sweta Siraj
10. Chetan D. Mehra
11. Nirmal D. Mehra
12. Radhika C. Mehra
13. Sitex India Private Ltd. …… Appellants

Versus

Adjudicating Officer of
Securities and Exchange Board of India …… Respondent

Mr. T.V. Subramanian, Authorized Representative for the Appellants.
Mr. Kumar Desai, Advocate with Ms. Daya Gupta and Ms. Chloris John, Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per Justice N.K. Sodhi, Presiding Officer

This appeal is directed against the adjudication order dated October 24, 2008 passed against the appellants imposing a penalty of Rs.1,30,000/- on them for violating Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code).

Weizmann Fincorp Limited is the target company and its issued and paid up capital comprises 2,45,000 equity shares of Rs.10 each and 4,75,000 cumulative redeemable preference shares of Rs.100 each. The equity shares are listed on the stock exchange but the preference shares are unlisted. The appellants were holding equity shares comprising 65.67% of the total equity capital of the target company and the remaining shares are held by the Indian public. Weizmann Limited – a public limited company is the promoter of the target company and it holds the entire 4,75,000 cumulative redeemable preference shares of Rs.100 each. The financial year of the target company ends on June 30. It is common ground between the parties that the target company had last declared dividend on the preference shares at its annual general meeting held on 31.1.2001 for the year closing on June 30, 2000. It is also not in dispute that the target company did not declare dividend thereafter on account of paucity of distributable profits.

One Trade Apartments Limited (TAL) had acquired some shares of the target company which triggered the takeover code as a result whereof that company (TAL) made a public announcement and sent its draft letter of offer to the Securities and Exchange Board of India (hereinafter referred to as the Board). While examining that letter of offer, the Board went into the shareholding pattern of the target company and found that Weizmann Limited, one of its promoters and the appellant herein had acquired voting rights on its 4,75,000 cumulative redeemable preference shares as the dividend due on those shares remained unpaid for an aggregate period of two years as a result whereof the takeover code got triggered. The Board further found that the appellants (appellants no.2 to 13 are persons acting in concert with appellant no.1) were required to come out with a public announcement on the acquisition of the voting rights and not having done so, had violated the provisions of Regulation 11(1) read with Regulation 14 of the takeover code. Accordingly, notices dated 27.4.2007 were issued to the

appellants calling upon them to show cause why an enquiry should not be held against them for imposing monetary penalty for their alleged non-compliance with the provisions of the takeover code. Appellant no.1 filed a detailed reply on behalf of all the appellants on 15.5.2007 and another reply on 19.6.2007. It was pointed out that the target company had last declared dividend on the preference shares at its annual general meeting held on 31.1.2001 for the year closing on June 30, 2000 and that the said company did not declare dividend in the next year. It was also pointed out that the annual general meeting of the target company for the year ending 30th June, 2002 was held on 31.12.2002 in which also there was no proposal for the declaration of any dividend as the target company had no distributable profits. The appellants submitted that the voting rights accrued to them on 31.12.2002 the date of the annual general meeting as it was on that date that the dividend due on their preference shares remained unpaid for an aggregate period of two years preceding the date of the meeting. It is the case of the appellants that since the preference shares had been excluded from the takeover code with effect from 9.9.2002, the appellants were not required to come out with a public announcement. On a consideration of the reply and the material collected by the adjudicating officer during the course of the enquiry, he found that the voting rights accrued to the appellants on the expiry of two years from the date when the dividend due on their cumulative redeemable preference shares remained unpaid. He concluded that this period of two years expired on June 30, 2002 and, therefore, the voting rights accrued to the appellants on the following day i.e. July 1, 2002 which triggered the takeover code. He found that the appellants had violated Regulation 11(1) read with Regulation 14 of the takeover code and, by the impugned order, imposed on them a monetary penalty of Rs.1,30,000 making them liable jointly and severally. Hence this appeal.

The short question that arises for our consideration in this appeal is as to what is the date on which the voting rights accrue on cumulative redeemable

preference shares on account of non-payment of dividend due thereon for an aggregate period of two years. Before we answer this question, let us briefly refer to the relevant provisions of the takeover code. The word 'shares' has been defined in clause (k) of Regulation 2(1) of the takeover code to mean shares in the share capital of the company carrying voting rights and includes any security which would entitle the holder to receive shares with voting rights but shall not include preference shares. The words "but shall not include preference shares" were inserted in the year 2002 with effect from 9.9.2002. Prior to this insertion, preference shares, if they carried voting rights, were included for the purposes of the takeover code. Regulation 11(1) at the relevant time provided that no acquirer together with persons acting in concert with him who had acquired 15% or more but less than 75% of the shares or voting rights in a company could acquire additional shares or voting rights in that company entitling him to exercise more than 10% (5% with effect from. 1.10.2002) of the voting rights unless he made a public announcement to acquire further shares of that company. It is, thus, clear that it is the acquisition of additional voting rights exceeding the requisite percentage specified in Regulation 11(1) that triggers the takeover code. It is in this background that we need to examine the date on which the appellants acquired the additional voting rights on their cumulative redeemable preference shares. The takeover code is silent as to the date on which the acquirer acquires the voting rights. In order to answer this question we need to refer to the provisions of the Section 87 of the Companies Act, 1956 (hereinafter called the Act) which deals with voting rights. The relevant parts of this section with which we are concerned are reproduced hereunder for the facility of reference :

