REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7148 OF 2009

M/S DAIICHI SANKYO COMPANY LTD. …APPELLANT

VERSUS

JAYARAM CHIGURUPATI & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NO.7314 OF 2009

M/S DAIICHI SANKYO COMPANY LTD. ...APPELLANT

VERSUS

N. NARAYANAN & ANR. …RESPONDENTS

SUPREME COURT OF INDIA
JUDGMENT

J U D G M E N T

AFTAB ALAM, J.

1. Whether the offer of rupees one hundred thirteen and paise sixty two only (Rs.113.62) per share made by the appellant, M/s Daiichi Sankyo Company Ltd. in its public announcement dated January 19, 2009 for

acquisition of the shares of Zenotech Laboratories Ltd. was fair and lawful or whether the offer price could not be less than rupees one hundred and sixty only (Rs.160.00) per share? This is the question that falls for consideration in these two appeals. A correct answer to the question requires a proper construction and understanding of certain provision of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the SEBI Takeover Regulations or Takeover Code).

2. The facts of the case are fairly simple and are admitted on all sides. The two appeals arise from almost identical facts but in this judgment we would be referring to the paper book of Civil Appeal No.7148 of 2009.

3. On October 3, 2007 Ranbaxy Laboratories Limited (respondent no.3), a company incorporated and registered under the Indian Companies Act, entered into a Share Purchase and Share Subscription Agreement jointly with Zenotech (respondent no.4) and its promoter, Dr. Jairam Chigurupati (respondent no.1 in Civil Appeal No.7148). The agreement provided for Ranbaxy to purchase from Zenotech's promoters a large block of equity shares (78,78,906 in number), representing 27.35% of the company's fully paid-up equity share capital, at the negotiated price of rupees one hundred and sixty (Rs.160.00) per equity share and to subscribe to 54,89,536 fully

paid-up equity shares at the same price (rupees one hundred and sixty per share) under a preferential allotment by Zenotech. Having entered into the agreement to acquire shares that would entitle it to exercise voting rights in Zenotech far in excess of the statutorily prescribed limit of fifteen percent (and, in all likelihood, control over it) Ranbaxy was legally obliged to make a public announcement to acquire shares of the company from the ordinary shareholders. It did so on October 5, within four days of the agreement as required by law. In the public announcement it sought to acquire from the public shareholders, equity shares of Zenotech constituting twenty percent of its expanded share capital. In the public announcement Ranbaxy quoted offer price of rupees one hundred and sixty only (Rs.160.00) per equity share as the negotiated price under the agreement (SPSSA) was the highest of the prices arrived at by the different ways prescribed by law. On November 8, 2007 the share purchase transaction between Ranbaxy and the promoters of Zenotech (Dr. Chigurupati and his family) was completed and at the annual general meeting of Zenotech held on the same day, the shareholders of Zenotech approved the preferential allotment of shares to Ranbaxy. On November 23, 2007 Zenotech duly allotted (by way of preferential allotment) 54,89,536 fully paid-up shares to Ranbaxy. The 'open offer' made by Ranbaxy for Zenotech shares, in terms of the Takeover

Regulations, closed on November 15, 2008. Following the completion of the open offer formalities, Ranbaxy issued a post offer announcement on January 30, 2008. The announcement disclosed that though in the public announcement it offered to purchase shares amounting to twenty percent of Zenotech's capital it actually received shares comprising only 2.2 percent of the expanded share capital of the company and further that on completion of all transactions Ranbaxy's shareholding in Zenotech stood at 46.85% of the latter's share capital. It may be stated here that even after the sale in terms of the agreement the promoters (Dr. Chigurupati and his family) retained a large portion of their shareholding in Zenotech.

4. It needs to be stated here that up to this stage Daiichi was nowhere on the scene. It is no one's case that the acquisition of Zenotech's shares and control by Ranbaxy was at the instance of Daiichi or it was in furtherance of some overt or covert understanding between the two.

5. On June 11, 2008 Daiichi (the appellant in these two appeals) entered into a Share Purchase and Share Subscription Agreement (the 'SPSSA') jointly with (i) Malvinder Singh and others, the promoters of Ranbaxy, and (ii) Ranbaxy Laboratories Ltd. Under the agreement, Daiichi would acquire 30.91% of the fully paid-up equity share capital of Ranbaxy by buying a sufficiently large block of shares from the company's promoters. In addition,

Daiichi would subscribe to (i) shares, representing in the aggregate 11% of the fully paid-up equity share capital of Ranbaxy, and (ii) 2,38,34,333 share warrants, each warrant exercisable for one equity share of Ranbaxy. On the same day Ranbaxy informed the Stock Exchanges that in the meeting held on that date its Board of Directors had ratified the terms of the SPSSA and had decided to seek the approval of the company's shareholders for issuance of the shares and the warrants to Daiichi, on preferential basis, as stipulated in the SPSSA. In this letter dated June 11, 2008, addressed to the Stock Exchanges it was also stated that, since Ranbaxy was holding 46.85 percent of the equity shares of Zenotech, the SPSSA "has also triggered an 'Open Offer' to be made by 'Daiichi Sankyo' to the public shareholders of 'Zenotech' to acquire a minimum of 20% of the Equity Shares of 'Zenotech' at a price to be determined under the applicable SEBI Regulations". In order to complete its takeover of Ranbaxy as envisaged under the SPSSA, Daiichi went through the gamut of the statutory prescriptions. On June 16, 2008 it made a public announcement ('open offer') to the shareholders of Ranbaxy (other than the Sellers under the SPSSA) to acquire in the aggregate 22.01% of the fully paid-up equity share capital of Ranbaxy. The offer price in the public announcement, was rupees seven hundred and thirty seven only (Rs.737.00) for each share, which was the price Daiichi had paid to the

company's promoters for acquisition of the shares under the agreement and which worked out to be the highest of the prices reckoned by the different ways prescribed by the law. Daiichi's control over Ranbaxy consummated on October 20, 2008 when it acquired more than fifty percent of the share capital of Ranbaxy (as it stood on that date) and on and from that date Ranbaxy became a subsidiary of Daiichi. The relation in which Ranbaxy came with Daiichi had another consequence, to which an allusion was made in the letter that Ranbaxy had addressed to the Stock Exchanges on the date of the SPSSA. Whether intended or not, as a result of its takeover (direct) of Ranbaxy, Daiichi also (indirectly) acquired control of 46.85% of the equity share capital in Zenotech, held by Ranbaxy. What on the date of the SPSSA was an anticipated consequence, on October 20, 2008 became the reality and this date became the starting point for reckoning the period during which the "acquirer", Daiichi must make the public announcement (open offer) to the shareholders of Zenotech. Daiichi duly made the public announcement in regard to Zenotech on January 19, 2009. In the public announcement, Daiichi offered rupees one hundred thirteen and paise sixty two (Rs.113.62) for each share of Zenotech. The offer price was based on the price of the Zenotech shares quoted on the stock exchange.

6. In regard to the offer price of rupees one hundred thirteen and paise sixty two (Rs.113.62) made in the public announcement by Daiichi, N. Narayanan respondent no.1 in Civil Appeal No.7314 of 2009, who was holding 63000 shares in Zenotech made a complaint to the Securities and Exchange Board of India (SEBI) (vide. letters dated January 19, March 5, April 1, April 15, and May 7, 2009). He claimed that the offer price for Zenotech shares could not be less than rupees one hundred and sixty (Rs.160.00) per share and requested the SEBI to direct Daiichi to revise the offer price accordingly and also to pay interest @ 15% for the delay in coming out with the public announcement.

7. Respondent no.1 in Civil Appeal No.7148 of 2009, Dr. Chigurupati who was the Director, founder and promoter of Zenotech and who along with his wife was holding 26% equity shares in Zenotech made a similar complaint to SEBI through a detailed representation dated January 27, 2009. The SEBI after due consideration of the matter turned down the claim of the respondents (vide letter dated June 18, 2009 in the case of N. Narayanan's complaint and letter dated June 22, 2009 in the case of the complaint of Dr. Chigurupati).

8. Against the decision of the SEBI, Dr. Chigurupati and N. Narayanan preferred separate appeals, being Appeal Nos.137 and 139 respectively of

2009 before the Security Appellate Tribunal. The Security Appellate Tribunal upheld the claim of the respondents and by order dated October 7, 2009 allowed the appeals, reversed the decision of the SEBI, modified the letter of offer (sic) issued by Daiichi and directed Daiichi to offer rupees one hundred and sixty (Rs.160.00) per share to the shareholders of Zenotech. Daiichi has now brought the matter in appeal before this Court.

9. Since the offer price for the Zenotech shares quoted in the public announcement is the bone of contention between the parties, we need to see some clauses in the public offer in some detail. In paragraph 1.2 it was stated as follows:

> "1.2 There are no 'Persons Acting in Concert' within the meaning of Regulation 2(1)(e)(1) of the Regulations in relation to this offer. However, due to the applicability of Regulation 2(1)(e)(2) of the Regulations, there could be certain entities deemed to be Persons Acting in Concert with the Acquirer."

Paragraph 4 was about "Reason for Acquisition and Offer and Future Plan about the Target Company" and in paragraph 4.1 it was stated as follows:

> "4.1 As stated in Para(s) 1.4 and 1.5 above, as a result of the acquisition of its stake in RLL, together with the acquisition of control in RLL, the Acquirer has indirectly acquired 46.85% of the fully paid up equity share capital of the Target Company held by RLL, which in turn has resulted in an indirect substantial acquisition of shares and voting rights in the Target Company by the Acquirer for the purposes of Regulation 10 and 12 of the Regulations. Accordingly, this Offer is being made pursuant to Regulations 10 and 12 of the Regulations."

And the offer price was calculated and quoted in paragraph 1.9 as follows:

> "1.9 The shares of the Target Company are frequently traded on the BSE within the meaning of Regulation 20(5) of the Regulations.
> The Offer price of Rs.113.62 per equity share is justified in terms of Regulation 20(4) of the Regulations as it is the higher of the following:"

i.	The negotiated price under the SPSSA#	N.A.
ii.	Highest price paid by Acquirer for any acquisition (including by way of allotment in a public or rights or preferential issue) during the 26 weeks prior to the date of the public announcement to shareholders of RLL	N.A.
iii.	The average of the weekly high and low of the closing prices of shares of the Target Company on BSE during the 26 weeks period preceding the date of public announcement to shareholders of RLL.	Rs. 113.62
iv.	The average of the daily high and low prices of the shares of the Target Company on BSE during the 2 week period preceding the date of public announcement to shareholders of RLL	Rs. 103.51
v.	Highest price paid by Acquirer for any acquisition (including by way of allotment in a public or rights or preferential issue) during the 26 weeks prior to the date of the P.A.	N.A.
vi.	The average of the weekly high and low of the closing prices of shares of target company on BSE during the 26 weeks period preceding the date of the P.A.	Rs.106.03
vii	The average of the daily high and low prices of shares of target company on BSE during the 2 weeks period preceding the date of the P.A.	Rs.109.52

10. Now is the time to take a look at the statutory provisions controlling and regulating such transactions and to see how far the steps taken by Daiichi/Ranbaxy were in conformity with the mandates of the law. The relevant provisions are to be found in the Securities And Exchange Board of India (Substantial Acquisition Of Shares And Takeover) Regulations, 1997 (the Takeover Code or the Takeover Regulations) framed under section 30 of the Securities Exchange Board of India Act, 1992. The Takeover Code was first notified by SEBI in November 1994. This was replaced by the 1997 Takeover Code after undergoing a number of amendments made in light of the recommendations of the first Bhagwati Committee's report of January 18, 1997. The 1997 Takeover Code provided for the regulatory mechanism for indirect acquisition of the kind we see in the present case. The 1997 Takeover Code underwent further amendments by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002, with effect from September 9, 2002 in light of the recommendations made by the second Bhagwati Committee's report submitted in May 2002.

11. Now, to the relevant provisions of the Takeover Code: regulation 2 has the definition clauses and sub-regulation (b) defines acquirer as follows:

> "2(b) "acquirer" means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target

company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;"

12. Thus, in terms of the definition, on entering into the SPSSA on June 11, 2008 Daiichi became the acquirer (directly) of Ranbaxy and also of Zenotech (indirectly, through the acquisition of Ranbaxy).

13. Regulation 2(c) defines control and regulation 2(e) defines "Person acting in concert" which is as follows:

"2 (e) "person acting in concert" comprises,—
(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.
(2) Without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established :
(i) a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;
(ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;
(iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;
(iv) mutual fund with sponsor or trustee or asset management company;
(v) foreign institutional investors with sub-account(s);
(vi) merchant bankers with their client(s) as acquirer;
(vii) portfolio managers with their client(s) as acquirer;
(viii) venture capital funds with sponsors;
(ix) banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer :

> Provided that sub-clause (ix) shall not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer such as confirming availability of funds, handling acceptances and other registration work;
> (x) any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2 per cent of the paid-up capital of that company or with any other investment company in which such person or his associate holds not less than 2 per cent of the paid-up capital of the latter company.
> Note : For the purposes of this clause "associate" means,—
> (a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and
> (b) family trusts and Hindu undivided families; "

14. We shall presently examine the provisions of regulation 2(e) in greater detail as the result of the case would depend a good deal on how we understand the meaning of "persons acting in concert" and what meaning is put to regulation 2(e)(1) and especially 2(e)(2)(i).