> "**Voting rights.**
>
> 87.(1) ……..…
> 2(a) Subject as aforesaid and save as provided in clause (b) of this sub-section, every member of a company limited by shares and holding any preference share capital therein shall, in respect of

> such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares.
>
> *Explanation :* ……
>
> (b) Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid-
>
> (i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting; and
>
> (ii) in the case of non-cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid.
>
> *Explanation* : For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not, -
>
> (a) on the last day specified for the payment of such dividend for such period, in the articles or other instrument executed by the company in that behalf; or
>
> (b) in case no day is so specified, on the day immediately following such period."

A reading of the aforesaid provision makes it clear that a member of a company limited by shares and holding any preference share capital therein has a right to vote only on resolutions placed before the company which directly affect his rights attached to his preference shares. He cannot vote on every resolution that is placed before the company. Clause (b) of Section 87(2), however, entitles the preference shareholder to vote on every resolution placed before the company at any meeting provided three conditions are satisfied–(a) the dividend is due on his preference share capital, (b) the whole of it or any part thereof has remained unpaid and (c) in the case of cumulative redeemable preference shares with which

we are concerned in this case, the dividend due must remain unpaid for an aggregate period of not less than two years preceding the date of commencement of the meeting. In other words, the cumulative preference shareholder will get a right to vote in a meeting only if the dividend due to him has remained unpaid for at least two aggregate years prior to that meeting. It is in that meeting that he will get a right to vote. It follows that it is on the date of that meeting that he acquires the voting rights for the purposes of the takeover code. The right to vote does not get permanently attached to the preference shares nor do they assume the colour of equity shares. The holder of such shares will have a right to vote only in such meeting(s) prior whereto the dividend due on preference shares or any part thereof has remained unpaid for an aggregate period of two years. The right to vote of a preference shareholder will have to be judged from meeting to meeting and he will get a right to vote only in that meeting in which his preference shares satisfy the conditions of Section 87(2)(b) of the Act. In the present case, it was the annual general meeting held on 31.12.2002 which satisfied the aforesaid conditions. It was prior to this meeting that the dividend which had became due on the preference shares had remained unpaid for an aggregate period of two years as, admittedly, the last dividend on preference shares was declared in the annual general meeting held on 31.1.2001 for the year ending June 30, 2000. We have, therefore, no hesitation in holding that the appellants acquired the voting rights on their preference shares on the date of the annual general meeting held on 31.12.2002. Shri. Kumar Desai learned counsel for the respondent Board referred to the Explanation to Section 87 (2)(b) of the Act and emphatically contended that the dividend on preference shares held by the appellants became due on the expiry of two aggregate financial years from the end of the financial year for which the dividend was last declared and this period, according to the learned counsel, expired on June 30, 2002 and, therefore, the dividend became due on the day immediately following the expiry of that period i.e. July 1, 2002. The

argument is that since the dividend due remained unpaid till June 30, 2002 the voting rights on the preference shares accrued to the appellants immediately on the following day i.e. July 1, 2002. We are unable to agree with this argument. The Explanation only gives us the date on which the dividend will be deemed to have become due on the preference shares in respect of any period. If a date is mentioned in an instrument executed by the company or if a date is mentioned in the Articles, then the dividend is deemed to be due on such dates and if no date is so specified then on the day immediately following such period. It does not follow from the Explanation that the voting rights shall also accrue on the day when the dividend is deemed to be due. This inference which Shri. Kumar Desai is seeking to draw from the Explanation is not warranted. As already stated, the right to vote shall accrue to a preference shareholder only in the meeting in which the dividend due to him or any part thereof has remained unpaid for an aggregate period of two years. In this view of the matter, the impugned order holding that the voting rights accrued to the appellants on the expiry of two years from the date when the dividend was last declared cannot be sustained. We have already held that the appellants became entitled to vote on the strength of their preference shares only in the annual general meeting held on 31.12.2002. Since on that date, the preference shares had been excluded from the ambit of the takeover code, the appellants were not required to make a public announcement.

In the result, the appeal is allowed and the impugned order set aside leaving the parties to bear their own costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

24.7.2009
bk/-

Prepared and Compared by :
BBN