15. Regulation 2(o) defines "Target Company" as follows:

> "2(o) "target company" means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired;"

16. Thus, on the date of the SPSSA both Ranbaxy and Zenotech became "Target Companies" for Daiichi, the acquirer, the former directly and the latter indirectly.

17. Chapter II of the Takeover Code deals with "Disclosures Of Shareholding And Control In A Listed Company" and Chapter III contains provisions dealing with "Substantial Acquisition Of Shares Or Voting Rights In And Acquisition Of Control Over A Listed Company". Chapter III begins with regulation 10 that makes it obligatory for an "acquirer" acquiring, in aggregate, fifteen percent or more of the voting rights in a company whether by acquisition of shares or voting rights to make a public announcement to acquire shares of that company in accordance with the provisions of the Takeover Regulations. Regulation 10, along with its marginal heading, reads as follows:

> "**Acquisition of [fifteen] per cent or more of the shares or voting rights of any company.**
> 10. No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations."

18. Regulation 11 has the marginal heading, **"Consolidation of holdings"** and it lays down the obligations of an "acquirer" who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, fifteen percent or more but less than fifty five percent of the shares or voting rights in a company. At the end of regulation 11 there

is an explanation that applies both to regulations 10 and 11. The explanation is relevant for our purpose and it reads as follows:

> "Explanation. — For the purposes of regulation 10 and regulation 11, acquisition shall mean and include,—
> (a) direct acquisition in a listed company to which the regulations apply;
> (b) indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad."

19. Regulation 10, as seen above makes it obligatory for an "acquirer" acquiring fifteen per cent or more of shares or voting rights in a listed company to make a public announcement to acquire shares of that company. Regulation 14 prescribes the time limit within which the public announcement stipulated in regulation 10 is to be made. Regulation 14 along with its marginal heading reads as follows:

> "**Timing of the public announcement of offer.**
> 14. (1) The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:
>
> Provided that in case of disinvestment of a Public Sector Undertaking, the public announcement shall be made by the merchant banker not later than 4 working days of the acquirer executing the Share Purchase Agreement or Shareholders Agreement with the Central Government or the State Government as the case may be for the acquisition of shares or voting rights exceeding the percentage of shareholding referred

> to in regulation 10 or regulation 11 or the transfer of control over a target Public Sector Undertaking.
>
> (2) In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be.
> Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipts.
>
> (3) The public announcement referred to in regulation 12 shall be made by the merchant banker not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer.
>
> (4) *In case of indirect acquisition or change in control, a public announcement shall be made by the acquirer within three months of consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company in India.*"
>
> (emphasis added)

20. It is noted above that on the date Daiichi entered into the SPSSA with Ranbaxy, it became the "acquirer" both in relation to Ranbaxy and Zenotech, directly in case of the former and indirectly in case of the latter. The period of time within which Daiichi was required to make the public

announcement in respect of the two target companies (the former directly and the latter indirectly) were prescribed in sub-regulation (1) (not later than four working days of entering into an agreement for acquisition of shares or voting rights) and sub-regulation (4) (within three months of consummation of such acquisition or change in control……) respectively of regulation 14.

21. It needs to be stated here that sub-regulation (4) was inserted in regulation 14 by the Second Amendment Regulation 2002 with effect from September 9, 2002 and before that date regulation 14 ended at sub-regulation (3). This means that before September 9, 2002 the Takeover Code in regulation 14(1), allowed only four days time for making the public announcement as required under regulation 10 for both direct and indirect acquisitions. In other words, in case the direct acquisition of a company would lead to the indirect acquisition of another target company the acquirer would be obliged to make the public announcements for both the target companies (direct and indirect) not later than four working days of entering into the agreement for acquisition of shares or voting rights in the directly targeted company. This would sometimes give rise to a number of practical difficulties. The problem was considered by the second Bhagwati Committee and in its report submitted in May 2002, the Committee made the following observations and recommendation:

> "21. Indirect acquisition of a company through chain principle.
>
> The Committee was of the opinion that the public offer for the company which gets acquired as a consequence of the takeover of the target company is triggered only upon the successful completion of the acquisition of the target. At the time of making the offer for the target company, such a takeover or rather its success is contingent and prospective and in the event of its failure, the consequent offer does not arise. Though the public announcement for the consequent offer could be made simultaneously, it would be conditional upon the successful completion of the first offer. Such conditional offer has its own impact on the market and is not without practical and procedural difficulties. Hence the public announcement for the consequent offer can be allowed to be made within a pre-specified time period of say three months from the date of closure of the first offer.
>
> The Committee recommended that:
>
> 1. The offer for a company which gets acquired as a result of acquisition of a target company can be subsequent to the successful completion of the takeover of the target by the acquirer. It should be made within 3 months of consummation of restructuring or arrangement by parent or holding company."

Sub-regulation (4) thus got inserted in regulation 14 in pursuance of the recommendation of the second Bhagwati Committee's report. The introduction of sub-regulation (4) in regulation 14 led to further consequential additions/ amendments in the Takeover Regulation that we shall see presently.

22. Regulation 16 deals with the "Contents of the public announcement of offer" and clause (ix) provides as follows:

> "(ix) the object and purpose of the acquisition of the shares and future plans, if any, of the acquirer for the target company, including disclosures whether the acquirer proposes to dispose

of or otherwise encumber any assets of the target company in the succeeding two years except in the ordinary course of business of the target company:

Provided that where the future plans are set out, the public announcement shall also set out how the acquirers propose to implement such future plans:

Provided further that the acquirer shall not sell, dispose of or otherwise encumber any substantial asset of the target company except with the prior approval of the shareholders;"

23. Then comes regulation 20 which deals with the "offer price" and is very important for our purpose. In so far as relevant for the present it is reproduced below:

"**Offer price.**
20.(1) The offer to acquire shares under regulation 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) and (5).

(2) The offer price shall be payable—
(a) in cash;
(b) by issue, exchange and/transfer of shares (other than preference shares) of acquirer company, if the person seeking to acquire the shares is a listed body corporate; or
(c) by issue, exchange and, or transfer of secured instruments of acquirer company with a minimum 'A' grade rating from a credit rating agency registered with the Board;
(d) a combination of clause (a), (b) or (c) :
Provided that where the payment has been made in cash to any class of shareholders for acquiring their shares under any agreement or pursuant to any acquisition in the open market or in any other manner during the immediately preceding twelve months from the date of public announcement, the letter of offer shall provide an option to the shareholders to accept payment either in cash or by exchange of shares or other secured instruments referred to above:

Provided further that the mode of payment of consideration may be altered in case of revision in offer price or size subject to the condition that the amount to be paid in cash as mentioned in any announcement or the letter of offer is not reduced.

(3) In case the offer price consists of consideration payable in the form of securities issuance of which requires approval of the shareholders, such approval shall be obtained by the acquirer within [seven] days from the date of closure of the offer:
Provided that in case the requisite approval is not obtained, the acquirer shall pay the entire consideration in cash.

(4) For the purposes of sub-regulation (1), the offer price shall be the highest of—
(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;
(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week period prior to the date of public announcement, whichever is higher;
(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher:
Provided that the requirement of average of the daily high and low of the closing prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, shall not be applicable in case of disinvestment of a Public Sector Undertaking.
Explanation.—In case of disinvestment of a Public Sector Undertaking, the relevant date for the calculation of the average of the weekly prices of the shares of the Public Sector Undertaking, as quoted on the stock exchange where its shares

are most frequently traded, shall be the date preceding the date when the Central Government or the State Government opens the financial bid.

(5) Where the shares of the target company are infrequently traded, the offer price shall be determined by the acquirer and the merchant banker taking into account the following factors:
(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;
(b) the highest price paid by the acquirer or persons acting in concert with him for acquisitions, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week period prior to the date of public announcement;
(c) other parameters including return on net worth, book value of the shares of the target company, earning per share, price earning multiple vis-à-vis the industry average :
Provided that where considered necessary, the Board may require valuation of such infrequently traded shares by an independent merchant banker (other than the manager to the offer) or an independent chartered accountant of minimum ten years' standing or a public financial institution.
Explanation.—
(i) For the purpose of sub-regulation (5), shares shall be deemed to be infrequently traded if on the stock exchange, the annualised trading turnover in that share during the preceding six calendar months prior to the month in which the public announcement is made is less than five per cent (by number of shares) of the listed shares. For this purpose, the weighted average number of shares listed during the said six months period may be taken.
(ii) In case of disinvestment of a Public Sector Undertaking, the shares of such an undertaking shall be deemed to be infrequently traded, if on the stock exchange, the annualised trading turnover in the shares during the preceding six calendar months prior to the month, in which the Central Government or the State Government as the case may be opens the financial bid, is less than five per cent (by the number of shares) of the listed shares. For this purpose, the weighted average number of shares listed during the six months period may be taken.

(iii) In case of shares which have been listed within six months preceding the public announcement, the trading turnover may be annualised with reference to the actual number of days for which the shares have been listed.

(6) xxxxxxxxxxxx

(7) xxxxxxxxxxxx

(8) xxxxxxxxxxxx

(9) xxxxxxxxxxxx

(10) xxxxxxxxxxx

(11) The letter of offer shall contain justification or the basis on which the price has been determined.

Explanation.—

(i) The highest price under clause (b) or the average price under clause (c) of sub-regulation (4) may be adjusted for quotations, if any, on cum-rights or cum-bonus or cum-dividend basis during the said period.

(ii) Where the public announcement of offer is pursuant to acquisition by way of firm allotment in a public issue or preferential allotment, the average price under clause (c) of sub-regulation (4) shall be calculated with reference to twenty-six week period preceding the date of the board resolution which authorised the firm allotment or preferential allotment.

(iii) Where the shareholders have been provided with an option to accept payment either in cash or by way of exchange of security, the pricing for the cash offer could be different from that of a share exchange offer or offer for exchange with secured instruments provided that the disclosures in the letter of offer contains suitable justification for such differential pricing and the pricing is subject to other provisions of this regulation.

(iv) Where the offer is subject to a minimum level of acceptance, the acquirer may, subject to the other provisions of this regulation, indicate a lower price for the minimum acceptance up to twenty per cent, should be the offer not receive full acceptance.

> (12) The offer price for indirect acquisition or control shall be determined with reference to the date of the public announcement for the parent company and the date of the public announcement for acquisition of shares of the target company, whichever is higher, in accordance with sub-regulation (4) or sub-regulation (5).

24. In order to clearly understand the ways in which the offer price is to be determined in the case of an indirect takeover of a company, as in the present case, it would be useful to examine regulation 20 from the rear end, that is to say starting from sub-regulation (12). This may sound a little strange but it is because sub-regulation (12) was introduced in the Takeover Code later, along with and as a consequence of insertion of sub-regulation (4) of regulation 14 to deal specifically with the offer pricing of the shares of a target company the acquisition of which takes place as a result of the direct takeover of some other company. We have seen above that the second Bhagwati Committee had, for good reasons, recommended for a separate and extended time period for making the public offer for a company that gets taken over following the acquisition of a target company. While making the recommendation, the Committee took care to see that the extended period for making the public offer does not act to the detriment of the ordinary shareholders of the company that gets taken over as a result of acquisition of a target company. It, accordingly, went on to observe and recommend as follows:

> "However, the investors of the 2nd company should get benefit of the best price available and for the purpose the reference dates of the public announcement for the first as well as the second offer may be taken for determining the offer price."

The Committee recommended that:

> "The price shall be determined as highest of the two prices determined as per the provisions of the Regulations, with reference to the date of the public announcement for the target company and the date of public announcement for the company which is consequently acquired."

25. Thus came sub-regulation (12) of regulation 20. Now, if we read regulation 20(12), it plainly says that the offer price for the shares of a company being taken over indirectly and as a consequence of the acquisition of the primary target, would be determined with reference to two dates, one when the public offer was made in regard to the "Parent company" (that is, the company, the acquisition of which resulted in the takeover of the secondary target company) and the other when the public offer is made for the secondary target company and the higher of the two will be taken as the offer price. In terms of sub-regulation (12) of regulation 20, therefore, the share price of Zenotech was required to be determined as on June 16, 2008 (the date of the public announcement for Ranbaxy, the parent company) and as on January 19, 2009 (the date of the public announcement for Zenotech, the indirectly target company). Regulation 20(12) tells us the dates with reference to which the offer price is to be determined but it does not tell us

how the offer price is to be determined. For that it refers us back to sub-regulations (4) and (5). It needs to be stated here that sub-regulations (4) and (5) remained unchanged and did not undergo any amendments following the introduction of sub-regulation (4) in regulation 14 and sub-regulation (12) in regulation 20. This is to say that the provisions of sub-regulations (4) and (5) apply both to cases of direct and indirect takeover; they were not designed only for cases of indirect takeover.

26 Sub-regulation (5) of regulation 20 lays down the method for determining the offer price for a company the shares of which are *infrequently traded*. That is not the case with Zenotech; hence, we may leave out sub-regulation (5). This takes us to sub-regulation (4) of regulation 20. Sub-regulation (4) prescribes three ways for determining the share price with the stipulation that the highest among them would be the offer price. Clause (a) of sub-regulation (4) refers to the negotiated price under the agreement. This would clearly apply to a case of direct takeover and shall have no application to a case of indirect takeover like the present one. Clause (b) is based on the **price paid** by the acquirer **or persons acting in concert with him** for acquisition of shares of the target company within the period of twenty six weeks prior the date of the public announcement and clause (c) is

based on the price of the shares of the target company as quoted on the stock exchange.

27. According to Daiichi, the appellant in these two appeals, regulation 20(4)(a) had no application in determining the offer price of Zenotech as there was no negotiated price under any agreement; its takeover of that company was indirect being a consequence and a fall out of its takeover of Ranbaxy. Regulation 20(4)(b) had similarly no application because neither Daiichi nor anyone acting in concert with it had purchased any shares of Zenotech within the period of twenty six weeks prior to the dates of the two public announcements, first for the shares of Ranbaxy and the second for the Zenotech shares. The only provisions, therefore, applicable in the case were those contained in clause (c) of regulation 20(4) under which the offer price was required to be determined on the basis of prices of the shares of Zenotech, the target company as quoted on the stock exchange. The appellant worked out the share price of Zenotech as on June 16, 2008 and January 19, 2009, following the different modes provided under regulation 20(4)(c) and, in the public announcement, offered rupees one hundred thirteen and paise sixty two (Rs.113.62) per share, that being the highest among all.

28. Here the respondents join issue with the appellant. According to the respondents, the provisions of regulation 20(4)(b) are fully applicable to the case and the appellants were completely wrong in disregarding it. The respondents contend that Daiichi and Ranbaxy came together as "persons acting in concert" on June 11, 2008 when the SPSSA was signed between the two companies or, in any event, on October 20, 2008 when Ranbaxy finally became a subsidiary of Daiichi. They continued in that relationship on January 19, 2009 when Daiichi made the public announcement for the shares of Zenotech. Further, Ranbaxy had paid rupees one hundred and sixty (Rs.160.00) per share for the Zenotech shares in January 2009 which falls within the period of twenty six weeks looking back from June 16, 2008, the date on which Daiichi had made the public announcement for Ranbaxy shares. In terms of regulation 20(12) the date of the public announcement for the parent company (June 16, 2008) is one of two relevant dates with reference to which the offer price for acquisition of the shares of the target company (Zenotech) is to be determined. Thus, according to the respondents, clause (b) of regulation 20(4) was clearly attracted and the price (Rs.160.00) under that clause being higher than the price (Rs.113.62) worked out in terms clause (c) that alone could form the offer price in the public announcement.

29. The Securities Appellate Tribunal accepted the respondents' contention observing and holding as follows:

> "It is Daiichi's own case, as is clear from the public announcement made to the shareholders of the target company, that Ranbaxy became its subsidiary on October 20, 2008 when the acquisition of Ranbaxy got completed. Being a subsidiary, Ranbaxy shall be deemed to be acting in concert with Daiichi with effect from that date as per Regulation 2(1)(e)(2)(i) of the Takeover Code. According to this Regulation, "person acting in concert" comprises a company, its holding company or subsidiary unless the contrary is established. There is no question of the contrary being established in the instant case because Daiichi itself had made it known in the public announcement to the shareholders of the target company that Ranbaxy had become its subsidiary on October 20, 2008. It is, thus, clear that on January 19, 2009, **the material date** on which the offer price for indirect acquisition is being worked out, Ranbaxy, being a subsidiary, was acting in concert with the Daiichi and that it (Ranbaxy) had paid Rs.160 per share to the shareholders of the target company during January 16 and January 28, 2008 when it acquired their shares under the Ranbaxy-Zenotech deal which period falls within twenty-six weeks prior to June 16, 2008. In other words, Ranbaxy, a person acting in concert with Daiichi on January 19, 2009, had paid during twenty-six weeks prior to June 16, 2008, Rs.160 per share to the shareholders of the target company. In this view of the matter, the price paid by Ranbaxy to the shareholders of the target company has to be reckoned with in terms of sub-regulation 4(b) read with sub-regulation (12) of Regulation 20 while determining the offer price for the indirect acquisition of the target company."

30. Mr. F. S. Nariman, learned senior counsel appearing on behalf of the appellant, contended that the Appellate Tribunal grossly erred in holding that since Ranbaxy was a "person acting in concert" with Daiichi on the date of

the public offer for acquisition of the shares of Zenotech, the price paid by it for acquisition of Zenotech shares in the past when the two companies were indisputably not in the relationship of "persons acting in concert" would be relevant for determining the offer price for Zenotech shares in terms of regulation 20(4)(b) read with regulation 20(12). Ranbaxy indeed became a subsidiary of Daiichi from October 20, 2009 but it did not acquire any share of Zenotech after that date or, even before that, after entering into the SPSSA with Daiichi on June 11, 2008. Any acquisition of Zenotech shares made by Ranbaxy earlier at a time when it was not a "person acting in concert" with Daiichi was of no consequence and the price paid by Ranbaxy for Zenotech shares at that time would certainly not attract sub-regulation (b) of regulation 20 (4) of the Takeover Regulations.

31. Mr. Ashok Desai, senior counsel appearing on behalf Ranbaxy fully supported the appellant's case.

32. The SEBI, though itself not in appeal against the judgment of the Appellate Tribunal and only impleaded as respondent in the two appeals, strongly defended its stand in rejecting the complaints made by the respondents before it. The learned Attorney General appearing for the SEBI submitted that the judgment of the Appellate Tribunal coming under appeal was based on a complete misinterpretation of the expression "person acting

in concert" as defined in regulation 2(e) of the Takeover Regulations. Taking a position even more forthright than the appellant, the learned Attorney General contended that the Daiichi and Ranbaxy never came within the definition of "person acting in concert". He submitted that the Appellate Tribunal erred in assuming that "being a subsidiary, Ranbaxy shall be deemed to be acting in concert with Daiichi as per regulation 2(e)(2)(i) of the Takeover Code". The Appellate Tribunal also missed the true import of the words "unless the contrary is established" at the conclusion of regulation 2(e)(2). The Attorney General submitted that the deeming provision under regulation 2(e)(2) needs to be read and understood in context and as part of the whole definition of "person acting in concert". He submitted that there may be two companies, one being the subsidiary of the other and yet no occasion may arise where they can be said to comprise "persons acting in concert" within the meaning of the Takeover Code. He submitted that the definition of a "person acting in concert" required something more than the mere relationship of a parent company and a subsidiary company.

33. Mr. C. A. Sundaram, and Mr. Shyam Divan, senior advocates representing respondent no.1 in Civil Appeal No.7148 of 2009 and respondent no.1 in Civil Appeal No.7314 respectively, strongly defended the

judgment of the Appellate Tribunal. Mr. Sundaram submitted that though according to the Tribunal, Daiichi and Ranbaxy came within the relationship of "persons acting in concert" [in terms of regulation 2(e)(2)(i)] on October 19, 2008 when Ranbaxy became a subsidiary of Daiichi, as a matter of fact the two companies comprised "persons acting in concert" within the meaning of regulation 2(e)(1) itself on signing the SPSSA on June 11, 2008. On signing the SPSSA Daiichi "agreed" to takeover Zenotech through the acquisition of Ranbaxy and the fact was further acknowledged in the letter sent by Ranbaxy to the Stock Exchanges on the same day. Referring to the definitions of "acquirer" [regulation 2(b)] and "persons acting in concert" [regulation 2(e)(1)] Mr. Sundaram contended that the mere agreement for acquisition of Zenotech would bring the two companies within the relationship of "persons acting in concert". Thus, Daiichi and Ranbaxy comprised "persons acting in concert" in terms of regulation 2(e)(1) from the date of the SPSSA itself even without taking the aid of the deeming provision in regulation 2(e)(2). Mr. Sundaram further submitted that the period from January 16 to 28, 2008 fell well within twenty six weeks from June 11, 2008 and hence, the price paid by Ranbaxy for acquisition of Zenotech shares in January 2008 must be taken into reckoning for determining the offer price in the public offer made for its shares by Daiichi.

34. The submission, which Mr. Sundaram called his alternate submission, does not need much discussion to be rejected. This is for the simple reason that regulation 20(4)(b) uses the words "….during the twenty six week period **prior to the date of public announcement**,…". It does not say "prior to date on which the acquirer and the purchaser came into the relationship of persons acting in concert".

35. The main argument of Mr. Sundaram, however, was that the expression 'persons acting in concert" used in regulation 20(4)(b) refers to a person who is *in praesenti*, that is, at the time of the public announcement acting in concert with the acquirer. This is exactly the basis of the Appellate Tribunal's judgment and if that is accepted the conclusion arrived at by the Tribunal simply follows. Ranbaxy was a person acting in concert with Daiichi on January 19, 2008, the date of the public announcement made by the latter for the Zenotech shares. Ranbaxy had purchased Zenotech shares during the period January 16 to 28, 2008 that fell within the twenty six weeks period from June 16, 2008, the date of the public announcement made by Daiichi for Ranbaxy shares. Hence, attracting regulation 20(4)(b).

36. Mr. Divan made additional submissions in support of the view taken by the Appellate Tribunal upholding the respondents' claim. He submitted that regulation 2(1)(e)(1) expressly contemplates a situation where the

parties **agree** to acquire shares or voting rights in the future. Hence, an agreement was sufficient to comprise "persons acting in concert" and no actual acquisition was necessary. He further pointed out that the definition of "persons acting in concert" in regulation 2(1)(e)(1) applies not only to acquisition of shares but **also extends to voting rights**. Hence, even an agreement between two parties to exercise the existing voting rights in cooperation with each other would bring them under the definition of "persons acting in concert" without any subsequent acquisition of shares. Mr. Divan contended that in the facts of this case, by virtue of the agreement dated June 11, 2008, Daiichi agreed to acquire voting rights to the extent of 46.85% in Zenotech, already held by Ranbaxy. On June 11, 2008, Daiichi might not have held any power over any voting rights in Zenotech but starting with October 20, 2008, Daiichi acquired absolute power over 46.85% voting rights in Zenotech. Thus, even if the requirement of a subsequent acquisition of voting rights was necessary, as argued on behalf of SEBI, it was satisfied on October 20, 2008.

37. Countering the submission made on behalf of the appellant and SEBI that for a holding company and its subsidiary to fulfil the test of "persons acting in concert' there must be an acquisition of shares **subsequent** to the

holding-subsidiary relationship coming into existence. Mr. Divan gave an interesting example that may be noted here:

38. In Mr. Divan's example 3 persons, A, B and C, strangers to each other, make purchases of blocks of shares of a certain company X (which is listed and whose shares are frequently traded on the stock exchange), on different dates at different prices. The purchase by each of them (A: 4%, B: 4% and C: 4.5%) being below 5%, the threshold for disclosure, none of them is obliged to make any disclosure of their acquisitions. Further, since the purchases were not by persons acting in concert, the acquisitions cannot be aggregated and there would be no obligation on any one to make an open offer for the shares of company X. Later on, all the three persons come together. They agree to pool the benefits of their shares with one another and to takeover company X, and they further agree that they would vote together going forward. C, having the largest stake, is nominated as the lead investor and all three enter into a shareholders' agreement on how to acquire more shares and make a public announcement under the takeover regulation. Following the agreement between them, C enters into an agreement with a financial institution to acquire another 5% block of shares of the company X at a price much lower than the price paid by A or B for their earlier

acquisitions. Mr. Divan submitted that if the submission of the appellant and the SEBI are accepted than the result would be as follows:

1. Since there is no fresh acquisition and C has only entered into an agreement with the financial institution for the acquisition of shares, the three persons are not yet in concert.
2. Since the earlier purchases were made before A, B or C came together as "persons acting in concert" their earlier acquisitions (4%+4%+4.5%) cannot be aggregated with the proposed fresh acquisition of 5% by them after having entered into the agreement. Consequently, Regulation 10 of the Takeover Code would not come into play and there would be no requirement to make a public announcement.

39. He contended that such a simple ploy would defeat the whole object and purpose of the Takeover Code. We shall presently consider the illustration given by Mr. Divan and the validity of the inferences drawn by him on that basis.

40. From the rival contentions it is clear that the real controversy among the parties is about the applicability of regulation 20(4)(b) to determine the offer price for Zenotech shares in the public announcement made by Daiichi. Regulation 20(4)(b) speaks of the price **paid** by the acquirer or persons

acting in concert with him for acquisition of shares , if any, during the twenty six weeks period prior to date of public announcement. It does not speak of any agreement to acquire shares or of any voting rights or control over the target company but the actual price paid for acquisition of its shares. Here a question arises, to what point in time does the expression "person acting in concert" used in regulation 20(4)(b) refer? Should the person be acting in concert with the acquirer at the time of the public announcement or at the time of acquisition of shares of the target company? To make the matter more explicit, assuming that Daiichi and Ranbaxy together comprised "persons acting in concert" on the date Daiichi made the public announcement for Zenotech shares, was it sufficient that they were in that relationship on that date or for the application of regulation 20(4)(b) it was necessary that Daiichi and Ranbaxy should have been in that relationship when Ranbaxy had made acquisition of Zenotech shares. The Appellate Tribunal has of course proceeded on the basis that since Daiichi and Ranbaxy were "persons acting in concert" on the date of the public announcement made by Daiichi for Zenotech shares sub-regulation (b) of regulation 20(4) would be attracted regardless of the fact that the two were not in that relationship on the dates of purchase of Zenotech shares by Ranbaxy.

41. On behalf of the respondents much argument was made to show that even before Ranbaxy became a subsidiary of Daiichi the two were covered by the definition of "persons acting in concert" on signing the SPSSA. Whether Ranbaxy became a persons acting in concert with Daiichi on signing the SPSSA or on becoming its subsidiary is one aspect of the matter but if the basis on which the Appellate Tribunal has proceeded is correct then it hardly matters if Ranbaxy was acting in concert with Daiichi on signing the SPSSA or on becoming its subsidiary, as long as it was in that relationship with Daiichi when Daiichi made the public announcement for Zenotech shares.

42. We now proceed to examine the question whether Daiichi and Ranbaxy came together in the relationship of "persons acting in concert" as claimed by the respondents and connected with it the larger question as to the stage when the relationship of "persons acting in concert" must be in existence for the applicability of regulation 20(4)(b) of the Takeover Code. For this, we must first understand what is the true meaning of "persons acting in concert" as defined in regulation 2(e).

43. To begin with, the concept of "person acting in concert" under regulation 2(e)(1) is based on a target company on the one side, and on the other side two or more persons coming together with the shared common

objective or purpose of substantial acquisition of shares etc. of the target company. Unless there is a **target company**, substantial acquisition of whose shares etc. is the common objective or purpose of two or more persons coming together there can be no "persons acting in concert". For, *dehors* the target company the idea of "persons acting in concert" is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial acquisition of shares of a target company they would not comprise "persons acting in concert".

44. The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a certain target company. There can be no "persons acting in concert" unless there is a **shared common objective or purpose** between two or more persons of substantial acquisition of shares etc. of the target company. For, *dehors* the element of the **shared common objective or purpose** the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The

relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the *sin qua non* for the relationship of "persons acting in concert" to come into being.

45. The submission made on behalf of the respondents that on signing the SPSSA Ranbaxy became a person acting in concert with Daiichi overlooks this basic precondition and ingredient of the relationship. The consequential takeover of Zenotech and its acknowledgment are not same thing as the **shared common objective or purpose** of substantial acquisition of shares or voting rights or gaining control over Zenotech. As stated above, the relationship of "persons acting in concert" is not a fortuitous relationship. It can come into being only by design. Hence, unless it is shown that Daiichi and Ranbaxy entered into the SPSSA for the common objective or purpose of substantial acquisition of shares or voting rights or control over Zenotech

they can not be said to have come in the relationship of "persons acting in concert". This is not even the case of the respondents. The inevitable conclusion, therefore, is that on signing the SPSSA Daiichi and Ranbaxy did not come within the relationship of persons acting in concert within the meaning of regulation 2(e)(1) of the Takeover Code.

46. We may now proceed to the deeming provision as contained in sub clause (2) of regulation 2(e). Here, it would be better to restate the obvious that the deeming provision can not do away either with the **target company** or **the common objective or purpose** of substantial acquisition of shares etc. of the target company shared by two or more persons because to do so would be destructive of the very idea of "persons acting in concert" as defined in sub-clause (1) of regulation 2(e). We, therefore, see no merit in the submission, as urged at one stage, on behalf of the respondents that sub-regulation (2) of regulation 2(e) containing the deeming clause should be seen as a 'stand alone' provision, independent of sub-regulation (1) of regulation 2(e). The deeming provision under sub-regulation (2) operates only within the larger framework of sub-regulation (1) of regulation 2(e).

47. Then what does the deeming provision do? The deeming provision simply says that in case of nine specified kinds of relationships, in each category, the person paired with the other **would be deemed to be** acting in

concert with him/it. What it means is that if one partner in the pair makes or agrees to make substantial acquisition of shares etc. in a company it would be presumed that he/it was acting in pursuance of a common objective or purpose shared with the other partner of the pair. For example, if a company or its holding company makes or agrees to make a move for substantial acquisition of shares etc. of a certain target company then it would be presumed that the move is in pursuance of a common objective and purpose jointly shared by the holding company and the subsidiary company. But the mere fact that two companies are in the relationship of a holding company and a subsidiary company, without any thing else, is not sufficient to comprise "persons acting in concert". The Attorney General is quite right in his submission that something more is required to comprise "persons acting in concert" than the mere relationship of a holding company and a subsidiary company. There may be hundreds of instances of a company having a subsidiary company but to dub them as "persons acting in concert" would be quite ridiculous unless another company is identified as the target company and either the holding company or the subsidiary make some positive move or show some definite inclination for substantial acquisition of shares etc. of the target company.

48. It needs further to be noted that the presumption created by virtue of the deeming provision is expressly left open to rebuttal as indicated by the concluding words "unless the contrary is established" occurring in sub-regulation (2). It is important to point this out here because the Appellate Tribunal has clearly misunderstood the nature and scope of the provision of rebuttal in observing as follows:

> "There is no question of the contrary being established in the instant case because Daiichi itself had made it known in the public announcement to the shareholders of the target company that Ranbaxy had become its subsidiary on October 20, 2008."

Regulation 2(1)(e)(2) defines "person acting in concert". It is a deeming provision. It has to be read in conjunction with regulation 2(1)(e)(1) which states that person acting in concert comprises of persons who in furtherance of a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly cooperate by acquiring or agreeing to acquire shares or voting rights in the target company or to acquire control over the target company. The word "comprises" in regulation 2(1)(e) is significant. It applies to regulation 2(1)(e)(2) as much as to regulation 2(1)(e)(1). A fortiori, a person deemed to be acting in concert with others is also a person

acting in concert. In other words, persons who are deemed to be acting in concert must have the intention or the aim of acquisition of shares of a target company. It is the conduct of the parties that determines their identity. Whether a person is or is not acting in concert with the acquirer would depend upon the facts of each case. In order to hold that a person is acting in concert with the acquirer or with another person it must be established that the two share the common intention of acquisition of shares of some target company. For example, there is no hard and fast rule that every foreign institutional investor (FII) would share with the sub-account(s) the common objective of acquiring substantial stakes or control in some target company. Whether in a given case an FII and his sub-account(s) have a common objective of making investment in India to earn profits in unit holders or whether they have a common objective of acquiring substantial stakes or control in some target company would depend on the facts of each case. In the former case regulation 2(1)(e)(2)(v) would not apply whereas in the latter case the said sub-regulation would apply. The above illustration brings out the true purport of the expression "unless the contrary is established" which expression finds place in regulation 2(1)(e)(2).

49. Something else that is of utmost importance is to understand that the deeming fiction under sub-regulation (2) can only operate prospectively and

not retrospectively. That is to say the deeming provision would give rise to the presumption, as explained above, only from the date two or more persons come together in one of the specified relationships and not from any earlier date. Thus, in the case in hand, the deeming provision under sub-regulation (2) would give rise to the presumption that Daiichi and Ranbaxy were "persons acting in concert", provided of course the other conditions as explained above were also satisfied, only from October 20, 2008, the date on which Ranbaxy became a subsidiary of Daiichi and not before that. Hence, the purchase of Zenotech shares by Ranbaxy in January 2008 cannot be said to be by a "person acting in concert" with Daiichi.

50. In light of the discussion made above, we are of the view, that the Appellate Tribunal was in error in proceeding on the basis that the material date for Ranbaxy and Daiichi to be acting in concert was the date of the public announcement for the Zenotech shares. The Tribunal Observed:

> "It is, thus, clear that on January 19, 2009, **the material date** on which the offer price for indirect acquisition is being worked out, Ranbaxy, being a subsidiary, was acting in concert with the Daiichi and that it (Ranbaxy) had paid Rs.160 per share to the shareholders of the target company during January 16 and January 28, 2008 when it acquired their shares under the Ranbaxy-Zenotech deal which period falls within twenty-six weeks prior to June 16, 2008."

51. The Appellate Tribunal's error is the result of mixing up the provisions of sub-regulations (12) and (4) of regulation 20. As explained earlier sub-regulation (12) came to be introduced in regulation 20 as a consequence of extension of time for making public announcement for the secondary and indirectly targeted company by insertion of sub-regulation (4) in regulation 14. Sub-regulation (12) of regulation 20 obliges the acquirer to work out the best value for the shares of the indirectly targeted company as obtaining on the date of the public announcement for the parent target company as well as on the date of the public announcement for the concerned indirectly targeted company and then to offer the shareholders the better of the two values. This is for the simple reason that the extension allowed for making the public announcement for the indirectly targeted company should not cause any prejudice to its shareholders. Sub-regulation (12) does not in any way affect sub-regulation (4) which remains unamended and it certainly does not alter the meaning of "person acting in concert" as used in that sub-section.

52. We are clearly of the view that for the application of regulation 20(4)(b) it is not relevant or material that the acquirer and the other person, who had acquired the shares of the target company on an earlier date, should be acting in concert at the time of the public announcement for the target

company. What is material is that the other person was acting in concert with the acquirer at the time of purchase of shares of the target company.

53. The true meaning of the idea of "persons acting in concert", as explained above will also clear all the doubts sought to be created by Mr. Divan's illustration as noted above. In that illustration, persons A, B and C earlier purchased shares of company A separately and as strangers. Those purchases were, therefore naturally not by "persons acting in concert". But later on, all the three persons came together. **They agreed to pool the benefits of their share with one another and to takeover company X, and they further agreed** that they would vote together going forward. Thus the earlier purchases were brought within the concept subsequently by an express agreement between the three persons even though at the time of purchase the purchasers were not acting in concert. Hence, the earlier purchases too would fully attract the regulatory provisions of the Takeover Code.

54. This is how we are able to follow the correct meaning of the expression "person acting in concert" as defined in regulation 2(e) and as used in regulation 20(4)(b) of the Takeover Code.

55. In light of the discussion made above the inevitable conclusions are that in so far as Zenotech is concerned Ranbaxy was not acting in concert

with Daiichi either from the date of the SPSSA or even after becoming a subsidiary of Daiichi and the acquisition of Zenotech shares by Ranbaxy in the month of January 2008 did not come within the ambit of regulation 20(4)(b). The offer price in the public announcement for Zenotech shares made by the appellant was correctly worked out. It follows that the judgment of the Appellate Tribunal is unsustainable and it has to be set aside.

56. It was submitted on behalf of the respondents that the Takeover Code was meant to safeguard and protect the interests of the shareholders. Therefore, in case there were two possible views of the matter the court should lean in favour of the one supporting the shareholders. The Attorney General strongly refuted the submission that the Takeover Code was intended solely to protect the shareholders interests. We, however, need not go into that question because in light of the above discussion, we find that the controversy is completely free from any confusion and the view canvassed on behalf of the respondents is not even a remotely possible view of the matter.

57. Before parting with the records of the case we would like to say that in arriving at the correct meaning of the provisions of the Takeover Code specially regulation 14(4) and 20(12) we were greatly helped by the reports of the two Committees headed by Justice Bhagwati. We mention the fact

especially because as per the legislative practice in this country, unlike an Act, a regulation or any amendments introduced in it are not preceded by the "Object and Purpose" clause. The absence of the object and purpose in the regulation or the later amendments introduced in it only adds to the difficulties of the court in properly construing the provisions of regulations dealing with complex issues. The court, so to say, has to work in complete darkness without so much as a glimpse into the mind of the maker of the regulation. In this case, it was quite apparent that the 1997 Takeover Code and the later amendments introduced in it were intended to give effect to the recommendations of the two Committees headed by Justice Bhagwati. We were, thus, in a position to refer to the relevant portions of the two reports that provided us with the *raison d'être* for the amendment(s) or the introduction of a new provision and thus helped us in understanding the correct import of certain provisions. But this is not the case with many other regulations framed under different Acts. Regulations are brought in and later subjected to amendments without being preceded by any reports of any expert committees. Now that we have more and more of the regulatory regime where highly important and complex and specialised spheres of human activity are governed by regulatory mechanisms framed under delegated legislation it is high time to change the old practice and to add at

the beginning the "object and purpose" clause to the delegated legislations as in the case of the primary legislations.

58. In the result, the appeals are allowed but with no order as to costs.

..…….……CJI.

...……..J.
(AFTAB ALAM)

...……..J.
(SWATANTER KUMAR)

New Delhi,
July 8, 2010